IN THE COURT OF APPEAL

CRIMINAL DIVISION

Neutral Citation Number: [2020] EWCA Crim

CASE NO 202000568/B1

Royal Courts of Justice

Strand

London

WC2A 2LL

Tuesday 6 October 2020

LORD JUSTICE HOLROYDE

MR JUSTICE KNOWLES

MR JUSTICE CHAMBERLAIN

REGINA

V

SAHIT FERATI

Computer Aided Transcript of Epiq Europe Ltd,
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MR R FITT appeared on behalf of the Appellant

J U D G M E N T

1. LORD JUSTICE HOLROYDE: This is an appeal, by leave of the single judge, against convictions for five offences of fraudulent evasion of tax.
2. The appellant, a man of previous good character, was the proprietor of a small restaurant in Ashton-under-Lyne, Greater Manchester. He engaged an accountant, Mr Asmar Ali, to draw up annual profit and loss accounts and to prepare quarterly VAT returns and annual income tax returns.
3. The figures stated in the income tax returns resulted, after taking into account the appellant's personal allowance, in a liability to pay modest amounts of National Insurance contributions but no liability to pay income tax.
4. Officers of Her Majesty's Revenue and Customs (hereafter "HMRC") made a test visit to the restaurant in January 2016, followed by a further visit in February 2016, when the appellant was asked a number of questions about his business, including as to the proportion of cash sales and sales paid by card. The appellant said that about 20% of his sales were in cash. Subsequent investigation by HMRC revealed evidence that sales at the restaurant were significantly higher than the figures declared in the tax returns.
5. On 18 April 2017 the appellant was interviewed under caution. He denied that he had made any under declaration of his takings and said that Mr Ali dealt with all his tax affairs. He said that he recorded the takings in daybooks and he produced one such daybook, which related to the year in which there was the least underdeclaration of takings. He said that he had all the other daybooks at his home, which was nearby, and invited the officers to come and collect them after the interview. The officers did not act upon that invitation until the following day, at which time the appellant's daughter declined to hand over the books.
6. The appellant was charged on an indictment containing seven counts. Counts 1 to 6 charged him with offences of being knowingly concerned in the fraudulent evasion of income tax, covering the tax years between 2011/12 and 2015/16. Counts 7 charged him with an offence of being knowingly concerned in the fraudulent evasion of VAT, between January 2012 and January 2017, that charge relating to the quarterly VAT returns submitted during that period.
7. The appellant stood trial in the Crown Court at Manchester, Minshull Street before HHJ Lever and a jury. Expert accountancy witnesses had been employed on both sides and they had cooperated in preparing an agreed joint statement. It was common ground that the profits of the restaurant business had been undeclared and that the correct level of tax had therefore not been paid by the appellant.
8. The findings of the expert witnesses were summarised in agreed facts which were read to the jury at the start of the trial. The witnesses differed in their estimate of the amount of the shortfall in tax paid, because their respective calculations were drawn up on the basis of different assumptions as to the proportion of takings which were paid in cash. The shortfall calculated by the defence expert, Mr Fanshawe, was the lesser of the two.
9. After the agreed facts had been read, and whilst waiting for the first witness to come into court, the judge said that it would be helpful know "by what percentage in each year the profits have turned out to be larger than they were claimed to be to the Inland Revenue at the material time". He indicated that he would like that to be done on the basis of Mr Fanshawe's figures, which were the more favourable to the appellant. He pointed out

that it was an essential ingredient of each of the charges that the appellant had been knowing concerned in the fraudulent evasion of tax. He commented to the jury that:

> i. "... if the understatement is five percent or ten percent, then it's more difficult isn't it for the prosecution to even start to convince you that it was deliberately and fraudulently and dishonestly done. If in fact – I don't know because I've not done the calculation – if in fact the statement to the Inland Revenue was half or a third of the actual profits, then it's a matter for you, but you may think that it is more clear or potentially clear that the owner of a business would know that it was making more money than has been stated."

10. That intervention by the judge is the subject of the first ground of appeal, which is that the judge erred in suggesting to the jury an incorrect approach to the case.
11. The prosecution then called a number of witnesses including Mr Ali. He said that he drew up the accounts of the business and submitted tax returns on the basis of the information supplied to him by the appellant. He said that the appellant did not provide him with any proper takings books, save for one year in which there was an inquiry by the Inland Revenue. Mr Ali said that generally the appellant brought in sheets of paper bearing figures, and sometimes he supplied figures orally during their meetings. Mr Ali said that he threw away the pieces of paper after he had taken the information from them. The judge, understandably, regarded that, and other features of Mr Ali's evidence, as very unprofessional and shoddy. It appears to be common ground in this appeal that Mr Ali was an unimpressive witness.
12. Mr Fitt, counsel then as now representing the appellant, made successful submissions of no case to answer on counts 1 and 2.
13. The appellant then gave evidence. He stated that he was in charge of the food and Mr Ali was in charge of the accounts. He provided Mr Ali with invoices, receipts and his taking books. If the figures were wrong, that was solely down to Mr Ali and not to him. He knew nothing of any underdeclaration of profits. If anyone should be in the dock, it was Mr Ali and not he. The appellant relied on his good character and on his handing over of the takings book for one year. He said he had acted on legal advice in deciding not to provide HMRC with the other books and he had instructed his daughter accordingly.
14. It appears that the evidence as a whole showed that the initial advice not to hand over the books had come from Mr Ali, and it was at a later stage that legal advice was given to a similar effect.
15. Mr Fanshawe gave evidence to the effect that because the VAT quarters applicable to the business did not coincide with the fiscal year, it would have required considerable sophistication on the appellant's part to provide false turnover figures each quarter which would result in adjusted profits at the year end which were roughly equivalent to his personal allowance. In answer to a question by the judge Mr Fanshawe accepted that one possible explanation was that Mr Ali had colluded with the appellant to provide false figures to HMRC. That enquiry by the judge is the subject of ground 2, which contends that the judge erred in suggesting to the jury an incorrect approach to the case, namely that the appellant and the principal prosecution witness may have collided in committing the alleged offences.
16. In the course of his summing-up the judge reminded the jury of the evidence relating to

