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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 30 July 2020

LORD JUSTICE HOLROYDE

MRS JUSTICE ANDREWS DBE

RECORDER OF NOTTINGHAM
(HIS HONOUR JUDGE DICKINSON QC)

(Sitting as a Judge of the CACD)

R E G I N A

v

LOUISA MBADUGHA

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Mr D Martin-Sperry appeared on behalf of the **Applicant**

Mr D Hughes appeared on behalf of the **Crown**

J U D G M E N T

1. LORD JUSTICE HOLROYDE: On 8 June 2017, after a trial at the Central Criminal Court before HHJ Katz and a jury, this applicant was convicted of two offences, fraudulent evasion of duty (count 1) and fraudulent evasion of VAT (count 3). She was subsequently sentenced to a total of 3 years 6 months' imprisonment. Her application for an extension of time to apply for leave to appeal against conviction was refused by the single judge. The applications are now renewed to the full court.
2. The charges related to the operation of The Italian Wine Company (to which we shall refer for convenience as "the company") during the period 2008 to 2013. The applicant was the financial controller of the company, which was based in Neasden. As its name implies, the company imported wine from Italy. In particular, it was supplied by an Italian company to which we shall refer as "SBF".
3. The applicant was aged 59 and of previous good character at the time of the trial. She stood trial jointly with Livio Mazzarello, the sole shareholder in the company, and Steven Waters, its managing director. Others named in the charges were Renato Fornara and Marco Leonardi, respectively the manager and the accountant of SBF. All were alleged to have been knowingly concerned in the fraudulent evasion of duty payable upon the importation of wine by the company and of VAT payable upon the sale of the wine by the company.
4. Mazzarello, Fornara and Leonardi were prosecuted in Italy. Mazzarello admitted in the Italian proceedings that he was a head promoter, founding member and organiser of a criminal association. That fact was in evidence before the jury at the Central Criminal Court. Mazzarello's case was that he had made the admission of part of an agreement with the Italian authorities which did not involve his receiving a prison sentence.
5. The company was required to notify Her Majesty's Revenue & Customs ("HMRC") of each incoming consignment of wine and to pay excise duty on the imported wine. For this purpose, the Italian supplier SBF generated an electronic administrative document, with a unique administrative reference code for each consignment. The delivery driver had to carry a copy of the electronic administrative document. The company had to close an administrative reference code within five days of receiving delivery of the wine and had to submit monthly returns to HMRC. The company was also required to account for the VAT on sales of wine within the United Kingdom.
6. The prosecution case was that the company had evaded nearly £35 million of duty and tax due by supplying false returns which understated the amount of wine imported. The hauliers carrying the wine from Italy to the United Kingdom were provided with two sets of documentation. One set of documents contained details of the full load and was only to be produced if the load was physically inspected by officers of HMRC. The other set of documents contained details of only a small part of the load, the fraudulent scheme being that only that portion of the delivery would be declared to HMRC and the rest would be sold separately without any duty or VAT being paid.
7. The applicant was responsible for the company's accounts, invoices, VAT returns and payroll. From time to time HMRC carried out inspections in which the applicant participated. It was the prosecution case that the records kept by the company were a sham, the true records being stored on a computer server based in Italy. It became

common ground during the trial that the Italian server did indeed contain the correct records. From those correct records it could be seen that the applicant had presented to the company's accountants, King & King, and to HMRC what was in fact a wholly misleading picture of the extent of the company's imports and sales of wine. She has always denied that she did so knowingly.

