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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL
Tuesday, 29 October 2013

B e f o r e:
LORD JUSTICE McCOMBE
MR JUSTICE WYN WILLIAMS
MRS JUSTICE PATTERSON DBE
R E G I N A
v
DARIUS AUGUNAS

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Mr A K Montgomery appeared on behalf of the **Appellant**
Mr N Hoon appeared on behalf of the **Crown**

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

1.LORD JUSTICE McCOMBE: On 4 September this year in the Crown Court at Kingston upon Thames after a trial before Mr Recorder Weatherill QC, the appellant was convicted of three offences contrary to the Fraud Act 2006, namely one offence of fraud contrary to section 1 of the Act and two offences of possession of articles for use in fraud contrary to section 6. On 30 September he was sentenced by the learned recorder to 9 months' imprisonment for the section 1 offence and to 3 months' imprisonment on each of the section 6 offences, all sentences to be served concurrently, giving rise to a total sentence of 9 months' imprisonment. He now appeals against both conviction and sentence by leave of the single judge.

2.The underlying facts of the case and the charges that followed are very straightforward. On 11 August 2009, the appellant attempted to purchase at Harrods department store in London a laptop computer at a price of £949. It turned out that the card that was used was a false card. A further counterfeit card was found in his possession.

3.He is a Lithuanian national. On arrest, he gave his true name and produced a genuine identity card. In interview, his account was that he had met a woman called "Jorgita" at a club. He had been in this country for only a month at the time. She told him that he would need a bank card to get a job, and so he provided his relevant details. He said a few days later he received two bank cards in his own name, and at this stage the woman asked him to buy a computer at Harrods, and told him that she had put £1,200 into the account to cover the purchase. He did what she asked and ended up being detained when the card proved to be bogus.

4.He said in evidence before the judge that he had no knowledge that the cards were false. He did not dispute that they were in fact false. The Crown case, on the other hand, was that he knew full well that the cards were not genuine and that his account to the police and in evidence had been entirely untrue.

5.We would mention that, although the charges arise out of events in 2009, the appellant did not stand his trial until the date we have mentioned when he had been arrested for entirely different offences and this older matter came to light.

6.The issue of fact for the jury was a very straightforward one, and the sole ground of appeal before us against the conviction arises out of certain passages in the judge's summing-up. It is argued that in the course of some of these passages, the judge misdirected the jury as to the mental element that had to be proved by the Crown before the appellant could be convicted, namely that they needed to be satisfied that the appellant knew that the bank cards were counterfeit. It is submitted that the judge's directions as a whole failed to do this.

7.It is as well to remind ourselves of the terms of the statute and of the charges as formulated in the indictment. Section 1, in its material parts, reads as follows:

> "(1) A person is guilty of fraud if he is in breach of any of the sections listed in subsection (2) (which provide for different ways of committing the offence).
>
> (2) The sections are—
>
> (a) section 2 (fraud by false representation)"

Section 2 then goes on to provide this:

> "(1) A person is in breach of this section if he—
>
> (a) dishonestly makes a false representation, and
>
> (b) intends, by making the representation—
>
> (i) to make a gain for himself or another, or
>
> (ii) to cause loss to another or to expose another to a risk of loss.
>
> (2) A representation is false if—
>
> (a) it is untrue or misleading, and
>
> (b) the person making it knows that it is, or might be, untrue or misleading."

Section 6, which was the subject of counts 2 and 3, provides:

> "(1) A person is guilty of an offence if he has in his possession or under his control any article for use in the course of or in connection with any fraud."

8.With those passages of the Act, which we have had fully in mind in considering this case, it is helpful to indicate how the charges are formulated in counts 1 and 2. Count 1 was in these terms:

> "**STATEMENT OF OFFENCE**
>
> FRAUD, contrary to section 1 of the Fraud Act 2006.

