Neutral Citation Number: [2008] EWCA Crim 1354

Case Nos 200701912 B2 / 200801300 B2/
/200702049 B2 / 200702068 B2

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/06/2008

Before:

LORD JUSTICE LATHAM
MR JUSTICE DAVID CLARKE
and
MR JUSTICE MACDUFF

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Between :

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	- v -	
	Ilham Anwoir **Brian McIntosh** **Ziad Meghrabi** **Adnan Elmoghrabi**	

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David Bentley on behalf of Ilham Anwoir
Jeremy Ornstin (solicitor advocate) on behalf of Brian McIntosh
William Clegg QC and **Ian Bridge** on behalf of **Ziad Meghrabi**
Mark Milliken-Smith QC and **Sarah Elliott** on behalf of **Adnan Elmoghrabi**
Simon Farrell QC, Raymond Tully and Nicholas Yeo on behalf of the **Crown**

Hearing date: 21st May 2008

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Judgment

Lord Justice Latham:

1.On the 16th March 2007 the four appellants (as they have become) were convicted of a number of offence involving money laundering, contrary to section 328 of the Proceeds of Crime Act 2002 ("POCA"). Anwoir was convicted of counts 1, 2, 3 and 5; McIntosh was convicted of counts 1 and 4; Meghrabi was convicted of counts 1, 2, 3, 4 and 5; Elmoghrabi was convicted of counts 2 and 5. In general terms, they were sentenced as follows: Anwoir two years imprisonment suspended for two years; McIntosh eight years imprisonment; Meghrabi ten years imprisonment and Elmoghrabi seven years imprisonment. Anwoir and Meghrabi renew their applications for leave to appeal against conviction, on the original grounds that had been refused by the single judge; their applications for leave to appeal on what we shall refer to as the NW point, and as far as

Anwoir is concerned, what we shall describe as the jurisdiction point had been referred to the full court by the registrar. As far as the jurisdiction point is concerned, Meghrabi was granted leave to argue that point by the single judge. The application for leave to appeal against conviction by McIntosh on the NW and jurisdiction point, has also been referred to the court by the registrar. As far as Elmoghrabi is concerned, he appeals against conviction by leave of the single judge on three grounds, seeks to renew his application on the fourth ground, and to renew his application for leave to appeal against sentence, which was refused by the single judge.

Background Facts

2. The five money laundering counts arose out of investigations which originated in a police operation targeting suspected drug dealers. In the course of that investigation, an undercover police officer known as Macca tape-recorded conversations which he had with McIntosh. In the course of those conversations it became clear that McIntosh had access to people who were prepared to launder money from drug dealing. He talked about getting rid of cash in very large sums, including a reference to £500,000. He identified the person who was his contact as someone who had "a car hire business in Belsize Park, he deals a lot with Arabs." that was a clear reference to Meghrabi. He confirmed the size of the transactions in the following terms: "we did a million fucking quid through him last year". He said that Meghrabi had "a proper Bureau de Change".

3. As to the source of the monies for these transactions, in a conversation on the 20th May 2004, he referred to bringing substantial numbers of mobile phones into the country "and don't pay the VAT and all that shit…" He suggested, once again that the sort of sums involved were in the region of a million pounds. This was a clear reference to what is sometimes known as a carousel fraud where commodities, such as mobile phones, are either actually or notionally imported into the U.K. and then exported in such a way as to obtain VAT repayments without ever accounting for the VAT itself. He also made it clear that he was perfectly happy to deal with the proceeds of drug trafficking and once again confirmed the money laundering nature of the business that he was referring to by describing his dealings with Meghrabi in the following terms:

> "I've dealt with this guy for two years, he's as sound as a pound,
> we've, you know he's cleaned up millions for us."

4. Although there was no direct evidence that some at least of the monies referred to by McIntosh were the proceeds of drug trafficking, the prosecution submitted that that could be clearly inferred not only from the fact that McIntosh was prepared to assist in laundering the proceeds of drug trafficking, but also from the fact that he and his associates were arrested and ultimately convicted of drugs offences. The prosecution accept that the convictions related only to relatively small quantities of drugs; but nonetheless the evidence taken as a whole would justify the inference that the monies being talked about by McIntosh at the very least included some monies from drug

trafficking.

5. This evidence resulted in the investigation of the affairs of Meghrabi, Anwoir, who was his partner with whom he had been through a form of Muslim marriage and Elmoghrabi, Meghrabi's half-brother. These enquiries included enquiries into the affairs of a bureau de change in Queensway, London, called Express FX. This had been bought by Meghrabi for a co defendant Elrayess, who worked at a bureau de change called Link FX. Elrayess was convicted on count 5 of the indictment and sentenced to fifty weeks imprisonment suspended for twelve months. His application for leave to appeal against conviction was refused by the single judge and has not been renewed.

