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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 1656



No. 202202134-B2

202203195-B2

Royal Courts of Justice

Tuesday, 12 December 2023

Before:

LORD JUSTICE EDIS
MRS JUSTICE FARBEY
HER HONOUR JUDGE MORELAND

REX

V

MICHAEL STAINER

Transcript prepared from digital audio by
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THE CROWN was not represented.

THE DEFENDANT appeared in person.

J U D G M E N T

MRS JUSTICE FARBEY:

- 1 On 19 May 2020 in the Crown Court at Southwark before HHJ Gregory Perrins and a jury, the applicant, then aged 74, was convicted of two counts of cheating the Public Revenue contrary to common law (counts 1 and 2) and 1 count of fraud by false representation contrary to section 1 of the Fraud Act 2006 (count 3). On 7 July 2022 the judge sentenced him to 3 years' imprisonment on each count to run concurrently and disqualified him from being a company director for three years. The offences each concerned the applicant's failure to pay income tax and National Insurance contributions due to HMRC under registered PAYE schemes relating to two of the applicant's companies, namely Kentish Estates Limited and The Grand Folkestone Limited. In broad terms the companies were at different times vehicles for the operation of the applicant's hospitality business and for the payment of staff wages.
- 2 The applicant, who appears before us in person today, renews his application for an extension of time of 21 days for leave to appeal against conviction and 91 days for leave to appeal against sentence following refusal by the single judge. He seeks leave to introduce fresh evidence, namely the witness statement of Jaqueline Redmond dated 6 June 2022 made on behalf of HMRC. Ms Redmond confirms that the applicant was made bankrupt in 2018 and then again in 2021. The applicant also seeks to rely on an administrator's report dated 23 May 2022 which appears to relate to disposal of freehold property. The applicant submits that this material is evidence of HMRC's attempts to destroy his business by pursuing a petition for bankruptcy which prevented him from settling the liabilities relating to what he continues to maintain are deferred PAYE and National Insurance contributions.
- 3 The facts of the offences are set out in detail in the Criminal Appeal Office summary. In short, between April 2011 and April 2015 ("the indictment period") the applicant and his wife owned a business known as The Grand Folkestone Limited which consisted of a number of self-contained apartments, tea rooms, restaurants, bars and function rooms. Fifty members of staff were employed in various roles. The applicant as their employer was responsible for deducting PAYE tax and National Insurance contributions from their wages.
- 4 Deductions were made from the employees' gross pay. However, the applicant did not account for those deductions to HMRC. They were not paid.
- 5 The applicant and his wife were arrested on 23 July 2015 when HMRC officers attended the Grand Folkestone. HMRC seized material that was used to calculate the PAYE tax and National Insurance contributions that each of the applicant's companies (mentioned above) should have paid during the indictment period.
- 6 The trial documents plainly show that the issue for the jury was whether the prosecution had proved that the applicant intended to cheat the Public Revenue (counts 1 and 2) and whether he had made false representations to staff by issuing documentation to them that showed employers' deductions for payments to HMRC that had not in fact been made (count 3).
- 7 The prosecution case was that the applicant had behaved dishonestly throughout the indictment period. He was paying employees' wages net of tax and National Insurance and had not declared those deductions to HMRC. He had retained the tax monies, making financial gains for himself while exposing his employees to a risk of loss, namely the loss of qualifying years and consequently their entitlement to, and the level of, state pension. The applicant's assertion that it had been his intention to satisfy the liability for these deductions was disingenuous. The Grand Folkestone was not generating enough income and the applicant could not pay. The prosecution maintained that the applicant had made false representations to his employees through their wage slips which showed that the deductions had been made on their behalf, the

implication being that the deducted amounts were being paid to HMRC. The applicant, during a staff meeting, had dishonestly explained the reason for the shortfalls and informed staff that he had been provided with the wrong reference number for the payments to be made.

