Easter Term
[2015] UKSC 24
On appeal from: [2013] EWCA Crim 2237

JUDGMENT

R *v* GH (Respondent)

before

Lord Neuberger, President
Lord Kerr
Lord Reed
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

22 April 2015

Heard on 24 February 2015

Appellant	*Respondent*
Kennedy Talbot Will Hays (Instructed by CPS Appeals and Review Unit)	Tim Owen QC Mark Summers QC (Instructed by Lound Mulrenan Jefferies Solicitors)

LORD TOULSON: (with whom Lord Neuberger, Lord Kerr, Lord Reed and Lord Hughes agree)

1. The respondent stood trial at the Central Criminal Court on a charge of entering into or becoming concerned in a money-laundering arrangement, contrary to section 328(1) of the Proceeds of Crime Act 2002. The particulars of the offence were that he and another

> "between the first day of August 2011 and the 13th day of January 2012 entered into or became concerned in an arrangement which they knew or suspected would facilitate the retention, use or control of criminal property, namely money received into a Lloyds Bank account … and a Barclays bank account … from the sale of motor insurance through the [AM Insurance] website, by or on behalf of [B]."

2. At the close of the evidence, the respondent submitted that there was no case to answer because at the time that the respondent entered into the arrangement no criminal property was yet in existence.

3. The trial judge, Recorder Greenberg QC, upheld the submission. The prosecution appealed against her ruling pursuant to section 58 of the Criminal Justice Act 2003. The appeal was dismissed. The Court of Appeal (Lloyd Jones LJ and Irwin and Green JJ) held in summary that under section 328 it is not necessary for criminal property to exist at the moment when parties come to a prohibited arrangement, but that the arrangement must relate to property which is criminal property at the time when the arrangement begins to operate on it; and that on the facts of this case the property had not become criminal property at the time when the arrangement began to operate on it.

4. The court certified that the case involves the following point of law of general public importance:

> "Where, by deception, A induces the payment of money to a bank account opened for that purpose by B (pursuant to an arrangement with A to receive and retain that money, then may B commit an offence contrary to section 328 of the Proceeds of Crime Act 2002, on the basis that the arrangement to receive and retain the money in that bank account can be treated as both

> rendering the property 'criminal property' and facilitating its retention, use or control?"

The prosecution was given leave to appeal by this court.

Facts

5. In order to avoid the possibility of prejudice in the event of a new trial, I will avoid using the names of the parties involved. The case arose from the activities of a fraudster, B, who pleaded guilty to a number of offences. He established four "ghost" websites falsely pretending to offer cut-price motor insurance and recruited associates to open bank accounts for channelling the proceeds.

6. One of the websites was established in the name of AM Insurance. It operated from 1 September 2011 to January 2012. Shortly before the website went live, H opened two bank accounts, one with Lloyds Bank and the other with Barclays. B took control of the documentation and bank cards relating to them. During the short active lifetime of the website, unsuspecting members of the public were duped into paying a total of £417,709 into the Lloyds Bank account and £176,434 into the Barclays account for non-existent insurance cover. The prosecution opened the case to the jury on the basis that H may not have known the details of B's fraud, but that the circumstances in which the accounts were opened were such that H must have known or at least suspected that B had some criminal purpose.

POCA money laundering offences

7. Part 7 of the Proceeds of Crime Act ("POCA") is concerned with "money laundering" as defined in section 340(11). The expression includes any act which constitutes an offence under sections 327, 328 or 329. Those sections criminalise various forms of dealing with "criminal property", as defined in section 340.

8. Section 340(3) provides that property is criminal property if

> "(a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and

(b) the alleged offender knows or suspects that it constitutes or represents such a benefit."

9. Section 340(5) provides that a person benefits from conduct "if he obtains property as a result of or in connection with the conduct".

10. "Criminal conduct" is defined in section 340(2) as conduct which

> "(a) constitutes an offence in any part of the United Kingdom, or
>
> (b) would constitute an offence in any part of the United Kingdom if it occurred there."

