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Case No: 201800028
& 201800029

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SOUTHWARK CROWN COURT
HHJ KORNER QC
T20167446

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/11/2019

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
(LORD JUSTICE FULFORD)
MR JUSTICE NICKLIN
and
SIR KENNETH PARKER

- -

Between:

Arthur Walter Lee	**Appellant**
- and -	
Regina	**Respondent**

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- -

Mr Christopher Harding (instructed by **Linskills Solicitors**) for the **Appellant**
Mr Paul Sharkey (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 31ST October 2019

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Approved

LORD JUSTICE FULFORD:

Introduction

1. On 4 December 2017, in the Crown Court at Southwark before Judge Korner Q.C. and a jury, the appellant was convicted of the offences set out below. He was acquitted of count 1, a charge of conspiracy to cheat the public revenue, contrary to s.1(1) of the Criminal Law Act 1977.

2. On 5 December 2017, he was sentenced as follows:

Count on indictment	**Offence**	**Sentence**
Count 2	Conspiracy to cheat the public revenue contrary to s.1(1) of the Criminal Law Act 1977 (a conspiracy with Susanne Green only)	30 months' imprisonment, concurrent to the sentence on count 3
Count 3	As above but specifically concerned with an attempt to obtain £330,000	54 months' imprisonment

3. The total sentence, therefore, was 54 months' imprisonment.

4. The appellant stood trial with various co-accused. Susanne Green was convicted on counts 1 and 2 and received a total sentence of 5 ½ years' imprisonment. Michael Perry pleaded guilty to count 1, mid-way through his examination-in-chief, and was sentenced to 5 years 3 months' imprisonment. Daniel Weidner was convicted on count 1 and sentenced to 5 ½ years' imprisonment. Michael Myatt was convicted on count 3, sentenced to 2 years' imprisonment and disqualified from being a company director for 3 years. Stephen Maish was convicted on count 4, sentenced to 2 years' imprisonment and disqualified from being a company director for 3 years. Mathew Brooks was acquitted on count 3.

5. The present applications for leave to appeal against conviction and sentence have been referred to the full court by the single judge. We granted leave for both conviction and sentence at the commencement of the hearing.

The Background Facts

6. The alleged fraud involved the allocation of VAT payments which had been made to Her Majesty's Revenue and Customs (HMRC) but which had not been attributed to the accounts of the companies who had made these payments, because they lacked sufficient information to be allocated to the correct account ("unallocated payments"). Such payments were held in a "suspense" account. The fraud involved the wrongful allocation of those amounts to companies whose owners or directors were clients of an accounting firm, Chase Bureau.

7. The bulk of the allegations took place between March 2011 and January of 2012, but evidence suggested that the planning began earlier, and attempts to obtain one of the larger amounts (about £333,000) continued well into 2013. Within a relatively short space of time, HMRC were defrauded of some £2 million.

8. The defendant, Susanne Green, was a HMRC employee who worked at a HMRC office in Southend. She worked in the Electronic Payments Team ('EPT') which dealt with unallocated payments. The EPT was often unable to allocate unallocated payments. Sums, sometimes into the hundreds of thousands of pounds, remained unallocated for several years and were kept in suspense accounts as mentioned above.

9. It was alleged that Green took advantage of her position fraudulently to direct the unallocated payments to "front companies" that were used to receive the money. This involved the use of company directors recruited to act as "front men" who would allow their companies to be utilised in this way.

10. The appellant was Green's sometime lover and they remained on friendly terms throughout the conspiracy. The appellant was a co-director, along with a man called Terence Sabine, of Binelee Management Ltd ("Binelee") and AT Enterprises Ltd ("AT Enterprises"), and these companies were used in 2011 to claim fraudulent repayments. With respect to count 2, the appellant provided Green with details of his companies which were to receive dishonest payments, and Green selected unallocated payments that could be fraudulently allocated to them. Indeed, the credit to Binelee was the first fraudulent misallocation to take place in furtherance of the fraud. It was the Crown's case that the text messages between the appellant and his co-accused Perry, along with references to "Arthur" in text messages to which he was not a party, revealed his involvement, not just as a go-between between Green and the others involved, but as one of the organisers of the conspiracy.

11. Count 3 was perpetrated through those working at Chase Bureau, in particular the co-accused Perry, who recruited one of his clients, the director of Apex Datacomms (Michael Myatt), to receive the fraudulently obtained funds. The Crown's case was that the appellant was the middleman between Green at HMRC and Perry at Chase Bureau, providing each with the information necessary to make the misallocation of £330,000 and to pursue the claim. HMRC records for Apex Datacomms were first viewed by Green (for no legitimate business purpose) in late May 2011, this being very shortly after it was alleged Green and the appellant had successfully conspired together to obtain a payment to Binelee.

12. In January 2014, the appellant and several other suspects were arrested. As regards the directors of the front companies, the court has been told that the investigative decision was taken to arrest only those who had submitted false paperwork to HMRC, or signed the relevant documentation, in order to further the fraudulent clams. In relation to Binelee and AT Enterprises, it was only the appellant who had submitted such paperwork. Evidence later obtained from the appellant's firm of accountants tended to confirm that he was aware of, and had been pursuing, a fraudulent reclaim that had been misallocated to Binelee. As set out above, text messages were said to demonstrate the appellant's central role in organising and pursuing the reclaim for Apex Datacomms, and, although they did not go far back as 2011, they purportedly showed that he had been involved in this fraudulent enterprise from its inception.

13. The appellant denied these allegations. He declined to answer questions in interview but gave evidence at trial. He admitted the relationship with Green but said it only began after the first allocation had been made. He asserted he was introduced to Green by Terence Sabine, his business partner, and on his case – as it emerged in stages in his various Defence Statements, in part served after the trial commenced – it was Green and Sabine who had conspired to cheat the Revenue. He maintained it was his friendship with Green that explained the text messages exchanged between him and Perry. The later texts regarding access to Green, along with having meetings with her and asking for assistance, on his account, concerned the fact that Perry and a man called Trevor Barr (the latter, who was the director of a company called Risebrook Limited, was named at a late stage in the trial by the prosecution as a co-conspirator on count 1) had acted for another client. Prior to the proceedings against him he was unaware that these messages related to Apex. Other

text messages were said to concern Perry's intention to become involved in the business of supplying pills, and purchases he was making from the appellant's company.

