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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 11th July 2019

B e f o r e:

LORD JUSTICE SINGH

MR JUSTICE NICOL

and

SIR JOHN ROYCE

R E G I N A

- v -

MOHAMMED ALI
MOHAMMED MASHUK
AHMED SYED

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Miss L Tsiattalou appeared on behalf of the Appellant Mohammed Ali
Mr S Reevell appeared on behalf of the Appellant Mohammed Mashuk
Mr W Martin appeared on behalf of the Appellant Ahmed Syed

Mr J Talbot appeared on behalf of the Crown

J U D G M E N T
(Approved)

Thursday 11th July 2019

LORD JUSTICE SINGH:

1. These are three appeals against sentence brought with the leave of the single judge.

2. On 26th November 2018, following a trial in the Crown Court at Blackfriars, the appellants were each convicted of one count of fraudulent trading, contrary to section 993 of the Companies Act 2006 (Ali and Mashuk on count 1 and Syed on count 2). Ali and Mashuk were acquitted on count 2; Syed was acquitted on count 1. Count 3 (also fraudulent trading) was ordered to lie on the file in the usual terms. On 17th January 2019, they were each sentenced by Her Honour Judge Sullivan to 28 months' imprisonment.

3. The background facts can be summarised as follows. The prosecution arose out of a Trading Standards investigation into malpractice at a group of letting agents trading under the name of Crestons. Sitting behind that trading name were various companies including Sirs London Limited ("SLL") and Sirs Associates Limited ("SAL"). Mashuk and Ali carried on the business of SAL for a fraudulent purpose by failing to protect tenancy deposits, as required by law, by taking rent from tenants and failing to pay it to the landlords, and by failing to refund tenancy deposits to landlords or tenants at the end of the tenancies. They also took holding deposits from prospective tenants which, on at least one occasion, they failed to return.

4. Syed carried on the business of SLL fraudulently in a similar manner, except that there were no known examples of holding deposits being taken and not returned. There was one instance of a reservation deposit being taken for a property purchase (against the express wishes of the property owner), which was not returned in full to the prospective buyer.

5. Over the period covered by count 1, which involved Mashuk and Ali, tenants and landlords, from whom statements were taken, were defrauded to a value of £29,500.92. In respect of count 2, which concerned Syed, the value of the fraudulent activity was £71,290.84. The figures represented money owed that was never passed on, but did not include sums of money paid in commission for services that were not supplied or the cost to complainants of engaging lawyers to enforce their rights.

6. Ali was appointed as the director of SAL from its incorporation on 6th March 2012. Mashuk was appointed as company secretary from 28th August j2012. A petition to wind up SAL was presented to the High Court on 8th May 2015, and the company was placed into liquidation on 3rd November 2015. Syed was appointed company secretary of SLL from the point of its incorporation on 7th March 2012 and he remained in that position until 9th March 2012. A petition to wind up the company was made on 14th July 2015, and the company was placed into liquidation on 14th September 2015.

7. Although the companies traded under the banner of "Crestons", the precise identity of the company entering into contractual arrangements with tenants and landlords was unclear. On Crestons' business documents the same three addresses appeared, regardless of the identity of the registered company, so the same addresses appeared on SAL papers as for SLL papers. On occasion, no registered company name would be given, in breach of the Companies Act 2006 and the Companies (Trading Disclosures) Regulations 2008. This appeared to be deliberate and many consumers did not know which company they were dealing with. It was the prosecution case that creating confusion or uncertainty about a trader's identity was a hallmark of a rogue trader, used in an attempt to avoid detection, liability and consumer redress.

8. Each of the appellants had responsibility for managing the business at one of the three addresses

out of which Crestons operated.

9. On 15th April 2015, a Trading Standards Officer, Ms Manning, attended at Crestons office in Islington as part of a wider project to visit all letting agents in that borough to ascertain whether they were compliant with the law. Ms Manning spoke briefly with Syed, but he said that he was too busy to speak and that she would need to make an appointment. Syed was provided with leaflets giving advice about the need for the business to display information about its ownership and fees, guidance on holding deposits, and the requirement to joint a redress scheme.