11. Section 340(4) provides that

> "It is immaterial
>
> (a) who carried out the conduct;
>
> (b) who benefited from it;
>
> (c) whether the conduct occurred before or after the passing of the Act."

The respondent relies on the use of the past tense, for the purposes of an argument to which I will come.

12. Section 340(9) provides that property includes money; all forms of property, real or personal, heritable or moveable; and things in action and other intangible or incorporeal property.

13. Section 329 deals with acquisition, use and possession of criminal property. Section 327 deals with concealing or transferring criminal property and the like. Section 328, with which we are directly concerned, deals with arrangements facilitating the acquisition, retention, use or control of criminal property by or on behalf of another person.

14. Together, sections 327, 328 and 329 form the principal money-laundering offences and they cover a wide range of conduct. There are supplementary offences relating to tipping off and to businesses operating in the regulated financial sector (who have positive reporting duties if they have cause to suspect money laundering).

15. The material words of section 328 for present purposes are in subsection (1). This states:

> "A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person."

16. Although on a literal interpretation these words could be read as creating criminal liability if the defendant suspects that the effect of the arrangement is to facilitate the acquisition, etc, of criminal property, even where his suspicions are misplaced and the property concerned is not criminal, that is not its accepted or correct interpretation. The *actus reus* of the offence is entering or being concerned in an arrangement which in fact facilitates the acquisition etc of criminal property, and the *mens rea* required is knowledge or suspicion. (See *R v Montila* [2004] UKHL 50, [2004] 1 WLR 3141, a decision of the House of Lords regarding different but analogous wording in earlier legislation.)

17. The present case arises under section 328 but the arguments advanced on either side effect also sections 327 and 329. Subject to immaterial exceptions, a person commits an offence under section 327 if he

> "(a) conceals criminal property;
>
> (b) disguises criminal property;
>
> (c) converts criminal property;
>
> (d) transfers criminal property;

(e) removes criminal property from England and Wales or from Scotland or from Northern Ireland."

18. Subject to similar exceptions, a person commits an offence under section 329 if he

"(a) acquires criminal property;

(b) uses criminal property;

(c) has possession of criminal property."

19. As the Court of Appeal explained in *Bowman v Fels (Bar Council intervening)* [2005] EWCA Civ 226, [2005] 1 WLR 3083, POCA gave effect to Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering (as amended by Council Directive 2001/97/EC), but the Directive set minimum requirements and in some respects POCA was more stringent. For example, money laundering as defined in POCA includes dealing with property known "or suspected" to constitute or represent a benefit from criminal conduct; by contrast, the definition in the Directive required knowledge. The current version of the Directive is 2005/60/EC. This repealed and replaced 91/308/EEC.

Case law on criminal property

20. There is an unbroken line of Court of Appeal authority that it is a prerequisite of the offences created by sections 327, 328 and 329 that the property alleged to be criminal property should have that quality or status at the time of the alleged offence. It is that pre-existing quality which makes it an offence for a person to deal with the property, or to arrange for it to be dealt with, in any of the prohibited ways. To put it in other words, criminal property for the purposes of sections 327, 328 and 329 means property obtained as a result of or in connection with criminal activity separate from that which is the subject of the charge itself. In everyday language, the sections are aimed at various forms of dealing with dirty money (or other property). They are not aimed at the use of clean money for the purposes of a criminal offence, which is a matter for the substantive law relating to that offence.

21. The first authority was the decision of the Court of Appeal Criminal Division (Clarke LJ, Hughes and Dobbs JJ) in *R v Loizou* [2005] 2 Cr App R 618.

22. The defendants were charged under section 327 with transferring a large quantity of cash, knowing or suspecting that it constituted a person's benefit from criminal conduct. The defendants were under police surveillance and the transfer took place in the car park of a hotel. The prosecution put its case in alternative ways. The first was that the money represented the proceeds of earlier criminal conduct. That approach was legally uncontroversial. The prosecution's alternative case was that the money became criminal property at the moment of the transfer because it was paid for a criminal purpose, namely the purchase of smuggled cigarettes. At a preliminary hearing the judge ruled that so long as the prosecution could prove that the money was transferred for a criminal purpose, the *actus reus* of the offence was established by the act of transfer, at which moment the money became criminal property. His ruling was reversed by the Court of Appeal. The court held that criminal property within section 327 meant property which was already criminal at the time of the transfer, by reason of constituting or representing a benefit from earlier criminal conduct and not the conduct which was the subject of the indictment.