14. He admitted signing a letter to HMRC for repayment, but said that he did so entirely on the instructions of David Fletcher, his accountant. On his case, he had had no involvement whatsoever in the conspiracy and it was argued on his behalf that there had been a "scandalous failure by HMRC" to investigate other individuals properly or at all, particularly Sabine and Barr. It was suggested on his behalf that HMRC had failed to convert what could have been justified suspicion of him (centrally, because he signed the letter) into firm evidence. There was no evidence that he ever received any monetary benefit from his alleged involvement.

15. Distilling the core issues for the jury, for count 2 it was alleged that Green and the appellant conspired together to make and process false claims to HMRC for the repayment of VAT to Binelee Management and AT Enterprises. For count 3, it was contended that the appellant conspired with Perry and /or others named on the indictment knowing or believing that the objective was to make a false claim to HMRC for repayment of VAT to Apex Datacoms.

THE APPEAL AGAINST CONVICTION

Abuse of Process

16. The case at the Crown Court first came before the Recorder of Westminster, Judge McCreath, on 11 November 2016. The papers were ordered to be served by 25 November 2016, when initial disclosure was to take place. Defence statements were ordered for 31 January 2017, following receipt of a detailed case summary.

17. On 17 November 2017, the appellant's representatives wrote to the Crown Prosecution Service ("CPS") requesting disclosure. There was a response on 2 December 2016 and a disclosure schedule (the second) was served on 22 December 2016. On 21 March 2017, the appellant served his first Defence Statement, which included further requests for disclosure. The prosecution summary was not served until 27 March 2017, and the third disclosure schedule was served on 22 May 2017. The fourth disclosure schedule was served on 27 June 2017. Following receipt of an application for disclosure, the case was listed before Judge Korner for a pre-trial review and on 25 August 2017 a fifth and final disclosure schedule was served. It is to be noted that this was the first time that the schedule listed items which were deemed to be disclosable as meeting the disclosure test (namely, whether the previously undisclosed material might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the accused: section 3 Criminal Procedure and Investigations Act 1996 ("CPIA")). On 6 September 2017 the appellant's representatives wrote to the CPS seeking disclosure of additional material. Around 21 September 2017, a skeleton argument on behalf of the appellant alleging abuse of process on the part of the CPS was uploaded onto the court's document case management system ("DCS"). The trial had been due to start on Monday 2 October 2017. The case was, in consequence, listed by Judge Korner on Thursday 28 September 2017, and she ordered the prosecution to serve a response by Friday 29 September 2017. This process was not completed until the morning of Tuesday 3 October 2017.

18. The judge ruled on the application to stay the proceedings as an abuse of process on Friday 6 October 2017.

19. It was submitted on the appellant's behalf, by way of overarching and general submissions, that the disclosure process had been so flawed that it could only have come about as the result, at best, of incompetence, and, at worst, because of prosecutorial misconduct. Reasonable lines of enquiry which pointed away from the appellant, and the linchpin role which the prosecution had latterly ascribed to him in the conspiracy, had not been pursued either effectively or at all, or had been pursued and resulted in evidence consistent with his innocence, suggesting that other individuals not charged with any offences were better positioned to play the role attributed to him in the alleged conspiracy. In uncompromising terms, it was alleged that evidence has been disguised and withheld by the Crown. In a similar vein, it was submitted that the prosecution had demonstrated a marked reluctance to disclose the true scope and course of the HMRC investigation and failed to preserve, seize, review and disclose relevant material and insofar as HMRC investigators attempted to comply with their duties of disclosure at all, they did so in a deliberately narrow and restrictive way. The prosecution was said to have failed to recognise and address the deficiencies in the investigation and disclosure process, and they neglected to hold the HMRC investigators to account or to require them to adhere to the statutory regime. There had been, it was claimed, significant and ongoing breaches of the disclosure duties under the CPIA despite repeated attempts by the defence to engage the prosecution, and as a result it was impossible for the defence or the court to have the necessary confidence that the prosecution had pursued all reasonable lines of enquiry and was willing or able to discharge its obligations fairly and in good faith.

20. It was submitted that the failings identified in disclosure were the symptoms and indicators of serious prosecutorial misconduct which took four particular guises. First, this was an improperly motivated case against the appellant, advanced on a false basis which the prosecution knew to be false, but which suited HMRC purposes. Second, there had been malicious efforts to ignore and hide material which was inconsistent with that basis. Third, there was significant resulting prejudice to the appellant in his ability to defend himself against grave criminal charges built on circumstantial evidence. Finally, it was submitted that there was a clear manipulation of the process of the court such as to undermine public confidence in the criminal justice system, and further and alternatively, the effect of the prosecution's failings so seriously and irredeemably prejudiced the appellant's case that he would not receive a fair trial.

21. Those somewhat general, but undoubtedly serious, assertions were supported by detailed and specific contentions, which have been incorporated as part of the grounds of appeal. They are as follows:

    a) The alleged slow process – otherwise described as a "drip-feed" – of disclosure.

    b) The failure, until 25 August 2017, to disclose the relationship between the defendant Perry and another HMRC officer (Harmsworth), which was investigated albeit resulting in no charges.

    c) The suggested failure properly to investigate the activities of Terence Sabine, who (as set out above) was a business partner and co-director with the appellant of the companies involved in Count 2. It was undisclosed until 25 August 2017 that Green had contacted Sabine immediately after her release from the police station in January 2014.

    d) The appellant's accountant, Mr Fletcher, had been falsely presented as a disinterested witness of good character (however, we observe that when his criminal history – a

conviction for defrauding HMRC – was uncovered, he was not called, and this complaint inevitably fell away).

e) The failure to investigate properly the activities of the owner of Chase Bureau, John Symons, who was arrested and large sums of cash were seized, some of which was forfeited by consent.

f) The failure to obtain and disclose until August 2017 telephone billing from the British Transport Police (BTP) which related to a criminal investigation concerning Sabine, despite requests from the defence, although the existence of this was known to HMRC in March 2014.

g) Finally, the failure to highlight text messages passing between the defendant Perry and Barr, the director of Risebrook Limited, when the company account received some of the misallocated funds. Further, it is alleged the prosecution wrongly failed to investigate Barr who was said to be implicated in this criminality.