6. As a result of those enquiries, the appellants faced an indictment containing the five counts to which we have referred. The first count charged Anwoir, Meghrabi and McIntosh with an offence relating to the sum of £740,000 in cash paid into Meghrabi's accounts for the benefit of McIntosh and his associates which were used for various property transactions. Count 2 charged Anwoir, Meghrabi, Elmoghrabi and others with an offence of money laundering between the 8th October 2003 and the 13th December 2004 which related to the activities of Express FX, and count 5 charged the same defendants in relation to the trading of Express FX bureau from the 14th December 2004 to the 22nd February 2006. Both these counts were based on the evidence of the pattern of trading after Express FX had been purchased. The business had previously had a turnover of approximately £70,000 a year. In the two and a half years following its purchase, the turnover was £50,000,000 much of it changed into Euros in denominations of £500 Euro notes. As to £15,000,000 there were no records. Substantial numbers of false invoices were discovered in particular involving a company called Danasgate, and others, which the prosecution suggested were completely fictitious in the sense that either the company in question did not exist, or it denied having been involved in the relevant transactions.

7. Count 3 charged Anwoir and Meghrabi in relation to transactions between Link FX and Express FX. Finally, count 4 charged McIntosh and Meghrabi in relation to a proposed transaction involving money from Spain which was the proceeds of drug trafficking.

8. Anwoir, McIntosh and Meghrabi gave evidence. Although she appreciated that large amounts of cash were passing through Meghrabi's hands, and the two bureaus, Anwoir believed that these were all legitimately earned sums of money, mainly from the Saudi royal family for services such as car hire and rented chauffeur driven cars. In relation to the bureau, she was simply a cashier, had no organisational or managerial role, and was not responsible for keeping the records. Although she accepted that her initials appeared on a number of transaction records, there were 118 transactions bearing her initials between the 9th and 24th March 2005 when she could prove that she was in Australia.

9. As far as McIntosh was concerned, his account was that he had indeed been involved in

property transactions but they were entirely legitimate. He also accepted that he had talked to Meghrabi about transactions involving very substantial sums of money, particularly cash which Meghrabi wished to invest, for example in Spain, which was the explanation for the discussions which formed the basis of count 4. He believed that Meghrabi dealt in a substantial way with the Saudi royal family or at least with Arabs, and that most of the business was dealt with in cash.

10. Meghrabi stated that he had legitimate business dealings with wealthy Arab clients including the Saudi royal family which generated a substantial amount of cash. As far as he was concerned the money which was used for the property transactions was entirely legitimate money; and he had no reason to suspect that the money coming back from McIntosh represented the proceeds of crime. The Spanish transaction was also legitimate. He accepted that he had invested in Express FX, but denied that he had any substantial part to play in the way it was run. His half-brother, Elmoghrabi, worked in the bureau and was an experienced currency trader. He knew nothing of the false invoices, or the transactions which were not recorded.

11. Elmoghrabi did not give evidence, but in cross examination his counsel put his case, which was that, contrary to what Meghrabi said, all the currency deals which he arranged were on the instructions of Meghrabi and occasionally Elrayess. He was retired and was at the bureau simply to pass time after his retirement. He accepted that he had loaned money which was used to buy the bureau.

The Grounds of Appeal

12. We propose first to deal with the two grounds of appeal which relate to the indictment generally. In so far as no leave had been granted to argue these grounds, we granted leave at the beginning of the hearing. The first ground is what we have described as the NW ground. This ground is based upon the decision of this court in R v NW, SW, RC and CC [2008] EWCA Crim 2. It is submitted that in that case, this court held that for the purposes of a prosecution under section 328 of POCA the prosecution, whilst it did not have to establish precisely what crime or crimes had generated the property in question, it did have to establish at least the class or type of criminal conduct involved. It is acknowledged on the part of the appellants that this decision would appear to conflict with another decision of this court, R v Craig [2007] EWCA Crim 2913 which does not appear to have been drawn to the attention of the court in NW.

13. Before discussing those authorities and the problems that they present, it may be helpful to set out the relevant statutory provisions. Section 328 of POCA makes it an offence for a person to enter into or become concerned in an arrangement which he knows or suspects facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person. “Criminal property” is defined in section 340 of the Act. This provides, 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;

(c) whether the conduct occurred before or after the passing of this Act."