8. On 17 April 2013 the applicant and her co-accused in this country, and the named conspirators in Italy, were arrested in a joint operation involving both UK and Italian authorities. At the company's premises a large quantity of concealed cash in both sterling and Euros was found. When interviewed under caution the applicant denied any knowledge of this cash. When challenged about disparities between deliveries which had been observed by HMRC officers and the relevant documentation, she said that the company also traded in other commodities as well as wine. In later interviews she made no comment.
9. At trial, the prosecution adduced evidence as to the systems by which the company accounted for duty and VAT and the paperwork which was generated. Evidence was adduced of observations showing that the company was making cash sales of wine which did not appear in the company's records but did appear in the records held on the Italian server, and of the interception of loads coming in from Italy and the documentation seized from drivers.
10. Officials of HMRC gave evidence of their contacts with the applicant, some of which were specifically following interceptions of loads. An employee of King & King, Anil Seechurn, gave evidence about his dealings with the applicant.
11. At the conclusion of the prosecution case a successful submission of no case to answer was made on behalf of Mr Waters. The trial continued against the applicant and Mr Mazzearello.
12. The applicant gave evidence. She accepted that others had been involved in fraudulent activity. Her case was that she had not been knowingly engaged in that fraud. She does not speak Italian. Information had deliberately been kept from her. She knew nothing about the Italian server. She called witnesses as to her good character.
13. Mr Mazzearello gave evidence to the effect that the fraud was perpetrated by others in Italy and that he was not involved. He too called character witnesses.
14. Thus, the issue for the jury was whether the prosecution had proved that the applicant was knowingly concerned in the fraudulent activity which had undoubtedly occurred. A similar issue fell to be decided in respect of Mr Mazzearello.
15. The judge in summing up made clear to the jury that they must decide the case on the evidence. At Volume I, page 8C of the transcript, he emphasised that the issue at the heart of the case against each defendant was whether they were knowingly concerned. He continued:
 - i. "There doesn't seem to be much dispute that fraud was going on. The question is whether they were knowingly concerned. How are we ever going to know they were knowingly concerned when they dispute it? There is no magic way to press a button and the answer comes out before you. It can't be done like that. You are going to have to look at all of the evidence and your inferences about whether you are sure somebody was knowingly concerned.

That is the only way of doing it, and that means you can use your logic, your common sense, in relation to evidence that you are sure about - what was going on, what did that person say, what did that person do, what else was happening, what the documents show, what they said about it, and you can use, as I said, logic and common sense to come to common-sense conclusions, based on evidence which you are sure about.

- ii. One thing you cannot do is speculate, guess. There is to be no guesswork and no speculation, please. That is forbidden."

16. At page 18B the judge gave a further direction:

- i. "So examine the evidence and decide what you are sure the defendant in question was doing and saying at the material times, in the context of whatever else you are sure was going on. In that way, you may use logic and common sense to draw inferences; that is, to come to common-sense conclusions, but you must not speculate. And where there are alternate inferences available from the evidence, well, then you may only draw an inference of guilt against the defendant if you're sure that you can reject inferences consistent with innocence.
- ii. Just to expand upon that for a moment, two sides may say: 'These are the facts'. The prosecution will say, 'The inference you should draw is this.' The defence may say, 'No, the inference you should draw is that.' So you will have two different arguments about the proper inference you should draw. You can only draw the inference against a defendant consistent with their guilt if you're sure you can reject the ones that are consistent with their innocence. That's the way to approach it."

17. The judge directed the jury as to what was meant by the phrase "being knowingly concerned". Later in his summing-up the jury sent a note asking for a further direction, in particular as to whether a person who turns a blind eye to something of which they are aware, can be knowingly concerned. At Volume II, page 18E the judge answered that question, referring the jury to his earlier directions, of which they had copies, and emphasising that there must be some participation in the offence with the required knowledge and intention.

18. Mr Mazzarello absconded whilst the jury were in retirement and was not seen again during the trial. He was convicted in his absence of offences of fraudulent evasion of duty and of VAT. He was later sentenced to a total of 14 years.

19. It is necessary next to summarise the convoluted history of the grounds of appeal, which have been advanced by and on behalf of the applicant. The notice of appeal was filed by the applicant acting in person. It was received by the Criminal Appeal Office on 30 August 2017. It was accompanied by wide-ranging grounds of appeal of the

applicant's own composition. She applied for an extension of time, her application being 43 days out of time, leave to appeal against her convictions, a representation order and permission to call a witness. The last of those applications appears to have related to Mr Sidney Kolinski, the senior partner of King & King and Mr Seechurn's employer. The applicant said of him, that her trial representatives had interviewed Mr Kolinski and he was available to attend court, but the applicant had never seen his statement and her lawyers had not called him to give evidence.

