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CO/9495/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 30 October 2013

B e f o r e:

MR JUSTICE BEAN

Between:
MAREK CHOLEWINSKI

Appellant

v

REGIONAL COURT IN NOWY SACZ, POLAND

Respondent

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(Official Shorthand Writers to the Court)

Mr S Fidler (instructed by Stephen Fidler & Co) appeared on behalf of the **Appellant**
Mr D Sternberg (instructed by CPS Extradition Unit) appeared on behalf of the **Respondent**

J U D G M E N T
(As approved by the Court)

1. MR JUSTICE BEAN: The appellant appeals from a decision of District Judge Coleman sitting at the Westminster Magistrates' Court ordering his extradition on 7 out of 8 offences specified in a conviction warrant issued by a Polish Regional Court on 28 March 2008.

2. The District Judge declined to order his extradition on Charge 1 for the simple reason it was not an extradition offence, an offence not being known to English Law, namely failure to make maintenance payments.

3. Nothing arises in this court in respect of that decision, nor does any issue arise in this court as to the District Judge's decision to order extradition on charges 2 to 4, and 6 to 8. The issue is in relation to charge 5.

4. The relevant paragraph of the European Arrest Warrant reads as follows:

> "In the period from March 2001 to June 19, 2004, in an undetermined place, being an agent for Towarzyztwo Ubezpeiczeniowe "Samopomoc" [insurance company] he concealed documentation in the form of 120 insurance policies of this company ie TPL insurance policies of the serial numbers starting from DA1503551 to DA1503600, from 1707951 to DA1708000: AutoCasco policies with serial numbers starting from DB 0269325 to DB 0269329, from DB 0268951 to DB 0268955 and general policies with serial numbers starting from BD 0054011 to BD0054020 of which he had no right of sole disposal."

5. Mr Stephen Fidler, for the appellant, challenges the decision to order extradition on this charge on two grounds. The first is that the warrant does not indicate that the offence took place in Poland. On the contrary, it says that it occurred "in an undetermined place".

6. I accept the submission of Mr Daniel Sternberg for the requesting State authorities that the simple answer to this is to be found in the terms of section 2 of the 2003 Act. In the case of an accusation warrant s.2(4)(c) requires the information given in the warrant to include particulars of the time and place at which he is alleged to have committed the offence. In the case of a conviction warrant, however, the place of the offence need not be specified (see different wording of s.2(6).

7. Mr Fidler's second point, however, is far more substantial. He submits that the dual criminality requirement is not satisfied in respect of this charge. There is no specific offence of concealment of an insurance policy in English law. The District Judge considered that the matter could be classified as an offence either under s.1 or s.20 of the Theft Act 1968.

8. Section 1 creates the offence of theft which is committed when a defendant dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it. The difficulty about seeking to place this case under that section is that

the warrant gives no particulars of what it is that the appellant was found to have been planning to do with the insurance policies which he concealed.

9. One can speculate that he might have been concealing them with a view to altering them and then perhaps making or assisting others to make false claims. He may have had some grudge against his employers of which we know nothing. All that the warrant says is that he concealed the policies of which he had no right of sole disposal. It does not seem to me that the requesting State has shown that the policies were concealed by him with the intention of permanently depriving his employers of them.

10. I turn, therefore, to s.20 which was the primary basis on which the District Judge reached his decision. Section 20 of the Theft Act 1968, as it stood at the time of the commission of these offences, and at the time of the issue of the warrant, provided by sub-section(1) that:

> "A person who dishonestly, with a view to gaining for himself or another, or with intent to cause loss to another destroys, defaces or conceals any valuable security, shall on conviction on indictment be liable to prison for a term not exceeding 7 years."

11. Mr Fidler faintly argued that the wording of the warrant does not include the word "dishonestly"; but dishonesty can be inferred. See for example, the decision of the Divisional Court in Zak v Regional Court of Bydgoszcz Poland [2008] EWHC 470 (Admin). It will be apparent from the brief recital of the facts contained in the European Arrest Warrant that this is a case in which, in my view, dishonesty can be inferred and so too can one or other of the alternatives of gain for the appellant (or another), or an intent to cause loss to another.