- 8 The applicant's case was that he had not acted dishonestly. There had been no intention to defraud HMRC. He had always intended to meet the tax liabilities at a future date. This was supported by the handwritten independent records he had kept of the deductions made from salaries and which closely accorded with the figures relied on by the prosecution. He would not have made those records unless he intended to repay the liability. He had kept in contact with HMRC for a lengthy period and had every reason to suppose that HMRC had given him a breathing space to pay and that he had reached an agreement with HMRC to defer payments. He had been open and honest with HMRC about his position and why he was not paying. He had not made false representations to members of staff. The deductions shown on their wage slips were not, and did not imply, false representations.
- 9 We turn first to the grounds of appeal against conviction. The applicant sets out his appeal grounds in a number of documents and relies on 13 appendices including the fresh evidence. We have given independent consideration to all the documents and to everything he has said, including his response to the decision of the single judge, which we received this morning by way of a skeleton argument.
- 10 The applicant submits that HMRC withheld relevant material. In particular the prosecution withheld a copy of a seized aide memoire that the applicant had made. The applicant contends that the aide memoire demonstrates that he had been in regular contact with HMRC to provide all the information requested. He blames HMRC for withholding other relevant evidence and for causing ongoing confusion as to the correct tax position.
- 11 There is no merit in these assertions. The respondent's notice confirms that the aide memoire was seized and uploaded to the digital case system on 4 March 2022. No reliance was placed on this document during the trial, which is unsurprising in so far as the document provides no assistance to the applicant. It cannot possibly be argued that the content of the aide memoire or anything relating to prosecution disclosure make the convictions unsafe, which is the sole test that this court applies. The applicant had ample opportunity to ventilate disclosure issues at trial. It is too late to do so now.
- 12 Next, the applicant seeks to rely on Ms Redmond's statement and the administrator's report to support a submission that HMRC have sought to avoid a claim for false arrest by using an invented VAT claim to bankrupt him and his wife, thereby preventing a settlement of the PAYE and National Insurance liabilities. This element of the grounds of appeal falls to be rejected out of hand. We make it plain that there is no evidence of misconduct by HMRC. It is fanciful to suggest that HMRC's own actions make the applicant's convictions unsafe. There is, likewise, no merit in the submission that the applicant should now be afforded an opportunity to investigate HMRC failures and misconduct. There is no evidence that we have seen to support such allegations.
- 13 The applicant makes a number of attacks on the judge's summing-up. None is warranted. The judge summed up the evidence fairly. He summarised the applicant's evidence to the jury in detail. The applicant maintains that the judge, at the end of his summing up, asked prosecution counsel and not defence counsel whether the summing up contained any errors. That is not correct. The transcript shows that the judge asked counsel in general, and it defies common sense that if the summing up had been unfair or inaccurate the applicant's King's Counsel would not have said so.