20. The applicant's grounds of appeal included criticisms of her trial representatives, criticisms of and challenges to the evidence of Mr Seechurn, a complaint that she was convicted on purely circumstantial evidence and a complaint that a pop-up dialogue box which appeared when accessing daily delivery records on the computer system, was said by the prosecution to read "reserved by Louisa" when in fact it read in Italian "reserved for Louisa". We should note that that error of translation was noted and corrected in the course of the trial.
21. In view of the criticisms which the applicant had made of her trial representatives, she was invited to, and did, waive her legal professional privilege. Trial counsel and solicitors provided their responses to the points made against them.
22. The prosecution put in a respondent's notice answering each of the points advanced by the applicant.
23. The single judge considered and rejected the original grounds of appeal, setting out his reasons in some detail.
24. It is not entirely clear in what sequence written grounds were next put forward on behalf of the applicant by her present legal representatives. At some stage a document was filed with the court bearing the title "Redrafted Incomplete Grounds of Appeal". This unusual document is undated, silent as to its authorship and contains no clear identification of any specific grounds of appeal. It concludes by saying that the previous grounds of appeal drafted by the applicant were abandoned save in respect of the decision made at trial not to call Mr Kolinski.
25. The hearing of the renewed applications was listed in July 2019. It was taken out of the list because counsel requested further time to perfect the grounds of appeal and to consider expert evidence. The hearing was next listed in October 2019. Unfortunately counsel was unwell. The case was therefore taken out of the list and it was re-listed for hearing on 11 December 2019.
26. In the light of representations made shortly before that date, the hearing was converted from a substantive hearing to a directions hearing. Mr Sapsford QC and Mr Martin-Sperry prepared a note for that hearing, in which they said that an early decision had been taken to abandon almost all of the grounds originally put forward by the applicant when acting in person. They set out four grounds of appeal, lettered (a) to (d) and submitted in particular that it was essential for the representation order to be extended so that a forensic accountant could be instructed.
27. The court gave a number of directions. They included the following. First, that the completed grounds of appeal were to be filed by 31 January 2020 and also served on trial counsel and solicitors. Secondly, that trial counsel and solicitors were to respond by 14 February 2020, and thirdly, that the defence were then to file their skeleton argument by 28 February 2020.
28. Completed grounds of appeal were not filed as ordered. Instead, a document entitled

"Provisional grounds of appeal and outline submissions" was filed on 29 January 2020. It contained three grounds of appeal; the fourth ground advanced in the earlier note having been abandoned. In summary, the three grounds were