22. The prosecution highlighted that Mr Webb, the disclosure officer, had examined the unused material and, in tranches, had reduced the items into schedule format. All the resulting schedules were submitted to the CPS lawyer, who from time to time examined the underlying material. Mr Webb gave evidence during the abuse of process application. He indicated that he had not originally considered the investigation into the relationship between Perry and the HMRC officer to be of any relevance, as it did not involve the misallocation of funds and no charges resulted. However, at a later stage he had changed his mind and brought this issue to the attention of the CPS lawyer. As far as Sabine was concerned, there was no evidence that he had anything to do with the misallocation of funds, and that since Sabine and Green were friends he had no reason to consider that a telephone call to Sabine, made after her arrest, was relevant until the later defence case statements were served. Until the defence alerted the investigators, he had no reason to believe that Fletcher had a criminal record, as all checks upon him having revealed 'no trace'. Moreover, it was a conviction which occurred in 2004, and there were no records available of this that he had been able to find. As already highlighted, the prosecution abandoned reliance upon Fletcher as a witness once the position became known. Although the link with a BTP investigation that concerned Sabine had been recorded on the 'sensitive' schedule, the potential relevance of certain text messages only became apparent at a later stage, once they were properly scheduled. Finally, the texts between Perry and Barr formed part of the prosecution evidence which had been served.

23. In essence, the prosecution submitted that, although there had been some fault in the disclosure process, these were remedied, and the wide-ranging allegations of bad faith and misconduct were not borne out by the facts.

24. The judge ruled that, whilst there had been errors in judgment made by the disclosure officer, largely through having devoted insufficient time and thought to this case, along with insufficient oversight of the disclosure process on the part of the CPS lawyer, there was nothing in the submissions which led her to conclude that these came about, or may have come about, through prosecutorial misconduct, or (as it was put by defence counsel) "malicious efforts to ignore and hide material, or, indeed, a manipulation of the process of the court". The judge considered that material which had either been requested or was deemed to be relevant to the defence had now been disclosed.

25. Although the disclosure process should have been completed at a far earlier stage, in her view a firm grip had latterly been taken of this exercise, and any further request would no doubt be addressed with expedition. Further, the defence had not demonstrated that the appellant would be prejudiced in the presentation of his defence which, according to the Defence Statement, was a denial of any involvement in the fraudulent transactions. Accordingly, the judge was satisfied that he could receive a fair trial and that it would not be unfair for him to be tried.

Ruling on bad character

26. On Friday 27 October 2017, the judge ruled on the appellant's request to adduce evidence of bad character against three individuals: John Symons (the owner of Chase Bureau), Terence Sabine and Susanne Green. The first two were neither witnesses, nor defendants, nor named as co-conspirators. As far as Symons was concerned, the evidence of bad character consisted of the large sums of cash found in his safe when the offices of Chase Bureau were searched, which in part had been forfeited by agreement as being the proceeds of crime, along with remarks made about him by an HMRC officer to a third party. As regards Sabine, the appellant sought to introduce evidence of bad character relating to his previous convictions, the fact that he was at the time of the arrest under investigation by the BTP and his recent arrest on charges of assault occasioning actual bodily harm and possession of MDMA with intent to supply. For Green, her suggested bad character was said to relate to the misallocation of the VAT refunds of other companies that were not the subject of the indictment, along with a company called New Order, the subject of Count 3, in which it was not suggested that the appellant or any other defendant was involved. Additionally, the appellant sought to introduce the misallocation of VAT payments by Green to the personal tax accounts of a number of individuals, one of whom was Sabine, and another was said to be connected to Perry, thereby including the latter individual in the application, at least by implication.

27. As the judge observed, the appellant had served four defence case statements. He declined to answer questions when interviewed, but, from the time of his first defence case statement, he maintained that he knew nothing of the misallocations, which were the responsibility of Green and that he was not a party to any conspiracy either with her or any other defendant. Sabine had been referred to only in the context that he had effected the introduction between the appellant and Green. However, at the time of the second defence case statement, after major disclosure had been made by HMRC, it was suggested that the person responsible for the misallocations in Count 2 was or may have been Sabine. It was argued on the appellant's behalf that the evidence of Sabine's criminal activities was important explanatory evidence under s.100 (1) (a) of the Criminal Justice Act 2003. It was submitted that the evidence of Sabine's convictions for dishonesty, although in part very old, were relevant to a propensity on Sabine's part to engage in dishonest activities. The position of the prosecution was that there was no evidence of Sabine's involvement in this fraud. In the light of the appellant's defence that Sabine was the person responsible for the misallocations to Binelee and AT Enterprises, the judge ruled that his previous convictions were matters which could affect the jury's decision as to whether they were satisfied in respect of Count 2 that it was the appellant who engaged in the agreement with Green to defraud HMRC, and, accordingly, evidence could be given of his convictions from 1985 until 1996, but not the unresolved investigation being carried out by the BTP, nor the evidence of the allegations that were made as a result of his recent arrest (equally unresolved).

28. The appellant argued that the evidence relating to Symons was important as regarding the role and involvement of those in the dock. The judge was wholly unpersuaded that this

evidence could assist with the jury's determination of this issue and refused leave to adduce the matters in relation to Symons (particularly the cash that had been found) as being wholly unconnected with the matters covered by the indictment relating to the appellant.

29. Finally, in respect of Green it was argued that the fact that she, during the period of the indictment, engaged in misallocation of VAT funds to Sabine and to other companies, with no alleged involvement by the appellant, constituted important explanatory evidence, relevant to an important matter in issue between the defendant and the prosecution, which was of substantial probative value in relation to an important matter in issue between a defendant and a co-defendant. The prosecution conceded this argument and the judge ruled that evidence relating to Green's misallocation of VAT refunds to other companies, without there being any evidence or allegation to show that the appellant had any involvement in those misallocations, was admissible as bad character evidence. Thus, the judge decided evidence could be given on misallocations to New Order, Summit Property Maintenance, Solitaires Hornchurch Limited, Bay House Hotel Limited, Assured Construction Limited, and Sabine's personal tax account (limited in the latter instance to an allocation on 31 August 2011).