10. A visit was eventually arranged for 16th June 2015. Syed was asked questions about the ways in which SLL treated holding and tenancy deposits. He claimed that holding deposits were passed to the landlord. This was untrue, as it was later revealed that such deposits were never passed to the landlords by SLL or SAL.

11. Since 2007 landlords or agents taking a deposit for an Assured Shorthold Tenancy have been required to protect it in one of three schemes and to inform the tenant of the scheme protecting the deposit. Syed said that SLL did not take tenancy deposits and it was the responsibility of the landlord to use a tenancy deposit protection scheme. However, the copy of Crestons' Terms and Conditions supplied to Ms Manning stipulated that Crestons and not the landlord would place the tenancy deposit in a holding scheme which would be protected with the Tenancy Deposit Scheme ("TDS"). In fact, SLL was not a member of any of the three statutory schemes, which were My Deposits, TDS and the Deposit Protection Service. The claim in the Terms and Conditions document was false.

12. SAL was a member of the My Deposit scheme from 21st August 2012 until 3rd March 2014 when its membership was terminated because it could not produce a balance on the client account

which was equal to or greater than the amount of deposits registered with the scheme.

13. Although a few deposits were protected by SAL, no tenant was given any information about where the deposit was protected. The protection was only notional, as SAL retained the money. SLL applied to join the My Deposit scheme in 2014, in the wake of SAL's membership being terminated, but the application was declined because of its association with SAL.

14. After her visit on 16th June, Ms Manning reviewed the material supplied by Syed and subsequently provided written advice about the issues uncovered. He did not act on the advice and claims continued to be made about membership of the TDS. At around the same time as Ms Manning's visit to the Islington branch, Trading Standards started to receive complaints about the business practices of Crestons.

15. At the trial, the court heard evidence about particular tenants and how they had been treated by the appellants. It is unnecessary for present purposes to rehearse in detail the facts of each case. A flavour can be gained from consideration of the example of a tenant called Jonathan Salisbury. An Assured Shorthold Tenancy was entered into with Crestons. The tenants paid a deposit of £3,900, which was registered with Mr Deposit, but not protected from December 2014, following the termination of SAL's membership. When Mr Salisbury sought the return of his deposit from Crestons, he was unsuccessful. In due course, when he sought to complain and his parents sought to raise the matter with Mashuk by ringing him on his mobile number, Mashuk said to Mr Salisbury never to call his "fucking" phone again.

16. There were further complaints, all of which led to a total estimated loss in respect of dealings with SAL of £29,500.92.

17. The court at trial also heard evidence about Syed's dealings at SLL. Again, it is unnecessary to rehearse the facts of those individual cases. Suffice to say that the complaints led to a total loss estimated at £71,290.84.

18. Ali was born on 1st July 1981. He had not previously appeared before the court. Mashuk was born on 13th September 1980. He had appeared before the courts on earlier occasions, but had no relevant previous convictions. Syed was born on 2nd June 1981 and had not previously appeared before the court.

19. The sentencing judge had before her pre-sentence reports and mitigation bundles in respect of each appellant.

20. In passing sentence, the judge said that it was apparent from the evidence she had heard at trial that many of those using the appellants' services had no idea of the existence of the limited companies behind the trading name of Crestons. The paperwork supplied to tenants and landlords was inconsistent and obfuscatory, both in its terms and as to the legal entity behind the contract. Mashuk and Ali had failed to protect tenancy deposits in an approved scheme, as required by law, since 2007. They also took rent from tenants, but failed to pass it on to landlords. They failed to refund tenancy deposits and took holding deposits from prospective tenants, which at least on one occasion they failed to return. Syed operated in the same manner, except that there were no known examples of holding deposits being taken and not returned. There was, however, one incident of a reservation deposit being taken for a property purchase against the express wishes of the property owner, which was not returned in full.