- (a) the convictions are unsafe because the Crown had failed "to lead highly technical evidence in order to demonstrate that the "landscape" that the applicant was presented with and that she in turn placed in front of the auditors "was not such, viewed objectively, as to alert someone in her position and with her characteristics of any underlying extensive Italian fraud."
 - (b) The judge failed properly to give the jury any direction as to how they should treat circumstantial evidence.
 - (c) It was not disclosed to the jury that the fraud was a major "Mafia" type of financing operation.
29. On 11 February 2020 trial counsel responded to those provisional grounds. They began by indicating that Mr Graffius (leading junior counsel at trial) had spoken about the case to both Mr Sapsford QC and Mr Martin-Sperry. Trial counsel summarised the evidence which the applicant had given, to the effect that she was not aware that she had access to a server in Italy, that she had simply used conventional accounting and banking software and that others in the company knew her passwords and could access them. Counsel pointed out that a prosecution witness, Mr Ford, who had considerable experience of investigations of this nature, had accepted in cross-examination that a person who knew another employee's password would be able to access that computer system in the name of that other employee. An extensive defence bundle had been provided to the jury during the trial. This included emails showing that Mr Leonardi, in Italy, had accessed the system, including setting up accounting records for others from which the applicant was specifically excluded, and had accessed and changed programs on the applicant's desktop.
30. Trial counsel further indicated that a defence computer expert had been instructed, had been provided via the prosecution with a complete cloned copy of the Italian server, had advised in response to a large number of questions posed by trial counsel and had prepared two reports. He had not been called at trial but his reports had formed the basis of the cross-examination of Mr Ford. Mr Ford had accepted, amongst other things, that Mr Leonardi was one of the administrators of the computer system and that the pop-up dialogue box "Reserved for Louisa" would be created automatically by the program whenever her password was applied, which anyone with access to her desktop would be able to do.
31. Trial counsel also stated that the applicant had not given instructions that Mr Leonardi should be contacted as a defence witness. His interview by the Italian authorities in 2013 had been disclosed, and counsel regarded the answers which he had given in interview by the Italian investigators as unhelpful to the applicant. They pointed out that he would have been liable to prosecution in this country and that, if called as a witness, he could have been questioned not only about his involvement in the offences charged against the applicant but also about his role in the broader fraud. As we have already noted, Mr Leonardi was of course named in the indictment as a joint offender.
32. Trial counsel further pointed out that the applicant's defence at trial had been that she believed the business of the company to be legitimate. The nature of the criminal organisation operating in Italy was therefore irrelevant to her defence. Counsel took the

39. Mr Martin-Sperry sought to justify this approach on the basis that, in the most recent grounds of appeal, the terms of which we have quoted above, the phrase "in all the circumstances of the case as set out above" in ground 2 must be understood as relating to everything which had gone before and not merely to ground 1.
40. In pursuing his argument Mr Martin-Sperry places particular emphasis on the Italian interview of Mr Leonardi in 2013 which, he argued, had not been disclosed and may not even have been known to the prosecution at the time of trial, with the result that trial counsel had been unaware of its contents and consequently unable to pursue the important points which he contends arises from it. Those points are illustrated by Mr Martin-Sperry by reference to some extracts from an imperfect translation of the interview, which he has provided to the court today.
41. These matters are said to be of particular importance because, Mr Martin-Sperry points out, the jury in the course of the trial, had asked a question about who had access to which computer. That question had been referred to the witness Mr Ford, who had made a short statement indicating that further work would be necessary before he would be able to answer it.
42. Mr Martin-Sperry urges upon the court that there is good reason to be anxious about the circumstances of the applicant's convictions, which he contends are unsafe in all the circumstances. In respect of his most recent specific ground, relating to the suggested absence of an adequate direction on circumstantial evidence, he relies upon the advice given in the Crown Court Compendium and on the specimen, directions contained in the relevant section of that valuable work. He argues that a direction along those lines was essential in this case, even if it may not be an essential in every case of circumstantial evidence.
43. Mr Hughes, for the respondent, in his submissions this morning, told this court that there had in fact been full disclosure of all the material from the Italian server and that accordingly trial counsel were fully equipped with all relevant material and had indeed been able to refer it to their expert witness. The response provided by trial counsel, to which we have referred, explains, submits Mr Hughes, the reasons why no attempt was made at trial to call Mr Leonardi as a witness and why the expert evidence available to them was used as a basis for cross-examination of Mr Ford without calling the expert witness himself.
44. Before coming to our views on the submissions made to this court, we must emphasise that the manner in which the grounds of appeal have been placed before the court has been wholly unsatisfactory. Rule 39.3(2) of the Criminal Procedure Rules contains specific provision as to the form of an appeal notice. Omitting a paragraph which is not relevant to the present case, the rule says this:
 - i. "The grounds of appeal **must**:
 - 1) Include in no more than the first two pages a summary of the grounds that makes what then follows easy to understand.
 - 2) In each ground of appeal identify the event or decision to which that ground relates;
 - 3) In each ground of appeal summarise the facts relevant to that ground; but only to the extent necessary to make clear

