Neutral Citation Number: [2006] EWCA Crim 1654

Case No: 2005 02160 B1

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT
SITTING AT THE MIDDLESEX GUILDHALL, LONDON
His Honour Judge Martineau

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11th July 2006

Before :

LORD JUSTICE LONGMORE
MRS JUSTICE GLOSTER
and
HIS HONOUR JUDGE DIEHL QC
(sitting as a Judge of the Court of Appeal, Criminal Division)

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Between :

	REGINA	**Respondent**
	- and -	
	HILDA GONDWE DA SILVA	**Appellant**

- -
- -

ROSSANO CIFONELLI Esq for the **Appellant**
RICHARD MILNE Esq for the **Respondent**

Hearing dates : 19th May 2006

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Judgment

Lord Justice Longmore :

1. On 2nd March 2005 in the Crown Court at the Middlesex Guildhall, the appellant, Hilda Gondwe Da Silva, was convicted of assisting another person to retain the benefit of criminal conduct knowing or suspecting that that other person was or had been engaged in criminal conduct contrary to section 93A(1)(a) of the Criminal Justice Act 1988 (counts 14 and 15 on the indictment). She was acquitted on counts 1 to 10 which charged her jointly with her co-accused husband of obtaining money transfers by deception. Her husband, Mario Da Silva, was convicted of obtaining money transfers by deception (counts 1 to 13). She appeals on one ground only with the leave of the Full Court, namely whether the judge should have given to the jury (as he did) a dictionary definition of the word "suspecting" and then (as he did) have added a further gloss to that definition.

2. In summary the facts were these. AMT is a company which runs coffee-bars. The coffee-bars at King's Cross Railway Station were managed by the co-accused who was responsible for submitting employee time sheets to head office upon which employee wage payments were based. Between 7th June 2001 and 21st July 2003, on ten occasions, sums of money representing the wages of three different people, "ghost workers", were transferred directly into one of two bank accounts operated by the appellant at the Halifax. The Crown alleged that three individuals, two of them sisters, had been employees of the company but at the material times had not worked at all. It was further alleged that the appellant had given encouragement and assistance to the co-accused knowing that the wages were being received dishonestly.

3. As an alternative against the appellant, count 14 alleged that between 11th November 2001 and 2nd September 2003 knowing or suspecting that her husband was or had been engaged in criminal conduct or had benefited from it, she entered into or was otherwise concerned in an arrangement which involved the deposit and withdrawal of sums into and from her bank account facilitating his retention or control of proceeds of his criminal conduct. The sums of money covered by count 14 related to the wages of the sisters. Count 15 was a similar offence in respect of a second bank account for the period June 2001 to September 2003. The sums of money here related to one Daniella Mateus. These two counts charged offences, as we have said, against section 93A(1)(a) of the 1988 Act. That sub-section provides:-

> ". . . . if a person enters into or is otherwise concerned in an arrangement whereby –
>
> (a) the retention or control by or on behalf of another ("A") of A's proceeds of criminal conduct is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise)
>
> . . . . . .
>
> knowing or suspecting that A is a person who is or has been engaged in criminal conduct or has benefited from criminal conduct, he is guilty of an offence."

4. The judge observed to the jury that if they concluded the appellant knew her co-accused husband had engaged in criminal conduct or had benefited from it, they would convict her as a participant in the principal offence. If they acquitted her, however, of the first 10 counts of the indictment and moved on to consider counts 14 and 15 of the indictment, he only needed to direct them about the question whether the Crown had proved that she suspected her husband was engaged in criminal conduct or had benefited from it.