Ruling on the renewed application on abuse of process

30. On Monday 30 October 2017, at a stage when the prosecution's case was nearly completed, the appellant renewed his previous submissions in the light of recent disclosures made by the prosecution. It was argued that, following disclosure in the recent past of details of the other misallocations made by Green, "the Crown had taken a very particular position on Sabine, both in the processes of disclosure and in its presentation of the case in the indictment and the opening" and it was not possible for the appellant to have a fair trial when "hugely significant disclosure was made so late and it was obvious from the attitude of the Crown and everything that the court has already heard in the abuse argument that there could be no confidence that a proper impartial investigation of Sabine would not lead to significant further disclosure". In a further written skeleton argument of 26 October 2017, in advance of oral argument before the judge, the appellant's counsel referred to the voluntary "disclosure" on 24 October 2017 of notes made by junior prosecution counsel of an interview conducted on 21 and 22 January 2014 by officers of HMRC with Lesley Maish, the wife of the defendant Stephen Maish, and a serving HMRC officer in the Southend office. Additionally, disclosure of un-redacted surveillance logs showed that at some stage she was a target. Whilst the appellant's counsel accepted that the contents of the interview were not directly relevant to the appellant's defence, he argued that the contents of the interview, which referred to connections between the defendants Maish, Weidner and directors of the secondary companies which received part of the funds, helped to "prove a negative", namely that there was no involvement by the appellant and on this basis the material was disclosable.

31. The appellant also averred that the late disclosure of these matters showed that the court could have no confidence that the prosecution "had learned anything", and he reiterated earlier submissions that this was an investigation which had "set its face against all reasonable lines of enquiry", and the failure to investigate Sabine or even now name him as a co-conspirator meant that the appellant could not get a fair trial.

32. Finally, it was submitted that if unsuccessful in this submission that the appellant's trial amounted to an abuse of the process, in the light of the large quantity of material which had now been disclosed since the start of the trial, the judge should discharge the jury and order a new trial.

33. The prosecution resisted the allegation of misconduct and repeated earlier submissions that the investigation showed no involvement by Sabine in any of the correspondence or text messages surrounding the VAT refunds, unlike the position with the appellant. The material relating to Sabine which had latterly been found was the result of the various defence case statements supplied on the appellant's behalf and that the information contained therein was peculiarly within the knowledge of the appellant, especially relating to Green's misallocation of funds into Sabine's personal tax account. It was submitted "that the disclosure process required an early engagement by the defence and the clear identification of the issues" and that the production been "speedy […] about matters now being raised about Sabine's involvement".

34. The prosecution accepted that the original assertion that there was no material available which showed that Green was able to access personal tax accounts was wrong. The relevant information had been uncovered by the officer in charge of the case, who had until recently been on sick leave. She discovered this fact very early on in the investigation, but it had not been transferred to the disclosure file and therefore did not appear on the relevant disclosure schedules. Whilst this was an admitted failing, it was submitted that it occurred through inadvertence, and that even if scheduled it would not have led to further investigation, as there was no evidence to suggest that VAT misallocation of Green had been made to personal tax accounts.

35. In respect of the Lesley Maish interview, it was listed in the first disclosure schedule and there were references in the interview of Stephen Maish to connections between Stephen Maish, Weidner and other directors. This material, therefore, was known to the defence. It was not accepted that the contents of her interview assisted the appellant in his defence or undermined the prosecution case against him.

36. The judge ruled that that whilst the provisions of the CPIA and the associated Codes of Practice were implemented in part to stop the "keys to the warehouse approach" it was the judge's view that it was incumbent upon prosecuting authorities to adopt the widest possible interpretation of what material may be disclosable, rather than one which was restrictive or demanded a full explanation for every defence request. Moreover, the description of material in disclosure schedules must be sufficient to enable the defence to understand the nature of the material. Against that background, she observed that the attitude adopted by those responsible for the disclosure process in this case had been unhelpful to the efficient progress of this trial. Other counsel had complained of difficulties in this context and had had to submit an application under the provisions of section 8 CPIA before receiving disclosure. However, although this "drip feed" approach was deplorable because of the amount of time and public money which had been spent in dealing with the applications, the judge was not persuaded by the appellant's submissions that the prosecution's approach had been one revealing *mala fides*, namely that it had deliberately failed to carry out investigations or disclose material because it improperly sought the appellant's conviction, or for some unknown reason sought to protect Terence Sabine.

37. The judge expressed the view that it might have been better if HMRC investigators had interviewed Sabine, and that he may have had more involvement in these or allied offences than was appreciated at the time of the investigation. However, the prosecution clearly had evidence which implicated the appellant in the alleged fraudulent transactions. It was accepted on his behalf that there was a case for him to answer on that part of the allegations which concern the misallocations to Apex Datacomms. The evidence of the text messages

was wholly independent from anything relating to the role which may have been played by Sabine.

38. The judge also accepted the submissions made by the prosecution that the failure by Crown counsel and others to appreciate at least one misallocation to Sabine was the result of the failure by the defence to raise this as an issue until 6 October 2017. Moreover, the judge accepted there had been a genuine error in failing to list material relating to this issue on the original disclosure schedule.

39. The judge agreed with the prosecution's submission that the relevant information contained in the interview of Lesley Maish was already available to the defence via the interview of Stephen Maish. The judge also emphasised that in addition to the disclosure which had been provided, the appellant was entitled to bolster his defence with the evidence of Green's misallocations to other companies and to Sabine's personal tax account, in circumstances which revealed no involvement by the appellant.

40. The judge observed that the authorities make it clear that there is a public interest in ensuring that those who are charged with serious crimes should be tried unless the failures by prosecuting authorities are so grave that to allow the proceedings to continue would offend the court's sense of justice and propriety or undermine confidence in the criminal justice system. This was not one of those cases and the judge was satisfied that the appellant could receive a fair trial, and that the proceedings were not an abuse of the process of the court.