- what is in issue;
 - 4) Concisely outline each argument in support of each ground;
 - 5) Number each ground consecutively, if there is more than one;
 - 6) Identify any relevant authorities and;
 - i. state the proposition of law that the authority demonstrates, and
 - ii. identify the parts of the authority that support that proposition..."
45. That has not been done in this case. The latest iteration of the shifting grounds has not particularised the grounds of appeal in any way. Mr Martin-Sperry was unable to assist the court with where a particular argument was to be found. The attempt to rely on ground 2 as importing all that had gone before requires a most generous interpretation of the language of that ground and is, in any event, unacceptable as a method of placing grounds of appeal before the court. It makes it impossible for the respondent to know to what argument it is to respond. It makes it impossible for the court to consider, in advance of the hearing, precisely what issues need to be decided. This is especially so when, as in this case, counsel have come into a case after the single judge stage has been completed, because at that stage any fresh grounds of appeal will need to be considered in the light of the principles stated in R v James [2018] EWCA Crim 285; [2018] 1 Cr App R 33.
46. In fairness to the applicant, we have nonetheless considered all of the arguments now advanced on her behalf so that we can thereby ensure that she is not disadvantaged in what we recognise is a case of great importance to her. We consider, first, the various earlier grounds of appeal which are now said to have been encompassed by the terms of ground 2.
47. Many of these submissions which have been made at earlier stages are, in reality, points as to the sufficiency of the prosecution's evidence to prove the elements of the offences charged, and as to the inherent improbability that a woman such as the applicant would be taken into the confidence of serious criminals engaged in a very substantial fraud. All those however were matters for the jury. They do not provide any ground of appeal.
48. Further, some of the previous grounds of appeal sought, in our view, an unjustified opportunity to re-argue the case on a basis different from that which had been put forward at trial. In so far as heavy emphasis is now placed on the assertion that Mr Leonardi's Italian interview had not been disclosed and that its importance was therefore not known to trial counsel, we are satisfied that the argument is based on a mistaken premise. We are satisfied, as indeed is apparent from the contents of trial counsel's response - which indicates that there had been discussion between Mr Graffius and present counsel - that all relevant material had been disclosed and was available for consideration not only by trial counsel and solicitors but also by the defence expert witness.
49. In any event, having considered the extracts from Mr Leonardi's interview, to which Mr Martin-Sperry has taken us this morning, we take the view that they raise more questions than they answer and cannot assist the applicant.
50. We would emphasise that from all we have read it is apparent that the applicant was represented at her trial by experienced and competent counsel, who acted in accordance with her then instructions, and advised her in entirely sensible and realistic terms as to

matters such as whether the defence expert witness should be called, or merely relied upon to provide material for cross-examination.

51. We are satisfied that none of the grounds previously advanced provides any arguable basis for saying that the convictions are unsafe.
52. As to the specific point relating to circumstantial evidence which is put forward in ground 1, the following considerations are, in our view, important. First, we do not accept that all of the evidence on which the prosecution relied against the applicant was circumstantial. The applicant's knowledge of the fraud was necessarily a matter of inference from the whole of the evidence. That being so, it seems to us, that the judge would have been in grave difficulty in seeking to summarise the relevant factors when in truth it was necessary, as he rightly directed the jury, for them to consider the whole of the evidence. In so far as the judge is criticised for not following the format suggested by the specimen directions in the Crown Court Compendium, we regard the criticism as misplaced in the circumstances of this case.
53. Secondly, the applicant has not cited any authority to suggest that a judge is required to give a direction on the specific topic of circumstantial evidence in every case in which such evidence is adduced by the prosecution. As was pointed out by trial counsel in their response to the provisional grounds of appeal, by Mr Hughes in his recent written response, and indeed by the Crown Court Compendium itself, this court in the case of R v Kelly [2015] EWCA Crim 817, rejected any such general obligation. In that case, as in this, it had been argued that the judge had failed to give necessary assistance to the jury as to their correct approach to a case which depended to a substantial extent upon evidence of circumstances. Pitchford LJ, giving the judgment of the Court, said at paragraph 38:

- i. "It is not unusual for the trial judge to point out to the jury the difference between proof by direct evidence and proof by circumstances leading to a compelling inference of guilt. However, there is no rule of law that requires the trial judge to give such an explanation or any requirement to use any particular form of words. It depends upon the nature of the case and the evidence."