- 14 The allegation that the judge tolerated a situation in which the jury considered material outside the evidence seen and heard in the course of the trial is unsubstantiated and lacks merit. There is no evidence that the jury carried out internet research.
- 15 The applicant notes that the transcript of the verdicts with which we have been provided does not include the verdict on count 3. If the applicant had any real doubt about the counts on which he had been convicted, he ought to have asked his KC. The court log shows that prior to the verdicts on count 1 and 2, the judge took partial verdicts which, in context, must mean the not guilty verdicts in relation to the applicant's wife, who stood trial with him, and the guilty verdict for him on count 3. It is plain from his own counsel's sentencing document that he was convicted on all three counts. It is opportunistic for him to maintain that the outcome of the trial should be treated as being in doubt.
- 16 The applicant submits that the jury should not have been informed of his bankruptcies by the prosecution. The applicant's insolvency was placed before the jury as an agreed fact, which means that the applicant must have agreed to it as well as the prosecution. When it transpired that neither the applicant nor the prosecution relied on the agreed fact, the judge directed the jury that they should not take the applicant's bankruptcy into account. There can be no proper challenge to that direction, which was unarguably sufficient to cure any prejudice to the applicant.
- 17 Other matters raised in the grounds of appeal amount either to a recitation of the way in which the applicant disagrees with the verdicts or describe immaterial errors which cannot arguably make the convictions unsafe. To the extent that fresh evidence is relied on, nothing in any of the appendices appears to us to afford any ground for allowing the conviction appeal. There is no proper basis for it to be admitted.
- 18 In his skeleton argument, the applicant has raised for the first time some dissatisfaction with his barristers. We note that on the documents before us his counsel put the case with conspicuous diligence. There is nothing to suggest that the applicant's legal representatives were hampered by the size and volume of the disclosure which HMRC had given.
- 19 As regards the conviction appeal, we refuse an extension of time because it would serve no purpose. We would refuse leave to rely on fresh evidence and would refuse leave to appeal against conviction.
- 20 We turn to the application for leave to appeal against sentence. The judge noted that the applicant was responsible for paying 50 or so members of staff their wages and deducting PAYE tax and National Insurance contributions. He noted that the decision not to do so was a calculated one. The applicant had not considered the impact of his action on any of his employees. He had put each employee at risk of a large tax liability and the shortfalls in their National Insurance contributions had put their pensions at risk. The applicant had withheld these monies for his own financial gain.
- 21 As regards counts 1 and 3 the judge applied the sentencing guideline for Revenue fraud. In relation to culpability, he concluded that the offences were each of higher culpability at level A. There had been an abuse of power, trust and responsibility. The applicant had influenced and involved others. The applicant's conduct amounted to fraudulent activity over a sustained period of time.
- 22 In relation to harm, it was not in dispute that the total loss to HMRC was over £473,000 placing the overall offending into Category 5 harm. We see no reason to take a different view to the judge. The starting point for Category 5A offending is 5 years' custody and the category range

is 3 to 6 years' custody. As regards count 3, the judge applied the fraud guideline. He concluded that the offence was a Category 2A offence with a sentencing bracket under the guideline that was the same as the bracket for counts 1 and 2.

- 23 The judge had regard to the pre-sentence report, to the notes on the applicant's medical condition and to the other documents submitted by the applicant as part of his mitigation. He noted what we regard as the primary mitigation, which is that the applicant was 74 years of age and of hitherto good character. Having balanced the aggravating and mitigating factors, the judge applied a downward adjustment from the starting point to reach an overall sentence of 3 years, as we have mentioned.
- 24 In his grounds of appeal, the applicant maintains that the judge failed to give sufficient weight to the fact that the staff were not misled about the payments of their tax and National Insurance. There had been no fraud on the staff. HMRC alleged that there had been no notification of the deductions amounting to £473,000, and that there was an error in the reports. No such error was identified, and full details of the deductions made were provided. The judge should have sentenced him on the basis of the lesser sum of £18,000.
- 25 The applicant further submits that the judge imposed a sentence based on a preference to pay the mortgages on leased flats rather than to pay HMRC. The applicant could not have paid HMRC without authority, as he was neither a director nor shareholder and such payments would have been fraudulent. The judge failed to take account of personal mitigation, including the applicant's age, the delay in prosecution, his deteriorating health and previous good character.
- 26 Most of what the applicant says in these grounds is not relevant to an appeal against sentence. The judge applied the sentencing guidelines for each offence. We see no error of approach in the way he applied the guidelines or in his categorisation of the offences. He applied a substantial downward adjustment from the starting point to reflect the applicant's strong mitigation arising from factors such as his age and good character. His sentencing remarks are clear and detailed.
- 27 The only question for this court on an appeal is whether the applicant's overall sentence is manifestly excessive or wrong in principle. None of the arguments advanced by the applicant show that this test is met even arguably.
- 28 Finally, the applicant submits that the judge should have suspended the sentence. The maximum sentence that may lawfully be suspended is one of 2 years' imprisonment. It follows that such a course was not open to the judge in this case.
- 29 For these reasons we refuse an extension of time in relation to the sentence appeal because it would serve no purpose and we would refuse leave to appeal against sentence.
- 30 The applicant appears before us today and is no longer in custody. We make an order under section 18(6) of the Prosecution of Offences Act 1985 for the applicant to pay the reasonable costs of the transcripts in this case. The costs are £258.18 for the conviction application and £25.74 for the sentence application. The applicant must therefore pay £283.92. We shall allow him 28 days from today to do so.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.