23. In *Kensington International Ltd v Republic of Congo (formerly People's Republic of Congo) (Vitol Services Ltd, Third Party)* [2007] EWCA Civ 1128 [2008] 1 WLR 1144, the question arose whether a person who commits a criminal offence of bribery also thereby commits an offence under section 328. It was argued that the giving of a bribe necessarily involves the briber entering into an arrangement which he knows facilitates the acquisition of criminal property by the recipient, since the bribe, once received, constitutes the latter's benefit from criminal conduct. The argument was rejected. Moore-Bick LJ said at para 67:

> "I accept that section 328 is of broad application, but in my view that seeks to stretch its scope too far. As section 340(3)(b) makes clear, the mental element of the offence includes knowledge or suspicion on the part of the defendant that the property in question is criminal property, but that cannot be the case until it has been acquired by means of criminal conduct. In order for an offence under section 328 to be committed, therefore, the arrangement into which the defendant enters, or in which he becomes involved, must be one which facilitates the acquisition, retention, use or control by another of property which has already become criminal property at the time when it becomes operative. That requirement is not satisfied if the only arrangement into which he enters is one by which the property in question first acquires its criminal character."

24. In *R v Geary* [2010] EWCA Crim 1925, [2011] 1 WLR 1634, another case under section 328, a further argument was raised which is relevant in the present case. The defendant agreed to help a friend named Harrington to hide some money for a period. Under the arrangement Harrington transferred around £123,000 into the defendant's bank account. The defendant used some of it to make some purchases for Harrington and, after an interval, he repaid the balance to Harrington less about £5,000. The prosecution's case was that the money represented proceeds of a fraud carried out by a bank official, who stole it from dormant accounts. The stolen money was laundered through a network of recipients, each of whom retained a small sum as payment for his services. The recipients included Harrington and the defendant. The defendant's case was that he was approached by Harrington with a story that he was about to become involved in divorce proceedings, and that the defendant was asked to help Harrington to hide the money from Mrs Harrington (and the court), which he agreed to do. He denied any knowledge that the money had a criminal source.

25. In the course of the trial the judge was invited to indicate how he proposed to direct the jury. He said that in his view the defendant's account of the facts did not provide him with a defence to the charge under section 328. The defendant then pleaded guilty on the basis of the facts alleged by him, which the prosecution perhaps surprisingly were content to accept, and he appealed against his conviction on the ground that the judge's ruling was wrong. The Court of Appeal allowed his appeal and quashed the conviction.

26. It was argued by the prosecution that the arrangement on the accepted version of the facts involved a conspiracy to pervert the course of justice. The money transferred was therefore criminal property at the moment of being paid into the defendant's account. Alternatively, the arrangement involved not merely the receipt of the money but also its retention, use or control, and so constituted the offence. Both parts of the argument were rejected. Moore-Bick LJ said at para 19:

> "In our view the natural and ordinary meaning of section 328(1) is that the arrangement to which it refers must be one which relates to property which is criminal property at the time when the arrangement begins to operate on it. To say that it extends to property which was originally legitimate but became criminal only as a result of carrying out the arrangement is to stretch the language of the section beyond its proper limits. An arrangement relating to property which has an independent criminal object may, when carried out, render the subject matter criminal property, but it cannot properly be said that the arrangement applied to property that was already criminal

> property at the time it began to operate on it. Moreover, we do not accept that an arrangement of the kind under consideration in the present case can be separated into its component parts, each of which is then to be viewed as a separate arrangement. In this case there was but one arrangement, namely, that the appellant would receive money, hold it for a period and return it. To treat the holding and return as separate arrangements relating to property that had previously been received is artificial."