the appellant's initial offer to provide all his daybooks to HMRC, including the appellant's evidence that he had acted on legal advice in not providing them. The judge confirmed that that was the appellant's legal entitlement, emphasising, as he had already directed the jury, that it was for the prosecution to prove guilt. He pointed out that HMRC could have obtained a warrant to search the appellant's home for the daybooks but had not done so.

17. The judge then reminded the jury of a direction he had given them in this regard earlier in the trial, saying:

    i. "The defendant's refusal to hand over the takings books can in no way, shape or form, actually prove his guilt. The only potential relevance they have, and only if you think it right and only to the extent you think it right, is affecting his credibility, whether you believe him or not."

18. That direction is the subject of ground 3, which contends that the judge erred in directing the jury that they could use evidence that the appellant failed to provide documents to HMRC as evidence that adversely affected his credibility.
19. The jury convicted the appellant of counts 3 to 7.
20. In his written and oral submissions in support of ground 1, Mr Fitt submits that the prosecution case was that the appellant had knowingly provided inaccurate turnover figures to Mr Ali but the judge's remarks distracted the jury from that issue. It was common ground that it was Mr Ali who calculated the inaccurate profit figures, and an adjusted profit figure may bear little resemblance to the turnover figure. The judge wrongly indicated to the jury that, regardless of whether the appellant had provided correct turnover figures, he could be found guilty if Mr Ali's calculation of the profit was inaccurate by more than about 10%.
21. Mr Russell, representing the respondent in this court as he did below, submits that the judge did no more than raise a common sense point that it may assist the jury to know how significant was the difference between the actual and the declared profit, because the greater the discrepancy the more likely it might be that the sole proprietor of the business would know that he was providing incorrect information. The appellant, in his evidence-in-chief, indicated that he had a working grasp of the level of turnover. Mr Russell submits that as the proprietor of the business, who derived his living from it, he could reasonably be expected to know what level of profit he would expect from that turnover.
22. As to the second ground, Mr Fitt acknowledges that the judge when summing up did not say anything about possible collusion between the appellant and Mr Ali. He submits however, that it was not open to the prosecution to put its case on that basis, since to do so would be to impugn its own witness. Neither Mr Ali nor the appellant had been cross-examined on that basis. He submits that the judge, by asking the question he did of Mr Fanshawe, was effectively suggesting that the jury could convict on a speculative version of events for which the prosecution did not contend. Having done so, he should in summing up have given the jury a specific direction that it was not open to them to convict on the basis that the appellant had colluded with Mr Ali to provide false figures to HMRC.