14. In Craig, Gage L.J. cited a passage from the decision of Butterfield J in R v Kelly (unreported) in which the judge said:

> "Whilst the prosecution must prove that the property is "criminal property" within the meaning of the statutory definition, there is nothing in the wording of the section which imports any further requirement that the property emanated from a particular crime or any specific type of criminal conduct."

15. Gage L.J. at paragraph 29 of his judgment said:

> "We accept this is a correct statement of principle, although it was given in a case where the point was not raised in the way in which it has been today."

16. In NW, Laws L.J. identified the point at issue in that case in similar terms. He said at

paragraph 6:

> "To establish guilt under section 327 or 328, must the Crown prove what particular criminal conduct, or at least what type of criminal conduct, has generated the benefit which the alleged criminal property represents? Or is it enough if they can show, no doubt by reference to the large sums involved and the defendant's want of any means of substance (as well as any other relevant evidence), that the money in question can have had no lawful origin even if they have no lawful evidence of the crime or class of crime involved?"

17. In seeking to answer that question, Laws L.J. reviewed the two main authorities on the court's approach in relation to the civil enforcement provisions contained in Part 5 of POCA, the decision of Sullivan J in Green [2005] EWHC Admin 3168 and the decision of the Court of Appeal, Civil Division, in Szepietowsky [EWCA] Civ 766. In Green Sullivan J held that the Crown in such proceedings was required to give at least some particulars of what the criminal conduct in question was said to be. A wholly unparticularised allegation of "unlawful conduct" was not sufficient. In Szepietowsky, the Court of Appeal expressly agreed, holding that the statute had deliberately steered a careful course between requiring the Director to prove the commission of a specific criminal offence and allowing the Director to make wholly unparticularised allegations of "unlawful conduct" of the kind which would require a respondent to justify his lifestyle: see paragraph 102 of the judgment of Moore-Bick L.J..

18. It seems to us that it is necessary to look, however, with some care at both the decisions in the civil recovery proceedings and at the judgment of Laws L.J. in NW in order to see the extent to which there is in truth any real difference between the approach of the court in Craig, and the approach in NW. It is important to bear in mind that in Green Sullivan J was seeking to answer questions which were generally phrased, without reference to the particular facts of the case. And in giving his answer to preliminary issues raised, namely the extent of particularity required, he said at paragraph 47:

> "1. In civil proceedings for recovery under Part 5 of the Act the Director need not allege the commission of any specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.
>
> 2. A claim for civil recovery cannot be sustained solely upon the basis that a respondent has no identifiable lawful income to warrant his lifestyle."

19. In using the phraseology "kind or kinds of unlawful conduct", he was referring back to paragraph 17 of his judgment in which he made it plain that such general descriptions as "importing and supplying controlled drugs" and "money laundering" would be quite

sufficient. It is also important to note what he said in paragraphs 33 and 34. He there set out circumstances where the way in which money was being held or transported might of itself require an explanation, whereas the mere possession of money would not be sufficient. Implicit in those paragraphs, it seems to us, is the conclusion that circumstances could well arise where the only logical inference is that the property is the proceeds of crime. It will all depend upon the facts. We think that this is precisely what Laws L.J. had in mind in paragraph 16 of his judgment in NW where he said:

> "We did not understand the respondents to submit that there could never be a case in which the Crown might properly invite the jury to infer from the available facts that criminal activity was the only reasonable and non fanciful explanation for the presence of the relevant property in the hands of the defendants, even though there was nothing to show what class of crime was involved. We would in any event reject so general and unqualified a position. Everything of course, depends on the particular facts. The protection for the defendants is that such an inference can only properly be drawn if it meets the criminal standard of proof, and the jury must of course be so directed."

20. The difficulty comes from the next paragraph in which he said:

> "Accordingly there may be cases (whether or not this is one) in which guilt under POCA section 327 or 328 could be inferred, applying the criminal standard, without proof of the class of crime in question. Whether a prosecution in such a case is lawfully and properly brought depends in our judgment on the correctness or otherwise of the respondent's second argument, namely that on the correct construction of POCA section 340 the Crown are required to prove at least the type or class of crime in question to which we will come in due course."