PARTICULARS OF OFFENCE

DARIUS AUGUNAS on the 11th day of August 2009 at Harrods, Knightsbridge London committed fraud in that, dishonestly and intending thereby to make a gain for himself or another, or to cause loss to another, or to expose another to risk of loss, he made a false representation which was and which he knew was or might be untrue or misleading, namely that a Standard Chartered Mastercard [number given] was yours to use to purchase goods, in breach of section 2 of the Fraud Act 2006."

Count 2 was formulated in these terms:

"**STATEMENT OF OFFENCE**

Possession of articles for use in frauds, contrary to section 6(1) of the Fraud Act 2006.

PARTICULARS OF OFFENCE

DARIUS AUGUNAS on the 11th of August 2009 at Harrods Knightsbridge London had in his possession or under his control an article for use in the course of or in connection with fraud [card details given]."

Count 3 was worded in similar terms in respect of the second card found in his possession.

9. It will be seen that what by statute constitutes the offence under section 1 is the dishonest making of a false representation with a view to gain. A representation is "false" if it is "untrue or misleading" and "the person making it knows that it is, or might be, untrue or misleading". What is required is that the accused person knows that the representation is, or might be, misleading. It is not enough that a reasonable person might have known this; what matters is the accused person's actual knowledge. In our judgment, it not good enough for the prosecutor to satisfy the jury that the accused ought to have appreciated that the representation made by him was or might be untrue or misleading, nor is it enough that the circumstances must have given rise to a reasonable suspicion that the representation was, or might be, untrue or misleading. Of course, if an accused person wilfully shuts his eyes to the obvious doubts as to the genuineness of the misrepresentation that he is making, then he knows that it might be untrue or misleading and he would be guilty of the offence. With all those matters, as we see it, Mr Hoon for the Crown agrees and he recognises that certain parts of the summing-up in dealing with count 1 were less than happily phrased. With those matters in mind, we turn to the passages in the summing-up that give rise to the appeal.

10. The important primary directions in this case are those that were given on count 1. We will turn in a moment to what effect that had on counts 2 and 3. The judge's directions on count 1 began at page 4 at the passages between letters B and D, where he said this:

"In each case the Crown has to make you sure of all the constituents- that all the constituent elements of the offences are made out before you can convict, so in the case of ... count 1 the Crown must establish that on 11 August 2009 at Harrods the defendant dishonestly and with the intention either to make a gain for himself or another, or to cause loss to another, or to expose another to loss, made a false representation which he knew was or might be untrue or misleading, namely that the Standard Chartered Mastercard identified in the indictment was his to use for the purchase of goods."

11. So far, so good. The direction was in terms of the section. The next material part of the direction is at page 5 between letters A and D, where the judge said this:

"The issues for you on count 1 all centre on whether the defendant was acting dishonestly. That involves determining two things, both of which must be proved to your satisfaction so that you are sure in order for the Crown to make out the case against him, namely first whether his intention was to make an unwarranted gain for Jorgita and a corresponding loss for Harrods, or to expose Harrods to the risk of incurring such loss, and secondly whether to give effect to that he made a representation which was and which he knew was or might be untrue or misleading, namely that the card in question was his to use for the purchase of goods."

12. For present purposes, it is the second limb of that passage which is important, and again, as we see it, there is no problem: the direction was in terms of the Act itself. However, next we come to page 5F to G. Just before this passage, the judge correctly directed the jury that they were entitled to draw inferences from the facts heard and seen in evidence, and went on to say this at letters F to G:

"Thus a man who presents a credit card which is in fact counterfeit, thus not a valid card, will make a false representation if he knew or had reasonable grounds for suspecting that that was so, and that the supplier of goods might be misled into thinking that it was a valid card."

Here, as we see it, the judge begins to muddy the waters and puts into the jury's mind that knowledge of actual or possible inaccuracy is not necessary if there were "reasonable grounds for suspecting" the inaccuracy of the representation, or, in this case, reasonable grounds for suspecting that the card was a false one.

13. The judge returned to the straight and narrow, if we may put it that way, at page 6 between letters A and B where he said this:

> "The central issue for you on count 1 is whether the defendant was dishonest in presenting the Standard Chartered Mastercard to the staff at Harrods as a proffered means of paying for the laptop which Jorgita had asked him to purchase for her. He would be dishonest if he knew that the card was or might be counterfeit."