5. He then said this:-

> "So, probably, 'knowing' will not arise and what will arise instead is 'suspecting', which is a very different state of mind to knowing. To suspect something, you have a state of mind that is well short of knowing that the matter that you suspect is true. It is an ordinary English word. Members of the jury, if the Crown can show that the defendant said to herself, 'I suspect that this

> money is the proceeds of criminal conduct, but it may be, on the other hand, that it is not', that would fall within the definition of 'suspicion'. The dictionary definition, which I direct you is relevant, to the meaning of the word, is this. The dictionary definition of 'suspicion': 'an act of suspecting, the imagining of something without evidence or on slender evidence, inkling, mistrust'. Therefore, any inkling or fleeting thought that the money being paid into her account 9950 might be the proceeds of criminal conduct will suffice for the offence against her to be proved."

6. The passage to which exception is taken, and in relation to which leave to appeal has been given, is the passage where the judge referred to the (Chambers) dictionary definition which he directed the jury was relevant and then added the concept "fleeting thought" to the word "inkling". The Full Court, granting leave, thought that it was arguable that the judge should not have given that dictionary definition to the jury and that in so doing he introduced a gloss or qualification to the ordinary English word of suspecting or suspicion which was uncalled for and indeed potentially misleading. The court added that it might be the case that, whatever view the court hearing the appeal took about the direction that was given, they would nevertheless conclude that the evidence against the applicant was sufficiently strong for there not to be any doubts about the safety of her convictions on counts 14 and 15. That however is another matter.

7. Mr Cifonelli, who appeared for the appellant, sought to extend the ground on which he was given leave to appeal by arguing that the word "reasonably" ought to be read before the word "suspecting" in the statutory wording or (which comes to the same thing) the word "on reasonable grounds" ought to be read in after the word "suspecting". He submitted that it was impossible to suppose that Parliament intended that a facilitator should be guilty of an offence if he or she suspected that the relevant other person was or had been engaged in criminal conduct but had no reasonable grounds for that suspicion.

8. We regard this as an impossible argument. This court could not, even if it wished to, imply a word such as "reasonable" into this statutory provision. To do so would be to make a material change in the statutory provision for which there is no warrant. This is all the more the case when one sees that the draftsman is aware of the difference between "suspecting" and "having reasonable grounds to suspect" and on occasion uses the latter phrase in preference to the former word. Thus in section 93C which deals with "concealing or transferring proceeds of criminal conduct", we see sub-section 2 which provides:-

> "A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is . . . . another person's proceeds of criminal conduct, he
>
> (a) conceals or disguises that property; or
>
> (b) converts or transfers that property . . . ."

In the light of this express reference to "reasonable grounds" for suspicion in section 93C of the 1988 Act, it is impossible, in our judgment, to read in similar words in

93A(1) when the words are just not there.

9. Mr Cifonelli sought to explain the distinction between the two sections historically by saying that section 93A of the 1988 Act (originally inserted into the 1988 Act by the Criminal Justice Act 1993) was modelled on section 24 of the Drug Trafficking Act 1986, whereas section 93C (likewise inserted by the Criminal Justice Act 1993) was modelled on section 14 of the Criminal Justice (International Cooperation) Act 1990 (which was later re-enacted in the Drug Trafficking Act 1994). The argument appeared to be that Parliament had not thought about the matter carefully enough at the first stage of the confiscatory legislation in 1986 but by 1990 had come to realise that suspicion on its own was inappropriate and therefore provided for such suspicion to have reasonable grounds. The court should therefore interpret the provisions deriving from the 1986 Act in a similar way. Ingenious as the argument may be, that is not an appropriate approach to statutory construction. Whatever the ultimate derivations of the various provisions of the 1998 Act may be, they must be construed as a whole and it is impossible to ignore the fact that one section provides for reasonable grounds for suspicion whereas the section with which this case is concerned (section 93A) does not. It seems, to us, that these considerations are also supported by the speeches in R v Saik [2006] UKHL 18, [2006] 2 WLR 993.