21. The judge said that the appellants would be sentenced only on the basis of the evidence called at trial. Not only did the complainants lose money, rental payments that were made were late,

cheques bounced and people were passed from pillar to post when they complained. Mashuk was described as sometimes aggressive when challenged. It was accepted that that description was not applied to Ali or Syed. In one case it transpired that occupiers of a property had been issued with licences to occupy, rather than the Assured Shorthold Tenancy which Crestons had agreed with the landlord. This was not just a case of landlords losing money and needing to take legal action; a number of tenants also either lost their deposits or had to be paid by their landlords out of the landlord's own pocket.

22. The judge observed that the sentencing guideline in relation to fraud did not specifically apply to offences of fraudulent trading. However, the guideline listed factors relevant to culpability and harm which were broadly similar to the factors said to be relevant to sentence in *R v Mackey*, to which we will return and to which the judge was referred. She said that it was appropriate to pay "more than some regard" to the guideline. The judge accepted that the business of Crestons was not in itself fraudulent, but offences of this nature undermine public confidence in the letting sector. We will return to other aspects of the sentencing remarks in more detail later when we consider some of the criticisms which are made in the grounds of appeal. Suffice to say for present purposes that the judge was well aware of the mitigating circumstances which had been drawn to her attention, including, where relevant, family and caring responsibilities, although she noted that the appellants were not the only people able to care within their families.

23. We turn to the grounds of appeal in the case of each of the three appellants, which are in substance the same, although there are one or two points made specifically in one case rather than the others.

24. Ali's grounds of appeal are: first, that the sentence was too high when compared with relevant sentencing principles and the "leading authority" of *Mackey*; and secondly, that there was a

disparity with Syed when the financial value of the fraudulent trading attributable to Syed was more than double that attributable for Ali. For that reason, it was submitted in writing that there was an unacceptable disparity of sentence as between those two appellants. This point was not pursued before us, having regard to the observations of the single judge who clearly regarded it as being weak.

25. In Mashuk's case there are three grounds of appeal. First, it is said that the sentence was manifestly excessive. It is said that undue reliance was placed on the guidelines for fraud. Secondly, and flowing from that submission, it is said that the excessive reliance on the fraud guidelines at the expense of the specific guidance which is said to be contained within *Mackey* led to a manifestly excessive sentence and wrongly precluded consideration of the possibility of a suspended sentence. Finally, it is submitted that there was a disparity with Syed. This point has been maintained before us, although without much force. We shall return to it in due course.

26. In Syed's case there are also three grounds of appeal. First, it is said that the sentence was manifestly excessive because the judge failed properly to consider the authority of *Mackey*. Secondly, it is said that disproportionate weight was placed on the current sentencing guideline for fraud. Thirdly, criticism is made of the failure to impose a suspended sentence order.

27. At the hearing before us, the lead was taken on behalf of the appellants by Mr Simon Reevell, whose oral submissions were adopted by Mr Martin and Miss Tsiattalou. On behalf of the prosecution we had the advantage of helpful written by junior counsel who appeared at the trial, Mr Heller. He was unable to appear at this hearing. However, Mr Talbot did appear in order to assist the court. In the event, it was not necessary for the court to call upon him, although the court is grateful to him for his attendance, as it is to all counsel for their submissions.

28. The maximum sentence for the offence of fraudulent trading is ten years' imprisonment, which is the same as the maximum sentence for the substantive offence of fraud under section 1 of the Fraud Act 2006.

29. In his written submissions, Mr Heller makes the observation that the guidance issued by the Sentencing Council on fraud offences, to which we shall return, is helpful because it gives a structured approach to the assessment of relevant considerations, such as harm and culpability, although he recognises that the offences are not the same.

30. In granting leave to appeal, one of the reasons which the single judge gave was that until the Sentencing Council issues a guideline on sentencing for fraudulent trading, there is an important question about the extent to which the definitive guideline for sentencing offences of fraud, bribery and money laundering should be taken into account when passing sentence for fraudulent trading.