27. Moore-Bick LJ added, obiter, at para 39 that, on the assumption that the purpose for which the money was transferred to the defendant involved perverting the course of justice, it became criminal property in his hands on its receipt, and he could therefore have been charged with an offence of converting or transferring criminal property contrary to section 327 by returning most of it to Harrington, together with the goods which he had purchased with part of it.

28. In *R v Amir and Akhtar* [2011] EWCA Crim 146, [2011] 1 Cr App R 464, *Akhtar* entered into an arrangement with a mortgage broker to obtain money from mortgage companies by submitting false mortgage applications on behalf of third parties. He was prosecuted under section 328. The particulars of the offence in the indictment do not appear from the report, but the prosecution argued that *Akhtar* was guilty because he entered into an arrangement which he knew would facilitate the acquisition of property for third parties by deception, and, as an alternative submission, that the funds had the character of criminal property at the time when the arrangement began to operate on them. The Court of Appeal quashed *Akhtar's* conviction. As to the first part of the argument advanced by counsel for the prosecution, Elias LJ said at para 21:

> "On his analysis an offence is committed where a defendant becomes concerned in an arrangement which facilitates the criminal acquisition of property. The statute requires an arrangement facilitating the acquisition of criminal property. There is a material distinction."

He also rejected the argument that the funds had the character of being criminal property at the time when the arrangement began to operate.

Issues

29. The following issues arise:

(1) Does the commission of an offence under section 328 require the property to constitute criminal property prior to the arrangement coming into operation?

(2) Does the property have to exist at the time when the defendant enters into or becomes concerned in the arrangement?

(3) Did the sums received into the respondent's accounts constitute criminal property before being paid into those accounts?

(4) Was the *actus reus* of the offence committed by reason of the arrangement facilitating the retention, use or control of the money paid into the respondent's accounts?

Does the commission of an offence under section 328 require the property to constitute criminal property prior to the arrangement coming into operation?

30. Mr Kennedy Talbot submitted that the Court of Appeal authorities to which I have referred were wrong, and that the same conduct could both cause property to become criminal and simultaneously constitute the offence charged under section 328. He made the same submission in relation to sections 327 and 329, correctly recognising that the three sections have to be construed coherently. So, he submitted, a thief who steals "legitimate" property is necessarily at the same time guilty of "acquiring criminal property" contrary to section 329.

31. As Elias LJ pithily put it, this argument elides the distinction between a person who acquires criminal property and one who acquires property by a criminal act or for a criminal purpose.

32. The Court of Appeal's interpretation of "criminal property" in the various money laundering sections as meaning property which already has the quality of being criminal property, as defined in section 340, by reason of criminal conduct distinct from the conduct alleged to constitute the *actus reus* of the

money laundering offence itself, accords not only with the natural meaning of the sections but also with the purpose underlying them.

33. Paragraph 6 of the Explanatory Notes to POCA describes money laundering as "the process by which the proceeds of crime are converted into assets which appear to have a legitimate origin, so that they can be retained permanently or recycled into further criminal enterprises". That is a fair description of the ordinary meaning of the expression. With reference to the individual offences, para 469 of the explanatory notes states:

> "Section 327 creates one of three principal money laundering offences. The other two are to be found in sections 328 and 329. Because of the definition of criminal property at section 340, all three principal money laundering offences now apply to the laundering of an offender's own proceeds as well as those of someone else."

The reference to proceeds of crime is clearly a reference to the proceeds of an earlier offence.

34. The Court of Appeal's interpretation is also consistent with the definition of money laundering in the Council Directive. The version of the Directive which was in force at the date of enactment of POCA defined money laundering as meaning the following conduct, when committed intentionally:

> "the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action;
>
> the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity;
>
> the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity;

> participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing indents."

35. The 2005 Directive retains this wording but extends the scope of the Directive by a separate provision relating to "terrorist financing". This expression is defined to include the provision or collection of funds "with the intention that they should be used or the knowledge that they are to be used", to carry out certain offences identified in the Council Framework Decision of 13 June 2002 on combatting terrorism (2002/475/JHA).