12. The argument before me therefore focused on whether the insurance policies constituted "valuable securities". That is a question to be answered by reference to the definition of a valuable security for the purposes of s.20, which is to be found in sub section (3).

> "Valuable security means any document creating, transferring, surrendering or releasing any right to in, or over property, or authorising the payment of money or delivery of any property or evidence in the creation transfer, surrender or release of any such right or the payment of money or delivery of any property for the satisfaction of any obligation."

13. The diligent researches of Mr Fidler and Mr Sternberg have been unable to unearth any case in which it has been expressly decided whether an insurance policy falls within this definition. Counsel were able to point to R v Singh (Kirpal) [2004] EWCA Crim 2850. That was an appeal in a case where a defendant had pleaded guilty in the Crown Court to one count of procuring the execution of a valuable security by deception.

14. It appears that the defendant had been party to submitting and maintaining a false insurance claim but since the case had proceeded below on the basis of a plea of guilty and the appeal to the Court of Appeal was only against sentence, not against conviction,

we do not have the benefit of the views of the Court of Appeal as to whether a policy of insurance is a valuable security within the meaning of s.20 of the Theft Act 1968. This is not a criticism of anybody: it simply would not have been necessary, given the plea of guilty and the fact that the appeal was only against sentence for the judicial mind to have been addressed to the problem.

15. The leading case on s.20 was the decision of the House of Lords in R v Kassim [1992] 1 AC 9 at 18G, Lord Ackner, whom the other members of the House agreed, said:

> "It is [...] clear from the legislative history of s.20 (2) that 'execution' which is deemed to cover the various activities detailed in the sub section has as its object a wide variety of documents including bills of exchange and other negotiable instruments. The sub section contemplates acts being done to or in connection with such documents. It does not contemplate, and accordingly is not concerned with, the giving effect to the documents by carrying out the instructions which they may contain such as the delivery of goods or the payment out of money."

16. Mr Fidler relied on that paragraph because it specifies bills of exchange and other negotiable instruments and does not specify any other type of document such as an insurance policy. Mr Sternberg on the other hand, derives comfort from Lord Ackner's phrase: "a wide variety of documents."

17. Although, of course, any decision of their Lordships is authoritative, I do not think that this paragraph throws any light on the question before me. The facts in Kassim, which were dealt with by way of specimen counts, concerned the dishonest obtaining of a cheque book. Count 2, for example, alleged that the defendant procured the execution by Lloyds Bank PLC of a certain valuable security, namely a cheque, and then gave particulars of the cheque.

18. The issue before their Lordships was whether the defendant on those facts had procured the execution of a valuable security. No doubt a cheque is a valuable security because it is an instruction to a banker to pay money to someone else, but that does not help me with deciding whether an insurance policy falls within the sub section.

19. Similarly, in R v King [1992] QB 20, referred to by Lord Ackner in Kassim, the Court of Appeal held that Clearing House Automated Payment System Orders (generally known as CHAPS Orders) are valuable securities within the meaning of s.20, and went on to decide that in the particular case, they had been executed and thus the conviction was sound. That, likewise, does not assist me.

20. I have come to the conclusion that an insurance policy is not a valuable security within s.20(3) of the Theft Act 1965. It is not a document which creates any right to, in, or over property; nor one which authorises the payment of money or delivery of any property, nor one which evidences the creation of any such right. All that it does is evidence a contract between the policy holder and the insurance company which provides that in the event of certain events occurring, that is to say the insured perils,

money will be paid. At best, it creates a contingent future right to, in, or over property. None of the authorities cited to me suggest that this is enough.

21. It is for the requesting State to satisfy me that the dual criminality requirement has been satisfied and despite Mr Sternberg's best efforts, they have not been able to do so. Accordingly, I allow the appeal, and quash the District Judge's decision in respect of charge 5 only. Otherwise, of course, his decision stands.