21. There is a clear tension between these two paragraphs. Laws L.J. stated that the issue was a pure matter of law. But it is perhaps important to note that NW was a case in which the prosecution's evidence was essentially based upon the fact that NW had no visible means of support. That is quite a different case from the scenarios envisaged by Sullivan J in paragraphs 33 and 34 of his judgment. We consider that in the present case the Crown are correct in their submission that there are two ways in which the Crown can prove the property derives from crime, a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or those kinds is unlawful, or b) by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime. This in our judgment gives proper effect to the decision in Green, and is consistent with the decisions of this court in Gabriel [2007] 2 CAR 11, IK [2007] 2 CAR 10 and, of course, Craig. We consider that it is also consistent with the approach of this court in R v El

Kurd (unreported CA 26th July 2000).

22. The judge, directing the jury as to this aspect of the case said as follows at page 15:

> "you will note from the definition of criminal conduct that you do not have to be satisfied what conduct it was that produced a financial benefit for the other person. While it could be the proceeds of theft or fraud it could equally be the proceeds of unlawful gambling, prostitution, revenue offences or any other kind of dishonesty. The useful test, you may think, is to ask yourselves whether the financial benefit was honestly derived from legitimate business or commercial activity."

23. It is submitted on behalf of the appellants that whatever the requirement may be in relation to particularising the criminal activity, this direction signally failed to give proper help to the jury. There is some force in that. But the fact of the matter in the present case was that there was clear evidence from which the jury could infer that the money in question came from drugs and/or VAT fraud. The only innocent explanation, namely that it came from legitimate trading by Meghrabi, in particular, was clearly roundly rejected by the jury. In our view, the only real issue was participation and knowledge. That question was fairly and squarely before the jury. We accordingly reject this first ground of appeal. Turning to the second general ground of appeal, which we have described as the jurisdiction ground, that is based upon the wording of paragraph 3 of the Proceeds of Crime Act 2002 (Commencement No. 4, Transitional Provisions and Savings) Order 2003 which provides as follows:

> "The new principal money laundering offences shall not have effect where the conduct constituting an offence under those provisions began before 24th February 2003 [and ended on or after that date] and the old principal money laundering offences shall continue to have effect in such circumstances."

24. The point made on behalf of the appellants is that in relation to counts 1 and 3, evidence was led in relation to matters which occurred before the 24th February 2003, which was the commencement date of the relevant provisions so that the defendants should have been charged under the previous statutory provisions. It is submitted that that is the only way in which proper effect can be given to the words of the paragraph, which, it is said, clearly cover any continuing course of conduct amounting to an offence under POCA if it began before the 24th February 2003. We reject that submission for the simple reason given by the Crown in the present case, namely that the charges which were drafted to commence on the 24th February 2003 were clearly designed to catch conduct after that date amounting to money laundering. There is no suggestion in the evidence that there was only one transaction which straddled the commencement date. The course of conduct in both counts involved a number of separate transactions, which could

therefore be properly charged under POCA, albeit that they were capable of being overt acts evidencing a conspiracy which had begun before the 24th February 2003. We accordingly dismiss this ground of appeal.

25. We turn therefore to the remaining individual grounds of appeal. As far as Anwoir is concerned, she complains about the adequacy of the summing up. It is said that the judge failed to put her defence properly or fairly before the jury. In particular the judge failed to mention to the jury the 118 transactions which occurred while she was in Australia, despite the fact that counsel raised the matter on her behalf at the end of the summing up. It is submitted on her behalf that in summing up the case in short form, which undoubtedly the judge did, he failed to give to the jury the help that it required after five months of evidence.

26. We have considered with care this submission, which is echoed by Meghrabi, and have therefore read and re-read the summing up. There is no doubt that it was succinct; but it identified for the jury the relevant issues and the evidence on each side. As far as the omission of the Australian trip from his recitation of the facts was concerned, that was a point which could not possibly have been missed by the jury and constituted part of the written agreed facts which the jury had with them when they retired to consider their verdict. There is nothing in any exchange between the judge and the jury after they had retired to suggest that the jury had been left in any doubt about either what they had to decide, or the facts upon which they had to decide the issues. We accordingly refuse leave to appeal on that ground.

27. As far as Meghrabi is concerned, he, as we have said, echoes the complaints of Anwoir in relation to the adequacy of the summing up. It is pointed out that Meghrabi spent five days in the witness box whereas his evidence is contained in only ten pages of the transcript of the summing up. We repeat what we said above. We do not consider in all the circumstances that there is any basis on which leave should be granted in relation to this ground, and it is rejected.