31. As we have mentioned, there are no definitive guidelines for the offence of fraudulent trading. In *R v McCrae and Others* [2012] EWCA Crim 976, [2013] 1 Cr App R(S) 1, this court, in a judgment delivered by Haddon-Cave J, said that, nevertheless, the sentencing judge had been entitled to pay "some regard" to the guidelines for confidence fraud, which bore some similarities to the fraud in that case: see [16] of the judgment. In that passage the court made the point that the then guideline did not refer to conspiracy to defraud. The guideline at that time was that issued by the then Sentencing Guidelines Council in 2009 on "Sentencing for Fraud – Statutory Offences". We observe that the Sentencing Guidelines Council was created by the Criminal Justice Act 2003 and continued to function until 2010, since when it has been replaced by the Sentencing Council. There was a predecessor body, the Sentencing Advisory Panel, which was created by the Crime and Disorder Act 1998, but it did not have the functions which either the Sentencing Guidelines Council or the Sentencing Council now have. Its function was to provide

advice which could be taken into account by the Court of Appeal when considering, for example, whether to give a guideline judgment. Before 1998, and where relevant subsequently, there are, of course, cases in which the Court of Appeal has expressly set out guidance in guideline judgments.

32. Before the 1998 Act, there was a decision of this court in *R v Smith and Palk* [1997] 2 Cr App R(S) 167, in which the judgment was delivered by Potter LJ. At page 170 he said:

> "There is no doubt that, because of the wide spectrum covered by fraudulent trading offences in relation both to the amount and the level of criminality on the part of the defendant, a wide spectrum of sentences may also be appropriate. At the one extreme there may have been deliberate reckless trading on a large scale aimed at a rapid return, with no genuine intention to discharge the company's debts but simply to milk creditors and line the directors' pockets before the balloon goes up. On the other, there may have been a properly funded business which runs into financial difficulties out of which the directors attempt to trade in order to save their own and their employees' jobs, but reach a point where they have become reckless as to the realities and with the fact that they should up the shutters. In broad terms, also, it is right to say that a charge of fraudulent trading resulting in a substantial total deficiency to creditors is less seriously regarded than a specific charge of theft or fraud to an equivalent amount. …"

Taking those considerations into account, and given the guilty pleas of the appellants, together with the overall circumstances of that case, the court concluded that the sentence of three years' imprisonment was too high. The court was of the view (at page 171) that of the two extremes mentioned, the case was at the lower end of the scale in terms of criminality. The court said:

> "Its serious aspect lay in the creation of false invoices so that the company's bank funding would continue, rather than any direct intention to profit the company or the directors at the expense of the creditors. Further, there is no suggestion, as happens in many cases, of directors, aware that the balloon is going up, in effect looting the assets of the company in its last days. Rather, and exceptionally, they did their best to assist the receiver and later the

> liquidator, to preserve the assets and effect realisations which would minimise the loss. …"

There were also personal mitigating factors. In the circumstances, the court allowed the appeals and reduced the sentences of imprisonment to eighteen months.

33. We consider that that decision was on its own facts and does not assist in the present appeals.

34. We turn to the decision of the court in *R v Mackey* [2012] EWCA Crim 2205, [2013] 1 Cr App R(S) 100, which formed the mainstay of the submissions for these appellants, although it was acknowledged that it is not a guideline case in the strict sense. The judgment of the court was given by Sweeney J. He said, at [16] that to the extent to which it is appropriate to pay some regard to the definitive guideline (at that time the 2009 guideline), the appellant's offence involved a total gain or loss of £60,000 and elements of both confidence fraud and banking fraud. The relevant starting points for those offences would be three years' custody and, since the appellant had not traded fraudulently from the outset, 36 weeks' custody respectively. The court repeated what it had said in *Smith and Palk*, that the offences of fraudulent trading cover a wide spectrum. It also said, again, that, in broad terms, it is right to say that a charge of fraudulent trading is less seriously regarded than a specific charge of theft or fraud of an equivalent amount, although this may be truer of offences at the lower end of the spectrum. At [16(5)] the court said:

> "The factors that are relevant to sentence include the amount of the fraud; the manner in which it was carried out; the period over which it was carried out; the position of the defendant in the company and his or her measure of control over it; any abuse of trust involved; any effect on public confidence in the integrity of commercial life; any loss to small investors; the personal benefit to the defendant; the plea; and the age and character of the defendant – see *Feld* [1999] 1 Cr App R(S) 1. …"

35. Although that passage was, and remains, useful, as the sentencing judge said in the present case, the relevant factors mentioned are similar to those set out in the present guideline issued by the Sentencing Council with effect from 1st October 2014: "Fraud, Bribery and Money Laundering Offences": see, in particular, the section dealing with the substantive offence of fraud under section 1. If a case of fraud fell into category 3 – that is, covering a range of loss of £20,000 to £100,000, with a starting point based on £50,000 – and if the degree of culpability were of the highest (A), the starting point suggested in the guideline is three years' custody, with a category range of eighteen months to four years.

36. In our view, the circumstances in *Mackey* were very different from those in the present appeals. It is true that the loss to creditors in *Mackey* was £60,000. However, the fraudulent trading arose because what had started as a genuine business had got into financial trouble and the appellant decided to behave dishonestly in the hope that it would come right in the end. The dishonest means which she used included manipulation of documents, the forgery of signatures and the abuse of trust. The fraudulent trading lasted for at least five months. The appellant was, however, of previous good character. She was a single mother, with a history of significant ill-health and had a 7 year old daughter with learning difficulties. The court had particular regard to the protection of the best interests of children. In all the circumstances, the court considered that a sentence of eighteen months' imprisonment was "within the appropriate range, albeit towards the very top of it": see [18]. The appeal against sentence was, therefore, dismissed. We do not consider that any true analogy can be made with *Mackey*.

37. In the present case, the judge formed the view that this was a case of deliberate, reckless trading conducted over a sustained period of time by each of the appellants in the knowledge that he could not discharge his liabilities. We would observe that the judge clearly took that language from *Mackey*, which had in turn taken it from *Smith and Palk*. The judge continued that the

appellants had been dishonest in their dealings with complainants. She said that their offending was also aggravated by the fact that some of their victims, particularly the tenants and those from outside the United Kingdom, could be described as being vulnerable. She said that the appellants had abused the trust and responsibility placed in them by both landlords and tenants. There was a large number of victims. In her view, this was, therefore, a case of high culpability.

38. The judge then considered the amount of money at stake. As for the level of loss, she said that it fell within category 3, if this had been a case of fraud as such, covered by the definitive guideline. Furthermore, the judge was of the view that, although the business of Crestons was not in itself fraudulent, offences of this nature undermine public confidence, and, in this case, in the letting sector.

39. In all the circumstances of these cases, we are unable to accept the submissions which have been made on behalf of the appellants. In our view, sentences of 28 months' imprisonment were neither wrong in principle nor manifestly excessive.

40. The sentencing judge could not see any reason to distinguish between any of the appellants in terms of their culpability or the harm caused. She said that each had played a leading role in running Crestons. While it is true that the loss in the case of Syed was higher than in the cases of the other two appellants, Ali no longer relies on a ground of appeal based on disparity of sentence. Mashuk does still rely upon that ground of appeal, but only, as we understood Mr Reevell's submissions, faintly. Rather, Mr Reevell submitted that this point helped to illustrate his more fundamental submission that the judge had given excessive weight to the current guideline and insufficient weight to the decision of the court in *Mackey*.

41. We do not accept these submissions. In the circumstances of these cases, we have concluded

that it was open to the judge to pass the same sentences on each of the appellants, even if Syed might be considered by some people to have been fortunate.

42. For the reasons we have given, these appeals against sentence are dismissed.

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

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