54. Then at paragraph 39 Pitchford LJ went on to say:

- i. "The risk of injustice that a circumstantial evidence direction is designed to confront is that (1) speculation might become a substitute for the drawing of a sure inference of guilt and (2) the jury will neglect to take account of evidence that, if accepted, tends to diminish or even to exclude the inference of guilt (see *R v Teper* [1952] AC 480). However, as the House of Lords explained in *McGreevy*, circumstantial evidence does not fall into any special category that requires a special direction as to the burden and standard of proof. The ultimate question for the jury is the same whether the evidence is direct or indirect: *Has the prosecution proved upon all the evidence so that the jury is sure that the defendant is guilty?* It is the task of the trial judge to consider how

best to assist the jury to reach a true verdict according to the evidence."

55. Thirdly, we have listened carefully to Mr Martin-Sperry's submission that, in the particular circumstances of this case, a direction along the lines of the specimen contained in the Crown Court Compendium was essential. When asked to assist the court with what it was that the judge should have said to the jury but failed to say, Mr Martin-Sperry referred us to the terms of the specimen directions given in that work. However, in our view, the directions which the judge did give to the jury and, which we have quoted earlier in this judgment, plainly instructed the jury not to speculate and to ensure that they considered other possible explanations raised by the evidence. The fact that he did not use the word "circumstantial" does not diminish those directions. The twin dangers identified by Pitchford LJ in the passage at paragraph 39 of Kelly quoted above are amply met by the terms in which the judge directed the jury in this case. His focus on the inferences which the jury might draw from the evidence as a whole was, in our view, entirely appropriate to the circumstances of this case.
56. Turning to the application made by the applicant to adduce fresh evidence, we regard this as misconceived. Given that Mr Leonardi was named in the indictment as a joint offender, it is difficult to understand the basis on which it is said that the Crown were under an obligation to "make him available at trial". Nor is any indication given of how it is proposed his evidence should now be received by this court, bearing in mind that he would be liable to arrest and prosecution if he entered this country. Moreover, in so far as Mr Leonardi might now be able to give relevant evidence, he was equally able to do so at the time of trial. If the applicant wished him to be called as a witness, that is a matter which should have been dealt with at trial, bearing in mind that the contents of his interview by the Italian authorities had been disclosed. The response of trial counsel makes clear that they considered Mr Leonardi's position and took the view that, if he were to give evidence, he would be exposed to cross-examination and there would be a risk of causing detriment to the applicant's case. It is clear that they acted in accordance with the applicant's instructions. In our view, their assessment of the perils of seeking to call Mr Leonardi, even assuming it might have been possible for him to be brought to this country, was a realistic and sensible one.
57. There is, in our judgment, no basis on which it could be argued that the applicant should now be entitled to run her case in a different way from the course taken at trial and now to seek to rely on Mr Leonardi. In any event, the applicant's witness statement contains nothing to suggest that Mr Leonardi would be able to give evidence which could materially assist her case and might therefore afford a ground of appeal. As we have indicated, Mr Martin-Sperry, despite his best endeavours, has not been able to persuade us to any different view. We are therefore satisfied that there is no prospect of this suggested fresh evidence being admitted pursuant to section 23 of the Criminal Appeal Act 1968.
58. In those circumstances, we are satisfied that there is no basis on which it could be argued that the convictions are unsafe. If we had thought otherwise, we would have been willing to grant the applicant the necessary extension of time. As it is, no purpose would be served by our doing so, because an appeal cannot succeed. The renewed applications for an extension of time and for leave to appeal and the application to adduce

fresh evidence are, for those reasons, all refused.

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

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