36. In the UK, the Terrorism Act 2000 contains provisions relating to "terrorist property" which are similar to, but wider than, the money laundering offences under POCA. "Terrorist property" is defined in section 14(1) as meaning:

> "(a) money or other property which is likely to be used for the purposes of terrorism (including any resources of a proscribed organisation),
>
> (b) proceeds of the commission of acts of terrorism, and
>
> (c) proceeds of acts carried out for the purposes of terrorism."

In para (a) the definition includes words which are forward looking, to use Mr Tim Owen QC's description, whereas the definition of criminal property in Part 7 of POCA looks backward.

37. Sections 327, 328 and 329 were aptly described by Moses LJ in *JSC BTA Bank v Ablyazov* [2009] EWCA Civ 1124, [2010] 1 WLR 976, at para 14, as "parasitic" offences, because they are predicated on the commission of another offence which has yielded proceeds which then become the subject of a money laundering offence. A wider interpretation would have serious potential consequences for third parties including banks and other financial institutions. They already have an onerous reporting obligation if they know or suspect, or have reasonable grounds for knowing or suspecting, that another person is engaged in money laundering. That obligation would be considerably enlarged and its limits potentially difficult to gauge if they are required, on pain of criminal sanctions, to report any suspicion, or reasonable grounds for suspicion, of a customer's intended use of property either in connection with an offence within the UK or in connection with conduct elsewhere in the world which would be an offence if committed within the

UK. In *HKSAR v Li Kwok Cheung George* [2014] HKCFA 48, a similar issue arose on the wording of a Hong Kong money laundering ordinance. Ribeiro and Fok PJJ said in their joint judgment with which the other members of the Court of Final Appeal agreed, at para 84:

> "It is one thing to criminalise dealing with funds where the dealer knows or has reasonable grounds to believe that they are the proceeds of crime, it is quite a different matter to stigmatise as a money launderer, a lender dealing with its own 'clean' funds because of what the borrower does or intends to do with them."

However, that would be the consequence if property obtained "in connection with" criminal conduct (section 340(5)) bears the extended meaning for which the prosecution contends.

Does the property have to exist at the time when the defendant enters into or becomes concerned in the arrangement?

38. The Court of Appeal held in the present case that there is no basis on the plain meaning of the words used in section 328 for restricting the offence to a case where the criminal property is already in existence at the time at which a defendant enters into or becomes concerned in the arrangement. Mr Owen argued that the court was wrong. He relied on the use of the present tense in sections 327, 328 and 329, which he contrasted with the use of the past tense in the definition of criminal property in section 340(4). (See paras 8-10, 15, 17 and 18 above.) He observed that sections 327 and 329 presuppose the existence of the relevant criminal property at the time of the *actus reus*. Similarly, he submitted that under section 328 the court must take a snapshot view of the position at the moment when the defendant entered into the arrangement. There must at that moment have been criminal property to which the arrangement related. The words in section 328 "an arrangement which he knows or suspects facilitates … the acquisition, retention, use or control of criminal property" are not to be read, in his submission, as "an arrangement which he knows or suspects will facilitate".

39. That submission is right inasmuch as the offence requires actual facilitation of the acquisition etc, of criminal property as well as the requisite knowledge or suspicion. As a matter of strict English, the way in which the section has been drafted may be criticised for condensing the separate ingredients of *actus reus* and *mens rea* into one. But it places no undue strain on the language to read the section as providing that a person commits an offence if

a) he enters into or becomes concerned in an arrangement which facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person, and b) he knows or suspects that it does so. It has sensibly to be read in that way or else a party might be guilty by reason of having the necessary *mens rea* even if it transpired that the property was not criminal. The offence is complete when the arrangement becomes one which facilitates the acquisition, etc, of criminal property and the defendant knows or suspects that this is so. At that point he becomes a participant in an arrangement which is made criminal by section 328.