41. In respect of the alternative submission, that the jury should be discharged from giving a verdict on the appellant and he should receive a new trial, the judge considered that this was a drastic step which was not warranted by the late disclosure of material. There must be compelling reasons as to why persons charged with a conspiracy should not be tried together, and the disclosure issues which had arisen in this case did not amount to such reasons.

The Grounds of Appeal

42. The wide-ranging Grounds of Appeal come within the following five headings:

A. Terence Sabine

43. It is contended that the prosecution i) failed to investigate the role of Sabine adequately, ii) erred in not arresting him and iii) 'falsely' maintained that he had no relevance in the case. It is further maintained that they failed to disclose all of the relevant materials that related to Sabine.

B. Naming the other alleged conspirators in count 1

44. It is submitted the conviction is unsafe because the prosecution failed to name the other individuals alleged to have conspired in Count 1 until the beginning of the trial and they did not name Barr until the close of its case.

C. The Formulation of count 2

45. The appellant contends that by formulating count 2 as a conspiracy between the appellant and Green alone, the prosecution put pressure on the jury to convict the appellant in order to secure a conviction against Green. It is argued that this prejudice extended to count 3.

D. The Abuse of Process Applications

46. It is submitted that the judge erred in dismissing the applications to stay the proceedings, or alternatively to discharge the jury. It is submitted that the disclosure process was fundamentally and irredeemably flawed, and that the judge was personally at fault by not reviewing some or all of the undisclosed material to ensure that the prosecution had made sustainable decisions.

E. The Bad Character Application

47. In particular, it is alleged that the judge erred in refusing to permit the introduction, as bad character evidence, of the fact that Sabine had been a "target" in a major police investigation (the BTP case) and that in 2017 he had been arrested for offences of assault and possession with intent to supply class A drugs.

Discussion

48. As we have already observed, the allegations levelled at the prosecution as regards disclosure are wide-ranging and serious, and have included unvarnished suggestions of bad faith and a sustained attempt to pervert the course of justice. Although in oral argument Mr Harding for the appellant suggested it was possible that the relevant events were explicable as serious errors, he did not abandon the allegation of *mala fides*; indeed, he made it clear that he pursued all the matters within the written Grounds of Appeal. In evaluating the merits of these generalised contentions, it is important to investigate the precise detail of the assertions that underpin the five headings of appeal set out above.

A. Terence Sabine

49. Sabine was a co-director in Binelee and AT Enterprises, the companies used in 2011 to claim fraudulent repayments (count 2). The prosecution stated in unequivocal terms in the Notice of Opposition (22 June 2018) that:

> "13. […] the investigative decision was taken to arrest only those who had actually submitted or signed false paperwork to HMRC in support of the fraudulent claims. In relation to Binelee and AT Enterprises, it was only Lee that had submitted such paperwork. Evidence later obtained from Lee's firm of accountants showed that Lee was aware of and had been pursuing a fraudulent reclaim that had been misallocated to Binelee. Evidence from the firm provided no evidence that Sabine was party to or aware of such reclaims.
>
> 14. Mobile phone evidence, in particular text messages, showed that Lee had been actively involved in pursuing the false reclaim by Apex Datcomms upon which Lee was convicted on court 3. It did not show any involvement of Sabine in the fraud.
>
> 15. Other than Sabine being the director of Binelee and AT Enterprises, HMRC had no evidence that he had been party to the false reclaims. Indeed, the information provided to HMRC and the phone evidence strongly implicated Lee as being at the centre of the conspiracy; there was no such evidence against Sabine. It was for those reasons that Sabine was not arrested or interviewed. At that time, there were no (apparent) leads pointing in his direction."

50. The first defence statement was served on 2 March 2017. It asserted that the appellant was a man of good character, who was not a party to the conspiracy and had not knowingly taken part in a dishonest transaction. He knew Green and had had a brief intimate relationship with her, having been introduced to her socially by Sabine. He had not instructed Fletcher to contact HMRC regarding VAT payments and now believed that

Fletcher had previously been involved allegations of tax fraud. There was no suggestion that Sabine had been involved in the instant offending.

51. The second defence statement was served on 21 July 2017. It asserted that Lee was not in a relationship with Green until June 2011 and that the appellant was not, therefore, involved in events prior to June 2011. It was suggested that the appellant had no contact with Perry or others at Chase Bureau. It was noted that during the July 2014 interview of Constantinou (a defendant who had no connection with Chase Bureau and whose case was severed and tried separately) the interviewing officer had asserted that Sabine was suspected of involvement in the conspiracy. Sabine's telephone number and email address were provided, and he asked the Crown to conduct enquiries (we note this exercise was undertaken by the prosecution).

52. The third defence statement was provided on 6 October 2017. It alerted the Crown to a link between Sabine and the directors of "Zac Fashions", mentioned on the fifth unused schedule. It went on to state: *"*The Defendant has been informed that Terry Sabine's personal tax account has been accessed within the HMRC team at Southend, and believes that the access that Susanne Green made in relation to Zac Fashions was made at the request of Mr Sabine*".* A schedule of call data showed a pattern of contact on 23 and 24 January 2014 between Sabine and Green, and between Sabine and Dave King (the co-director of Summit Properties).

53. The fourth defence statement was provided on 27 October 2017. This included the assertion:

> "Terence Sabine has been erased from this prosecution and is being protected by the police. The Defendant asserts that this can be the only reason why, in 2014, HMRC did not secure mobile data obtained by B.T.P. on both Green and Sabine. This failure resulted in HMRC apparently not knowing Sabine's calls to Mr King (financial director of Summit) until March 2017. The Defendant notes HMRC sat on this material until an entry was made on the 5th schedule of unused material dated 24th August 2017, and this had to be requested without any reference to the need for disclosure under the CPIA relevance test – the schedule being endorsed – Disclose on the face of the schedule".