10. Finally on this point we would observe:-

(1) the Proceeds of Crime Act 2002, which is now the governing statute, likewise sometimes uses the words "suspects" as in eg section 328(1) (the equivalent of section 93A), section 330(2)(a) and section 331(2)(a) and, at other times, the phrase "reasonable grounds for suspecting" in eg sections 330(2)(b) and 331(2)(b);

(2) Mr Cifonelli's concern about inappropriate convictions is unlikely to arise in practice since, if a potential defendant in fact has no reasonable grounds to suspect that the facilitated person is or has been engaged in criminal activity, it is unlikely that a prosecution will be taking place and, if it does, extremely unlikely that a jury will decide that a defendant has a suspicion when no reasonable ground exists for entertaining such a suspicion.

11. We turn then to the ground on which leave was granted. This raises three questions:-

(1) Was the judge entitled to assist the jury by giving any definition and in particular a dictionary definition of the ordinary English word "suspect" or "suspicion"?

(2) Is the dictionary definition given by the judge the correct way to interpret the word "suspecting" in section 93A?

(3) Did the judge's introduction of the concept "fleeting thought" (not part of the dictionary definition cited by the judge) constitute a misdirection?

12. The judge could not, in our judgment, have been criticised if he had declined to define the word "suspecting" further than by saying it was an ordinary English word and the jury should apply their own understanding of it. Of course, the danger with saying nothing is that the jury might actually ask for assistance about its meaning and, if they did, the judge would have to assist as best he can. This judge, however, volunteered to assist the jury in relation to the word "suspecting" and we certainly do not consider that he can be criticised for doing so. The mere fact that a word is an "ordinary English word" within Cozens v Brutus [1973] AC 854 does not prevent a judge assisting a jury with its meaning, see R v Gillard (1988) 87 CAR 189, 194. If he does so assist the jury, it needs hardly be added, he must do so correctly.

13. If a judge justifiably decides to assist the jury about the meaning of a word, the dictionary definition is, in the absence of judicial authority, likely to be a sensible starting place. There is no English authority in a criminal context to which we were referred on the meaning of "suspect" or "suspicion"; definitions given in civil cases are sometimes in the context of "reasonable suspicion" of eg the police in relation to the commission of an offence, rather than in the context of simple "suspicion". Thus in Hussien v Chang Fook Kam [1970] AC 942, in which the Privy Council decided that reasonable suspicion was not the same as prima facie proof, Lord Devlin said at page 948:-

> "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end."

14. This dictum was followed in a similar context by the Court of Appeal in Holtham v Commissioner of the Police of the Metropolis, Times, 28th November 1987. This definition would not have been particularly helpful to the jury in the present case since the appellant was not, of course, making any investigation but the first part which refers to a "state of conjecture or surmise" gives a general indication of the general meaning of "suspicion".

15. In the civil context of blind eye knowledge, and dishonest accessory liability for breaches of trust, the authorities indicate that the suspicion has to be "clear" or "firmly grounded". They show that, in civil cases of this type, there is a requirement that the suspicion must be of a certain strength. Thus in Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd ("The Star Sea") [2001] UKHL 1, [2003] 1 AC 469, a case of alleged blind eye knowledge of unseaworthiness, Lord Scott stated the following at paragraph 116:-

> "In summary, blind-eye knowledge requires, in my opinion, a suspicion that the relevant facts do exist and a deliberate decision to avoid confirming that they exist. But a warning should be sounded. Suspicion is a word that can be used to describe a state-of-mind that may, at one extreme, be no more than a vague feeling of unease and, at the other extreme, reflect a firm belief in the existence of the relevant facts. In my opinion, in order for there to be blind-eye knowledge, the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in

> whose existence the individual has good reason to believe. To allow blind-eye knowledge to be constituted by a decision not to enquire into an untargeted or speculative suspicion would be to allow negligence, albeit gross, to be the basis of a finding of privity."