28. That leaves the discrete arguments put forward on behalf of Elmoghrabi. They arise out of the way in which the judge treated the fact that Elmoghrabi did not give evidence. Elmoghrabi had suffered a stroke in August 2004 which affected his right side. His legal advisors obtained reports from Professor Nell, and Dr. Lord which expressed concern about his fitness to give evidence. In circumstances about which complaint was made particularly by the co-defendants, application was made to the judge on the basis of the reports for an indication as to whether he would give a direction under section 35 of the Criminal Justice and Public Order Act 1994. In a full judgment on the 26th January 2007 the judge ruled

i) that he accepted the written evidence of the two medical experts that it was undesirable for the appellant to give evidence;

ii) that he did not propose to give an adverse inference direction under section 35 in respect of the appellant;

iii) that he did not require a *voir dire* to reach his conclusions;

iv) that he would not permit the appellant to call medical evidence as to the effect of the stroke before the jury in the light of his ruling that no adverse inference direction would be given;

v) that he would permit counsel for the co-defendants to comment upon the apparent ability of the appellant to work full time at the bureau irrespective of his stroke and its possible consequences upon the appellant's level of functioning.

29. At that stage it was agreed that all defendants were of good character. But on the 5th February 2007 the Crown disclosed an email from the Serious Organised Crime Agency suggesting that Elmoghrabi had, whilst resident in Egypt prior to 1987 been convicted of offences including illegally trafficking in foreign currencies. The judge indicated in those circumstances that he wished to revisit the ruling that he had previously given in relation to section 35. Further enquiries proceeded in order to determine the accuracy of the information. These revealed ultimately that the only conviction that was capable of being established was a conviction in his absence in 1988 for three offences of forgery relating to remarrying a woman he had already divorced. As a result, it was ultimately agreed that the previous admissions as to good character would have to be amended, so as to show that the appellant had been convicted of these offences. The judge then determined that he would revisit his ruling in relation to section 35. By that time Elmoghrabi had through his counsel stated that he did not intend to give evidence. The judge indicated that he would allow his case to be reopened and for him to give evidence, but he refused to allow medical evidence to be called either in a *voire dire*, or before the jury. It would appear as though the basis for his deciding to revisit the issue was that Elmoghrabi had not been open about his previous convictions, and that since the doctors had relied essentially on what he told them in coming to their conclusions he could no longer rely upon those conclusions.

30. It is submitted on behalf of Elmoghrabi that the judge was not entitled to revisit the issue which he had so clearly determined on the 26th January 2007, alternatively was not entitled to revisit it on the grounds that he gave, alternatively that fairness required him to permit the doctors to be called on a *voire dire* to determine the extent to which the convictions changed the basis on which he had made the earlier ruling, and in the further alternative, was wrong to refuse to allow the defence to call the doctors before the jury.

31. Section 35 of the Criminal Justice and Public Order Act 1994 provides by section 35(1)(b) that the court or jury determining whether the accused was guilty of the offence may not draw such inference as appears proper from the failure of the defendant to give

evidence where:

> "it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence."

32. Turning to the submissions on behalf of this appellant, we should state that there is nothing wrong in principle with a judge concluding that he could or should revisit an earlier ruling in relation to section 35. Equally, it is entirely a matter for the judge when making the ruling in the first instance or revisiting it, as to whether or not he holds a *voire dire*: see in a different context R v Chadwick [1998] 7 Archbold News 3. The difficulty in the present case it seems to us is that the judge refused to allow this appellant to put the evidence of the doctors before the jury. There is no doubt that the doctors' evidence had been served late, if it was intended that that material should go before the jury. The judge was concerned that as a result none of the other defendants had had an opportunity to seek any evidence themselves in relation to the issue, nor had the prosecution. In those circumstances he concluded that the admission of the doctors' evidence would result in satellite litigation in a trial which had already significantly overrun its course.

33. Whilst we are sympathetic to the judge's difficulties in this respect, it is interesting to note that the prosecution, when the issue was first discussed, felt that they could not oppose any application for severance. That seems to us to be an acknowledgement that there was a risk of unfairness if the matter continued on the basis that a section 35(3) direction were given, without the jury having at least heard from doctors who were of the view that the appellant's mental condition made it undesirable for him to give evidence. That was a matter which the appellant was entitled to put before the jury in order for them to make a proper assessment of the extent to which they should take into account his failure to give evidence. We are conscious of the fact that there was a very substantial body of evidence which supported the jury's guilty verdicts. We have also taken into account the fact that the jury were given an appropriate direction under section 34 of the Act in relation to his failure to give any answers to questions in interview. However, we have come to the conclusion that the unfairness which we consider was correctly identified by the prosecution renders the verdicts of the jury in respect of this appellant unsafe.

34. We accordingly quash his convictions and will hear submissions as to whether or not there should be a new trial.