54. In our judgment, the prosecution's original decision as to which individuals should be investigated and interviewed was entirely sustainable, namely those who had submitted or signed false paperwork to HMRC in support of the fraudulent claims. The prosecution needs to take a proportionate and fair approach to the expenditure of scarce resources when conducting criminal investigations, and this was a sensible approach in the context of this case. As material in relation to Sabine emerged during the disclosure process, it is clearly arguable that he ought to have been questioned, as the judge observed. Furthermore, it would appear that when confronted with a developing picture as regards Sabine, the prosecution took a somewhat inflexible approach to his possible involvement in this overall fraudulent enterprise, particularly bearing in mind that Sabine and the appellant were the only directors and they were the joint owners of the two relevant companies (leading to the inference that both men stood to profit from this criminality). However, the question for us is whether the appellant's convictions are unsafe. The prosecution disclosed material which potentially implicated Sabine, which the appellant deployed during the trial, was as follows:

a) Sabine's criminal record, showing convictions for drugs and acquisitive crime between 1985 and 1996 – resulting in some prison sentences (disclosed in May 2017); (we note that although there was other material that potentially indicated Sabine's historic involvement in drugs-related and acquisitive crime, it was contemporaneous with and similar to the material that was put before the jury);
b) Sabine's directorship of Binelee Management and AT Enterprises, and the engagement of his personal accountant (David Fletcher who had been convicted of substantial VAT fraud in 2004 and served a prison sentence) as the accountant for the businesses (as already noted, this latter issue diminished in importance once the prosecution decided not to call Fletcher) (disclosed August 2017);
c) that Sabine's email address was stored in Green's iPad (disclosed August 2017);
d) an updated criminal record check, which was undertaken and disclosed on 13 October 2017, revealed that Sabine had been arrested for two offences of assault occasioning actual bodily harm and possession with intent to supply class A drugs on 25 August 2017;
e) further fraudulent misallocations of funds had been identified, none of which had any link to Chase Bureau, including one to Summit Property Maintenance in an amount of £201,434 to a PAYE account, and in an amount of £8,516.32 to another individual (disclosed 11 October 2017); and
f) a fraudulent misallocation was made directly to Sabine's self-assessment tax account (disclosed 15/16 October 2017), namely a payment of £634.07, which appeared to have been allocated to Sabine's self-assessment record on 8 September 2011 (the effective date of payment is shown as 27 October 2009). A review of HMRC's Debt Management and Banking Team's spreadsheets seemed to confirm that Green dealt with a payment in this sum which showed Sabine's unique taxpayer reference number.

55. The relevant matters disclosed by the prosecution that were not deployed as a result of a decision by the judge were:

a) call data held by BTP showing that Sabine had been in direct contact with Dave King the director of Summit Properties Limited (disclosed August 2017);
b) a second, possibly fraudulent, misallocation that had been made directly to Sabine's self-assessment tax account payment in the sum of £1,000 which has a posting date of 20 July 2011 (the effective date of payment is shown as 2 November 2009). This payment was said to be the subject of suspicion, as 20 July 2011 was a date when Green misallocated a number of payments to front companies in this case.
c) BTP was conducting a criminal investigation and contacted HMRC because one of their targets (Sabine) had been in contact with Green, who showed on the BTP system as being on bail; and
d) call data records held by BTP showing that Sabine had been in direct contact with Green after she was released from the police station (disclosed August 2017);

56. As to the judge's decision to exclude the misallocation of £1,000 to Sabine's self-assessment account ([55(b)]), this was argued before the judge on the basis that it was evidence of Green's bad character, and tended to support the appellant's case because there was no evidence of his involvement in this instance of the misallocation of VAT funds. The judge ruled against its admission as bad character on the basis that there was no clear evidence that Green was responsible for this misallocation. She was concerned that the jury would be distracted by an ancillary dispute as to Green's involvement. Whether or not this should have been presented as a bad character application against Sabine and not

Green, the judge's underlying premise in our view was wholly correct. This payment was attended by real uncertainty and given it affected the case of another defendant (Green), the judge was right to exclude this evidence. This would have involved potentially significant debate about a matter that went only to alleged bad character, when similar evidence was available to be deployed before the jury. The judge refused to admit the matters set out at ([55 (c) and (d)]) as bad character evidence against Sabine. These decisions were entirely sustainable as this material – in the context of the unrelated and irrelevant BTP investigation – failed to meet the test for admissibility as bad character evidence, and in any event Green's links with Sabine (including contact between them after Green's arrest) were substantively before the jury. The judge's order in relation to the contact between Sabine and Dave King ([55(a)]) does not form part of the Grounds of Appeal.

57. In our judgment, although the better course may well have been to interview Sabine given the emerging picture (in this regard it is to be remembered particularly that some of the fraudulent payments went to accounts relating to companies for which he was a co-director), the prosecution were entitled to conclude that the evidence was insufficient to demonstrate that he was involved in this criminality. We have no reason to doubt that, albeit to an extent late, full disclosure was made of matters that satisfied the CPIA test. In those circumstances, all of the relevant material that was available was deployed by Mr Harding on the appellant's behalf, during the trial and including in his closing speech. The appellant was able to set out his case, on the evidence gathered by the prosecution, as to why there was doubt as to his involvement in count 2 because, *inter alia*, Sabine – rather than the appellant – may have conspired with Green.

B. Naming the other alleged conspirators in count 1

58. There is no merit in this contention, because by the end of case the other alleged co-conspirators had been set out for the jury's consideration, and in any event the applicant was acquitted on this count. No identifiable prejudice has been identified such as to render the convictions of the appellant on counts 2 and 3 unsafe.

C. The Formulation of count 2

59. The appellant highlights that before the jury could convict either Lee or Green, they had to be satisfied that both were guilty. It is argued that, given the evidence against Green was "overwhelming", this would have placed the appellant in a "wholly invidious position" because both would be either convicted or acquitted, and so "there was immense pressure on the jury to return a guilty verdict on the (appellant) to avoid having to find Green not guilty". Therefore, Sabine should have been included as a potential conspirator on this count.

60. In our judgment, there is no basis for the suggestion that the jury would have felt compelled to convict a defendant about whose guilt they were unsure. In addition to Green's conviction on count 2, the jury also convicted her on count 1, which related to fraudulent repayments of the order of £2 million, which was a significantly more serious allegation than the one reflected in count 2.