In other words, a vague feeling of unease was not sufficient, nor was gross negligence; see also paragraph 25 per Lord Hobhouse. The suspicion had to be firmly grounded and targeted on specific facts Likewise, in Barlow Clowes International Ltd v Eurotrust International Ltd, [2005] UKPC 37, [2006] 1 All ER 333, a case against an alleged money launderer based upon the defendant's dishonest assistance in a breach of trust, the Judicial Committee stated that it was sufficient, on the facts of that case, that the defendant "entertained a clear suspicion" that there had been a misappropriate of monies; see paragraph 28 of the judgment, and also paragraph 19, where the rubric "solid grounds for suspicion" was approved.

16. What then does the word "suspecting" mean in its particular context in the 1988 Act? It seems to us that the essential element in the word "suspect" and its affiliates, in this context, is that the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice. But the statute does not require the suspicion to be "clear" or "firmly grounded and targeted on specific facts", or based upon "reasonable grounds". To require the prosecution to satisfy such criteria as to the strength of the suspicion would, in our view, be putting a gloss on the section. We consider therefore that, for the purpose of a conviction under section 93A(1)(a) of the 1988 Act, the prosecution must prove that the defendant's acts of facilitating another person's retention or control of the proceeds of criminal conduct were done by a defendant who thought that there was a possibility, which was more than fanciful, that the other person was or had been engaged in or had benefited from criminal conduct. We consider that, if a judge feels it appropriate to assist the jury with the word "suspecting", a direction along these lines will be adequate and accurate.

17. The only possible qualification to this conclusion, is whether, in an appropriate case, a jury should also be directed that the suspicion must be of a settled nature; a case might, for example, arise in which a defendant did entertain a suspicion in the above sense but, on further thought, honestly dismissed it from his or her mind as being unworthy or as contrary to such evidence as existed or as being outweighed by other considerations. In such a case a careful direction to the jury might be required. But, in our view, before such a direction was necessary there would have to be some reason to suppose that the defendant went through some such thought process as set above. The present case was not a case where any such direction could be thought to be necessary.

18. That leaves the question whether the judge's direction by reference to the meaning of the Chambers' dictionary meaning of suspicion with the addition of the phrase "fleeting thought" constituted a misdirection. Neither counsel could tell us the source of the judge's direction but it is noteworthy that HHJ Martineau adopted exactly the same approach as the leading work on the topic. In Mitchell, Taylor and Talbot on Confiscation and Proceeds of Crime one finds that the authors say (at para. 9.022 of the edition current at trial), referring to section 50 of the Drug Trafficking Act 1994 (the drugs equivalent to section 93A),:-

> "Since suspicion is a word of ordinary English, it may be helpful to consider the dictionary definition of suspicion."

They then cite the 7th edition of Chambers and continue:-

> "Suspicion is a word in daily usage, it should be given its ordinary meaning. Thus any inkling or fleeting thought that the property might be the proceeds of drug trafficking will suffice for this section. This wide, all-encompassing section emphasises, yet again, the draconian effect of the legislation."

19. It is difficult to criticise the judge for giving a direction authorised by the leading text-book but we think, with respect, that using words such as "inkling" or "fleeting thought" is liable to mislead. If they are to be used, it would normally be advisable to add the qualification we have mentioned in paragraph 17 above. Most cases can be more conveniently dealt with solely by reference to the suggested direction in paragraph 16. We are, therefore, driven to the conclusion that there was here, through no fault of the judge, a misdirection of a technical kind. It is not, however, a misdirection which causes us to have any doubt as to the safety of the conviction.

20. The Crown had a good prima facie case. The appellant chose to remain silent when she was interviewed about her joint participation with her husband in relation to counts 1-10 of the indictment. Her case at trial (as was that of her husband) was that her husband told her that he had had an instruction from his area manager that he should make a bank account available for staff workers who could not obtain a bank account of their own. There was no evidence of that apart from that of the co-accused husband (whom the jury disbelieved). The appellant did not herself give evidence. We are satisfied that the convictions are safe and the appeal will be dismissed.

21. We regret the delay in issuing this judgment but the court wished to assimilate the arguments made to the Civil Division of this court in K Ltd v National Westminster Bank Plc in which the judgment will be delivered shortly.