14. However, a little lower down the same page between letters D and F, the judge is recorded as saying this:

> "You may conclude on the evidence that you have heard that there is reasonable doubt as it to whether the defendant actually knew the card was counterfeit. But that is not enough to cause you to acquit him. You may think here that the central question for you to decide is whether, given all the circumstances in which it came into his possession, the defendant ought to have appreciated that the card was or might be invalid and no good for payment for the laptop."

15. At 6H and just over the page to A, he continued as follows:

> "If on the other hand you conclude the circumstances were such that the defendant ought to have had doubts whether the card was valid or not, but nevertheless proceeded to present the card in an attempt to purchase the Sony laptop, then you must find him guilty."

16. Towards the end of the summing-up, after dealing with the evidence, the judge returned to the questions the jury had to decide in a long passage between page 16A and page 17A:

> "Ultimately you have to take all that you have heard and all that you have seen by way of evidence in this case into account and ask yourselves central questions. Essentially this case revolves around whether you find that the defendant was acting dishonestly. Of course he will not have been acting dishonestly if he believed, genuinely believed and had no reason to think otherwise that these cards were valid cards, and he was just doing a favour for Jorgita with no intention to cause any loss, no expectation that any loss will be caused to Harrods as a result. He was therefore an innocent dupe of what was described as a consortium of counterfeit card operators, an innocent dupe put out there to take the fall for them.
>
> If you find that he was an innocent dupe in the sense that he had no cause to suppose that the card that he was proffering for payment was other than a valid card, then he will not have made a misrepresentation as to that card, and you will find him not guilty.
>
> If on the other hand you come to the conclusion in relation to the Standard Chartered card that the circumstances that you have heard about must have given rise to a reasonable suspicion on his part that the card was or may have been an invalid card, a counterfeited card such that proffering it to Harrods would be likely to mislead Harrods to think it was a valid card, then it is likely that you will conclude too that he proffered that card in an expectation that it would achieve a gain for Jorgita and a loss, or the risk of loss to Harrods, and if you find on those facts then you must find him guilty. He is entitled to the benefit of any doubt that you may have."

17. As we say, in that long passage the question mark in relation to count 1 arises over the statement at page 16F where the judge asked the jury to consider whether the circumstances "must have given rise to a reasonable suspicion on his part." Was the judge there asking the jury to consider whether the appellant actually knew that the card was or might be bogus, or was he asking them to consider whether a reasonable person might have known that it was or might be bogus?

18. The initial questions posed by this appeal, although somewhat changed in the light of Mr Hoon's helpful recognition of the reality in the summing-up, were these: first, whether the directions put into the jury's mind some objective test of reasonable grounds for suspicion, rather than that required by the Act, namely knowledge that the representation is or might be untrue; and, if so, secondly whether the convictions are unsafe.

19. We turn to the residual point that is made by Mr Hoon in a moment about the safety of these convictions. However, we think it is right to say that, in our judgment, in cases of this sort the safest course for a judge to adopt is to pose to the jury the question for them in words as close as possible to those of the statute. Elaboration will rarely assist. It may be that some direction as to the consequences of an accused wilfully shutting his eyes to the obvious may be required, but rarely will more be needed. In our view, as Mr Hoon recognises, in certain of the passages which we have quoted, the judge did pose to the jury the wrong question, and in particular we are thinking of the passages at page 5F to G and 6F to G to which the learned single judge pointed in giving leave. We do not repeat them; they are set out above.

20. This was undoubtedly a strong prosecution case on the facts, and Mr Hoon's submission to us this morning is that what happened in fact was that the learned judge quite accurately summed up the law on counts 2 and 3 as to the possession of articles for use in fraud, with the correct mental element identified (that is actual knowledge of the falsity of the card or the potential falsity of the card), and no complaint can be made about it. That was logically the first question for the jury, and one which they are likely to have considered first. Having got that far, if that card was proffered and it was false, then the conviction on count 1 must have followed.