40. The Court of Appeal was therefore right in the present case to hold that it does not matter whether criminal property existed when the arrangement was first hatched. What matters is that the property should be criminal at a time when the arrangement operates on it. To take a practical example, if defendants make arrangements for the transportation and warehousing of a quantity of illegally imported drugs, it would make no difference for the purposes of section 328 whether the vessel carrying the goods were still on the high seas or had entered UK territorial waters, ie whether the act of importation had occurred, at the moment when the arrangements were made, save that the offence would not become complete until the goods were imported. The contrary interpretation would not accord either with a natural reading of the words used or with the obvious purpose of this section.

Did the sums received into the respondent's account constitute criminal property before being paid into those accounts?

41. Mr Talbot submitted that the money paid by the victims into the respondent's accounts was criminal property at the time of payment because it represented a chose in action, namely the obligation of the purchasers of insurance to pay the price. The fact that the contracts were procured by fraud and therefore voidable made no difference, in his submission, because the contracts were valid until avoided. This argument was first advanced in the Court of Appeal and was rejected. It appears from the judgment of the Court of Appeal that the argument presented to it was put in a slightly different form. The prosecution is recorded as having argued that B had acquired a proprietary interest in a chose in action, but the argument does not appear to have been developed as to how this fed through into the charge made against the respondent. Lloyd Jones LJ, delivering the judgment of the Court of Appeal, said that the argument did not assist the prosecution in this case because the particulars in the indictment identified the criminal property as money received into the accounts opened by the respondent. He added that the court did not consider it necessary to express a view on whether the fraud transactions may have given rise to property of another character, which he said was only touched upon and not fully argued before the court. In this court

Mr Talbot took the point that property will amount to criminal property if it constitutes "or represents" a benefit from criminal conduct; and so, if there was an underlying chose in action which the money paid into the account represented, the money paid would satisfy the definition of being criminal property.

42. That argument is sound as far as it goes, but the appellant faces a more fundamental problem in seeking to identify the alleged chose in action. POCA defines property as including a thing in action, but, if the prosecution is going to advance a case on that basis, it has to identify and prove the nature of the proprietorial right. Mr Talbot suggested initially that B had some sort of contractual right against the victims of his fraud, but any supposed contract would presumably have been between AM Insurance and the victims, and there is no evidence before the court to show what form any such putative contract may have taken. The prosecution would have to establish the existence of a prior bilateral contract (ie a contract which bound the purchaser in advance of paying the supposed premium), rather than a unilateral contract (ie an offer by AM Insurance which was available for acceptance by the would-be insured paying the premium quoted). Other questions might arise as to whether there was any legal chose in action prior to the payments made by the victims, but it is sufficient to say that there is a stark absence of material before this court to substantiate a case of the nature suggested. There may be cases properly founded on the laundering of property in the form of a chose in action, but it is not a subject with which jurors or, for that matter, judges of the Crown Court are likely to be readily familiar. If the prosecution is going to advance a case on that basis, it has not only to consider whether the case is capable of being presented in a readily comprehensible way (or whether there might be a different and simpler method of approach) but also to ensure that its tackle is properly in order. Abstract references to a chose in action, without the basis being clearly and properly identified and articulated, are a recipe for confusion.

Was the actus reus of the offence committed by reason of the arrangement facilitating the retention, use or control of the money paid into the accounts?

43. The particulars in the indictment made no reference to the acquisition of criminal property. They alleged that the respondent and another entered into or became concerned in "an arrangement which they knew or suspected would facilitate the retention, use or control of criminal property". As a matter of pleading, the Court of Appeal rightly criticised the form of the particulars for including the words "would facilitate". It should have been alleged that the defendants entered into or became concerned in an arrangement which, as they knew or suspected, facilitated the retention, use or control of criminal property (or words to that effect).

44. Looking at the substance of the matter, the money paid by the victims into the accounts was lawful money at the moment at which it was paid into those accounts. It was therefore not a case of the account holder acquiring criminal property from the victims. But by the arrangement the respondent facilitated also the retention, use and control of the money by or on behalf of B. Did the arrangement regarding the facilitation of the retention, use and control of the money fall foul of section 328 on the basis that it was criminal property at that stage, since it was the proceeds of a fraud perpetrated on the victims?