61. The Crown should only name an alleged co-conspirator when they are able to establish that the accused on the indictment conspired with that person in respect of that count (put otherwise, the evidence must be capable of founding this assertion). The appellant could only point to Sabine's role as a co-director of the two companies, along with the fact that there was contact between him and Green. This did not constitute sufficient evidence that he had played any part in seeking the fraudulent repayments relevant to count 2. In

contrast, there was clear evidence that the appellant had conspired with Green: the text message contact tended to demonstrate joint involvement in the fraudulent misallocations; the appellant submitted a document to HMRC falsely representing that repayments were due to his company; and there was evidence from an employee of the accountant employed by the appellant's companies to the effect that he had discussed a letter with her which mentioned the supposed "overpayment" from HMRC, which he knew was not due to his company.

62. The material disclosed during the trial that Green had made at least one misallocation in 2011 to Sabine's personal tax account, clearly provided evidence of a possible conspiracy between Green and Sabine in respect of those repayments, but this was not evidence in respect of the misallocations in respect of count 2. As the prosecution submit, a generalised suspicion that Sabine might have been involved in count 2, because of his other involvement with Green, does not amount to evidence sufficient to name him as a co-conspirator on that count.

63. Furthermore, the suggested failure to add Sabine to count 2 could have no bearing on his conviction on count 3. That latter count involved an alleged conspiracy between the appellant and a number of others to cheat HMRC by obtaining a fraudulent repayment of the order of £330,000 for Apex Datacomms. Whilst there was no evidence that Sabine had any involvement in count 3, there was significant evidence of the appellant's involvement in pursuing the claim in his text message exchanges in 2013 with both Perry (the accountant for Apex) and Green.

D. The Abuse of Process Applications

64. The judge took commendable care over these applications, and her judgments on the two applications were unimpeachable. We have extensively summarised her conclusions above. We consider that she addressed the competing arguments entirely appropriately, recognising that although the disclosure process was undoubtedly flawed, the manner in which the appellant's case was revealed equally involved considerable delay. The question for this court is whether the convictions are unsafe because of alleged prosecutorial bad faith or incompetence, particularly as regards Sabine and the prosecution's approach to him. In our judgment, there is no evidence of bad faith and all of the substantive failings by the Crown as regards disclosure were cured in time for the case to be presented to the jury by the prosecution and the defence in a properly informed and fair way.

65. The judge declined to look at the BTP material, for entirely correct reasons, given disclosure is, save exceptionally, a prosecution-led process (albeit its progress will be strictly overseen, as necessary, by the court). In *R v H* [2004] 2 A.C. 134, HL it was indicated that:

> "[…] Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court. Only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of material in its hands. […]" ([35], per Lord Bingham)

66. The appellant argues the judge should have reviewed the sensitive material held in relation to the BTP investigation once she became aware of the evidence that Green had made one (possibly two) fraudulent allocation(s) to Sabine's tax account. These fraudulent misallocations came to light as a result of the appellant's third defence statement served during the trial which set out (as rehearsed above): "The Defendant has been informed that

Terry Sabine's personal tax account has been accessed within the HMRC team at Southend, and believes that the access that Susanne Green made in relation to Zac Fashions was made at the request of Mr Sabine". In consequence, HMRC made enquiries and identified the two misallocations to Sabine.

67. This case concerned an investigation into misallocations to the VAT account of companies, rather than personal tax accounts (the latter would have involved a considerable undertaking). Nonetheless, a part of the BTP telephone billing records were disclosed once the appellant's case was sufficiently clear from the defence statements.

68. Given the chequered disclosure history in this case, on an exceptional basis we held a public interest immunity hearing with the prosecution alone, to assess whether the BTP investigation had any relevance to the present proceedings. It was wholly unrelated, and there was nothing additional from that enquiry which should have been disclosed to the appellant.

E. The Bad Character Application

69. The judge was correct to reject the application to admit evidence of the fact that Sabine had been a "target" of a BTP investigation. There was no sufficient basis for admitting this evidence.

70. Section 100 of the Criminal Justice Act 2003 (CJA) provides:

> **Non-defendant's bad character**
> 100.— (1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if -
>
> (a) it is important explanatory evidence,
>
> (b) it has substantial probative value in relation to a matter which—
>
> i) is a matter in issue in the proceedings, and
> ii) is of substantial importance in the context of the case as a whole, or
>
> (c) all parties to the proceedings agree to the evidence being admissible.

71. There was no basis for suggesting that his position as a target was "important explanatory evidence" or that it had "substantial probative value" when Sabine was simply the subject of an investigation which had no established relevance to the issues before the jury.

72. Equally, the judge correctly refused to admit evidence relating to a recent arrest of Sabine. Shortly before the trial, in August 2017, he had been detained for an alleged assault and he was discovered to be in possession of ecstasy tablets. He was arrested on suspicion of being in possession with intent to supply the drug. At the time of the bad character application, Sabine was on bail awaiting a charging decision. These were unproven allegations which had no probative value as regards the present indictment.

73. Turning to the misallocations made to Sabine's personal tax account, there was clear evidence in relation to one of them that it had been made by Green. The judge ruled this was admissible as bad character evidence

74. In relation to the second misallocation, the evidence was far more obscure. The relevant HMRC documentation purported to show that the misallocation had been made by another employee in the EPT, 'Sarah Rowlands' and not Green. The suspicion that Green may have had some involvement in this misallocation came from an officer's view that some of the handwriting on the documents may have come from Green, but it could not be put any higher. There was, therefore, no clear evidence that Green had made the misallocation.

75. The judge ruled, entirely sustainably, against the application to introduce the evidence concerning this misallocation to avoid a distracting enquiry as to whether Green was responsible. Under section 101(3) CJA the court has discretion to exclude such evidence if it would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. Green objected to the admissibility of this evidence. She would have been confronted with tenuous and non-expert evidence of a misallocation was properly determined by the judge to be unfair to her.

76. In the context of the case it is important to bear in mind that the judge allowed significant other evidence of the bad character of Green to be admitted, showing that she had made numerous other misallocations to companies to which Lee had no link. In relation to Green and Sabine generally there was substantial evidence before the jury on which they could judge their characters.