21. We follow the logic of that submission, and we have considered whether, particularly in the light of the direction in relation to those two counts and in the light of the judge's direction that each matter should be considered separately, that

possibly the conviction on count 3 might still be held to have been safe because there was no question of that card actually having been proffered for the use in any purchase. However, in our judgment, that is not the correct course. The learned judge took the approach of starting with the law on count 1. By reference to that, he defined what fraud was. That was the definition of fraud that the jury must be taken to have loyally adopted when they came to consider counts 2 and 3. He did not invite them, for example, to consider counts 2 and 3 first and proceed to consider count 1.

22.In our judgment, it is difficult, where a jury has been possibly put onto the wrong track as to whether the test of guilt is a subjective or an objective one in terms of an accused's knowledge, to say that the resultant verdicts of guilty are safe, even if there are, as there were here, passages of the summing up in which the test is set out clearly and correctly. In our judgment, the conviction on count 1 cannot be safe and the same consequence follows for counts 2 and 3. Accordingly, we propose to allow the appeal against conviction and quash the convictions on all the counts.

23.MR HOON: My Lord, I am instructed to apply to the court for a direction that there be a retrial. The evidence, as your Lordships observed, was very strong.

24.LORD JUSTICE McCOMBE: Yes. Mr Montgomery?

25.MR MONTGOMERY: My Lord, the things that I can raise to suggest that that is not in the interests of justice: the defendant has been in custody for four months from 23 June from the occasion of his arrest for another matter, so he has served the equivalent of 8 months' imprisonment.

26.LORD JUSTICE McCOMBE: And the total sentence was nine.

27.MR MONTGOMERY: Yes. So that you know his background situation, because there was mention in the papers in the transcript from that which my learned friend alluded to it on the date, which was that there was an arrest warrant from Lithuania, and he is in custody on that matter and faces an extradition hearing at Westminster on 8 November, as soon as that. I think the interpreter was quite helpful because I think she was the interpreter previously for him at one or other of the hearings preparatory to now, and says that there may be some issue in relation to a raft of cases involving Lithuanians in relation to conditions in Lithuanian prisons, which may be a block or not on whether that --

28.LORD JUSTICE McCOMBE: I have heard those arguments.

29.MR MONTGOMERY: So I do not want to present it to the court as a fait accompli that he is going to be extradited, but it is certainly a distinct possibility. But that is the situation. It is not as though it is a question of good character or not good character depending on this and whether there was a retrial, because unfortunately he committed an offence, I think to which he pleaded guilty, of simple theft afterwards. So he has his record marked as a man who has behaved --

30.LORD JUSTICE McCOMBE: What happened in relation to that offence?

31.MR HOON: A fine of £50.

32.MR MONTGOMERY: I am grateful to my learned friend.

33.LORD JUSTICE McCOMBE: But an acknowledgement of guilt on that charge.

34.MR MONTGOMERY: Yes. So those are just factors I suggest might militate in favour of a different view.

35.MR JUSTICE WYN WILLIAMS: Is the defendant remanded in custody in the extradition proceedings?

36.MR MONTGOMERY: He is. (Inaudible) those matters. He is in custody.

37.LORD JUSTICE McCOMBE: We will just rise shortly.

38.Mr Hoon, do you want to add to what you have said about the retrial application?

39.MR HOON: My Lord, no.

(A short adjournment)

40.LORD JUSTICE McCOMBE: Mr Hoon, in the light of the fact that this appellant has served his sentence, we decline to order a retrial, particularly in the light of the other matters of which we have been told by Mr Montgomery.

41.MR HOON: I am obliged.

42.MR MONTGOMERY: Thank you, my Lord.

43.LORD JUSTICE McCOMBE: Obviously the appellant will remain in custody in relation to extradition matters.

44.MR MONTGOMERY: Quite so, my Lord.

45.LORD JUSTICE McCOMBE: Thank you both for your assistance, it was very helpful. Could I thank the interpreter very much? We are very grateful to her.