23. In response, Mr Russell accepts that he could not and did not put the prosecution case on this basis, but he submits that the judge was not subject to a similar constraint. The defence had adduced evidence from its expert witness to the effect that it was a remarkable feature that the figures provided each year by the appellant resulted in a declared profit which placed him just under the tax threshold. Mr Russell submits that when that evidence was given, it was obvious to everyone that it was possible that it was the professional accountant Mr Ali who had adjusted the figures to produce those results.
24. As to ground 3, Mr Fitt submits that the judge should have directed the jury to ignore the evidence as to the offer to provide the takings books and the subsequent non-provision of them. His direction to the jury invited them to adopt an approach similar to that which would be appropriate under section 34 of the Criminal Justice and Public Order Act 1994, but it was not in the full terms of the direction which should be given when that section applies. The appellant had the right not to incriminate himself, and the judge's direction both deprived him of that right and invited speculation as to the contents of the books. The jury were effectively invited to assume that the books were withheld because they did not assist the appellant's case. That was a reversal of the burden of proof, particularly when the prosecution had chosen not to take any steps to search for the daybooks.
25. Mr Russell tells us that in discussions between counsel during the trial, he had warned that he might raise this issue in cross-examination. He decided he would do so when the appellant, in the course of his examination-in-chief, gave evidence in the terms which we have summarised. There was no objection raised to Mr Russell cross-examination. Mr Ali's evidence had been that he had only ever been provided with the one daybook to which we have referred earlier in this judgment. In those circumstances, Mr Russell submits that he was entitled to ask the appellant whether the takings recorded in the daybooks were correct. The appellant said that they were. Those questions having been asked without objection and answered, it is unrealistic to suggest that the jury should have been directed to ignore that evidence.
26. Mr Russell adds that there was subsequent discussions between counsel and the judge, which resulted in agreement as to the form of direction which the judge should give and did give. The jury were rightly directed that the only relevance of the non-production of the books was as to the appellant's credibility.
27. We are grateful to both counsel for their helpful, written and oral submissions. Having reflected upon them our conclusions are as follows.
28. In relation to ground 1, the judge requested information which was likely to be helpful to the jury. The extent of the disparity between actual profit and declared profit was relevant. The jury would be entitled to think that the greater the disparity, the more likely it was that a business proprietor in the position of the appellant might be aware that the declared profit was inaccurate. Equally, as the judge pointed out, the prosecution might be in difficulties if the disparity were small. Mr Fitt is of course correct to draw attention to the distinction between turnover and profit. However, the judge's comments came at the beginning of the trial, and he made clear that he did not know what the information he had requested would reveal. There was ample opportunity for the defence to make any relevant point based on the distinction between turnover and profit, and for any necessary direction to be given if there was an important point to be made in that regard. It is however apparent from the transcript of the summing-up that the appellant, in his evidence-in-chief, said that every month he looked at his daybook, looked at the

bank statements and made a mental check to see what his profit would be. In the event, the jury were later in the case provided, by agreement, with a table which showed that in the three fiscal years between 2013 and 2016 the profits declared to HMRC were respectively 41%, 56% and 28% of the actual profits as estimated by the defence accountant Mr Fanshawe.

29. The judge cannot, in our view, be criticised for making the enquiry he did and for identifying the potential significance of the information to be obtained. We agree with Mr Russell that he was doing no more than raising a common sense point. We think, with respect, it would have been better if the judge had avoided referring to specific percentages or proportions. But we cannot accept Mr Fitt's submission that the jury were effectively told that they could convict if the disparity was any greater than 10%. In our judgment, no unfair prejudice was caused to the appellant by the judge's remarks.
30. In relation to ground 2, it is relevant to note that the defence case was that the appellant had provided correct figures to Mr Ali, and Mr Ali was solely responsible for any understatement of profit in the tax returns. In presenting that case, the defence chose to adduce, through Mr Fanshawe, evidence to the effect that someone in the appellant's position would be hard pressed to produce false figures which consistently resulted in a net profit roughly equal to his personal allowance. We understand of course why that point, potentially helpful to the appellant, was made. It must however have been obvious to the jury that the declaration of false figures to HMRC might be explained, not only by dishonesty on the part of the appellant alone, as the prosecution alleged, or by dishonesty on the part of Mr Ali alone, as the defence alleged, but also by dishonesty on the part of both men. We do not accept that the question asked by the judge, which Mr Fanshawe answered by confirming that third possibility, either invited speculation or caused unfair prejudice to the appellant.
31. Moreover, the direction which it is said the judge should thereafter have given would have been wrong in law. The prosecution had not put its case on a basis of collusive dishonesty, but if the jury were sure that the appellant acted dishonestly, and was knowingly concerned in the fraudulent evasion of tax, then in law the appellant was guilty whether he had acted alone or in collusion with Mr Ali.
32. We turn to ground 3. As we have indicated, the appellant's case was that he provided Mr Ali with daybooks in which, to the best of his knowledge and belief, he had accurately recorded his takings. That evidence was the foundation of his assertion that any understatement in the tax teturns was down to Mr Ali and not to him. In interview, he volunteered to provide all of his daybooks to HMRC. He then did not do so. He was asked in cross-examination whether the daybooks contained accurate records of the takings of the business. No objection was, or could be, taken to that question. He asserted that they did. The fact that he had nonetheless declined, and still declined, to provide those books to HMRC was relevant to the jury's assessment of the credibility of that assertion.
33. Also relevant were the fact that the appellant was under no obligation to make the books available, as the jury were directed, and that he said he had acted on legal advice in retaining them. Those were all matters for the jury to consider in considering his credibility.
34. The judge, in directing the jury as he did after discussion with counsel, emphasised that the only relevance of the failure to hand over the books was as to the credibility of the

appellant and only to the extent that the jury felt it right.

35. We do not accept the submission that the appellant was deprived of his right against self-incrimination. He chose not to make available books which he asserted contained accurate records of the takings of the business.
36. Nor do we accept the submission that the burden of proof was reversed. The appellant was not being called upon to prove his innocence. He was being asked about an offer which he had made to provide the books, which he had subsequently withdrawn. The comparison with circumstances such as those covered by section 34 of the 1994 Act, when an adverse inference can be drawn in certain circumstances, is not, in our view, an apt one.
37. For those reasons, we are satisfied that none of the matters raised in the grounds of appeal, whether considered individually or collectively, cast doubt on the safety of these convictions. This appeal accordingly fails and is dismissed.

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