77. We turn next, albeit briefly, to some of the myriad other complaints by the appellant. The alleged failure, until 25 August 2017, to disclose the relationship between the defendant Perry and another HMRC officer (Harmsworth), which was investigated (resulting in no charges), did not render these convictions unsafe since it had, at most, tenuous bearing on the case for or against the appellant. In the event, the fact of the relationship was available to the appellant during the trial. Similarly, the alleged failure to investigate properly the activities of the owner of Chase Bureau (John Symons) who was arrested, and a search of a safe at Chase Bureau which revealed large sums of cash, was of slight – if any – relevance, and this information was known to the appellant. The same applies to the suggested failure to highlight text messages passing between the defendant Perry and Barr, the director of Risebrook Limited, when the company account received some of the misallocated funds, along with the alleged failure to investigate Barr. None of these suggested failings had any identifiable adverse impact on the appellant's case. Finally, the relevant information contained in the interview of Lesley Maish was available to the defence via the interview of Stephen Maish. In each relevant instance, we consider that the prosecution's decisions on disclosure (albeit this process was sometimes dilatory) and the decisions they had taken as to further investigations, do not lead to sustainable grounds of appeal as regards the appellant's case.

THE APPEAL AGAINST SENTENCE

78. The judge rejected the submission that this was, in reality, a victimless fraud: genuine payees were affected. Furthermore, there had to be an employee of HMRC in the EPT who was prepared to make the allocations having undertaken the necessary research and preparing the paperwork to authorise payment. It was not only fraudulent conduct but a colossal breach of trust on the part of the defendant Green, of which, we note, the appellant was aware.

79. The bulk of the misallocations took place after the appellant and Green claimed their relationship began. He signed the form for the dishonest claim in respect of Binelee and the credit to that company was the first fraudulent misallocation to take place in furtherance

of the fraud. The text messages between the appellant and his co-accused Perry, along with references to "Arthur" in text messages to which he was not a party, revealed his involvement not just as a go-between between Green and the others involved, but as one of the organisers of the conspiracy.

80. He had a copy of the Apex Datacomms letter in his home, and the jury found by their verdict on count 3 that he was not only involved in the misallocations to his own company, but also to Apex, and thereby acted as a link between Green and Perry for the purposes of that large claim. This offence was perpetrated through those working at Chase Bureau, in particular Perry, who recruited one of his clients, the director of Apex Datacomms, to receive the money. The appellant was the middleman between Green at HMRC and Perry at Chase Bureau, providing each with the information necessary to make the misallocation of £330,000 and to pursue the claim. HMRC records for Apex Datacomms were first viewed by Green (for no legitimate business purpose) in late May 2011, this being very shortly after it was alleged Green and the appellant had successfully conspired together to obtain a payment to Binelee.

81. He clearly benefited from the claims to his companies and would no doubt have benefited had the Apex claim succeeded.

82. Although he took part in the fraud through greed, the judge acknowledged he was to be sentenced on the basis of his role in the more limited conspiracies than those particularised on count 1, and therefore of less value. Having contested the matter he was not entitled to credit for a guilty plea.

83. Addressing the aggravating features, given the nature of the fraud, the significant planning, the length of time with which he was involved and his role as a link between Green and others involved, he was placed in the high culpability category. As regards mitigation, the judge noted that it was submitted that his lack of relevant previous convictions entitled him to be treated as a man of good character and she took account of the references provided to the court and the delay in bringing this matter to trial.

84. In support of this appeal, it is averred that the judge erred in placing the appellant's role in the high culpability bracket within the Definitive Guideline. It is argued his role should have been determined as significant, not least in light of the jury's verdict on count 1. However, in our judgment the judge did not err in finding the appellant had a high level of culpability. The fraudulent activity was carried on over a substantial period of time, there was significant planning and his role as the link or middleman was of considerable importance in the fraud. He had a leading role in offending which involved "group activity".

85. The sentence of 4 ½ years' imprisonment passed on count 3 was consistent with the relevant guideline for a fraud valued at £330,000 in which the appellant played a leading role.

86. The judge did not err in failing to adjust the appellant's sentence downwards to reflect the circumstances of the offences and sentences passed on other defendants. There were carefully explained reasons for the individual sentences and the argument based on disparity has no sustainable foundation. Particular complaint is centred on a comparison between the way this appellant was sentenced and Perry (who was imprisoned for 5 years 3 months on count 1 (the broader conspiracy), a sentence which was 9 months' longer than the appellant's sentence on the lesser count 3).

87. It is to be noted that, for Perry, the judge took a starting point of 6 years' imprisonment and reduced this by 9 months due to the delay, his good character and the fact that he pleaded guilty (albeit part way through his own evidence at trial). In respect of Perry, the appropriate guideline was for that of Cheating the Revenue, category 3A, which provides for a starting point of 8 years' imprisonment based on £5 million with a sentencing range of 6 to 10 years' custody for values of £2 million to £10 million. Perry fell to be sentenced at the very bottom of that sentencing bracket (6 years') given the relevant value was in the order of £2 million. On this basis the sentence on Perry was entirely appropriate and causes no concern as to the appellant's sentence.

88. As regards the sentence passed on Myatt (the director of Apex), about which there is also complaint by the appellant, the judge was entitled to place him in the bracket of medium culpability and she carefully and sustainably explained the basis for her approach. Again, the sentence imposed on him (2 years' imprisonment) does not undermine the validity of the sentence imposed on the appellant.

89. The judge, having heard all the evidence, was best placed to make findings as to the level of seriousness and the various defendants' respective roles. The Court of Appeal will be slow to interfere with such assessments in the absence of a clearly established error in approach.

90. The sentence imposed on the appellant was not manifestly excessive, reflecting as it did the correct starting point and some reduction was afforded for the delay and his lack of relevant previous convictions.

CONCLUSIONS

91. For the reasons set out above the appeals against conviction and sentence are dismissed.

Postscriptum

92. The appellant attempted to persuade us to consider a book which was published in July 2019 which touched on the position of Sabine. The appellant submitted it provides 'a glimpse' as to the kind of material in the hands of the police which ought to have been considered by the judge on a public interest immunity basis. It is entitled *Legacy: Gangsters, corruption and the London Olympics* by Michael Gillard. The appellant did not seek to establish admissibility under section 23(1) Criminal Appeal Act 1968, and we declined to consider this book. The suggested foundation that we should read it, in whole or in part, to gain a glimpse into the position at the time of trial does not provide a proper basis for its admission into evidence.