45. It was submitted on behalf of the prosecution before the Court of Appeal and in this court that in that respect the arrangement fell squarely within the ambit of section 328. The Court of Appeal treated the case as indistinguishable from *Geary* and rejected the argument. Lloyd Jones LJ said at para 39:

> "Although the arrangement particularised in count two is limited to facilitation of the retention, use and control of criminal property, facilitation of the acquisition of the money via those accounts is, on the Crown's factual case, an integral part of that arrangement. It seems to us that in these circumstances it is both artificial and illegitimate to seek to sever one element of an integral arrangement (facilitation of acquisition) in order to leave other elements (facilitation of retention, use and control) which, if considered in isolation to constitute the arrangement, would relate to criminal property. Moreover, the position cannot be improved by artificially limiting the particulars of offence alleged in count two to certain elements of the wider arrangement which the Crown maintains was in fact entered into."

46. There is an important distinction between the facts of *Geary* and the present case. In *Geary* it would indeed have been artificial to regard the property as changing its character between the defendant receiving it and repaying it. The property belonged to Harrington at all times and, more importantly, his interest in it was lawful on the facts known to the defendant. It was not a case of the defendant holding proceeds originating from a crime independent of the arrangement made between them. It was Harrington's lawfully owned property when it was paid to the defendant, and it remained his lawfully owned property throughout the time that the defendant had possession of it. It bore no criminal taint apart from the arrangement made between them. The fact that the arrangement involved a conspiracy to pervert the cause of justice did not mean that the money had a criminal quality independent of the arrangement.

47. The present case is different. The character of the money did change on being paid into the respondent's accounts. It was lawful property in the hands of the victims at the moment when they paid it into the respondent's accounts. It became criminal property in the hands of B, not by reason of the arrangement made between B and the respondent but by reason of the fact that it was obtained through fraud perpetrated on the victims. There is no artificiality in recognising that fact, and I do not see it as illegitimate to regard the respondent as participating in (or, in the language of section 328, entering into or becoming concerned in) an arrangement to retain criminal property for the benefit of another. For that reason, the ruling that the respondent had no case to answer was erroneous and this appeal should be allowed.

48. The same reasoning applies to sections 327 and 329. A thief is not guilty of acquiring criminal property by his act of stealing it from its lawful owner, but that does not prevent him from being guilty thereafter of an offence under one or other, or both, of those sections by possessing, using, concealing, transferring it and so on. The ambit of those sections is wide. However, it would be bad practice for the prosecution to add additional counts of that kind unless there is a proper public purpose in doing so, for example, because there may be doubt whether the prosecution can prove that the defendant was the thief but it can prove that he concealed what he must have known or suspected was stolen property, or because the thief's conduct involved some added criminality not just as a matter of legal definition but sufficiently distinct from the offence that the public interest would merit it being charged separately. *Brink's-Mat Ltd v Noye* [1991] 1 Bank LR 68 provides a notorious example of the laundering of the proceeds of the theft of gold bars from a warehouse, but the conduct of thieves in laundering property stolen by them would not have to be on such a grand scale to merit them being prosecuted for it.

49. The courts should be willing to use their powers to discourage inappropriate use of the provisions of POCA to prosecute conduct which is sufficiently covered by substantive offences, as they have done in relation to handling stolen property. A person who commits the offence of handling stolen property contrary to section 22 of the Theft Act 1968 is also necessarily guilty of an offence under section 329 of POCA, but the Court of Appeal has discouraged any practice of prosecuting such cases under POCA instead of charging the specific statutory offence under the Theft Act (see *R (Wilkinson) v Director of Public Prosecutions* [2006] EWHC 3012 (Admin) and *R v Rose* [2008] EWCA Crim 239, [2008] 1 WLR 2113, para 20). It is unlikely that the prosecution would fail to respect the view of the court in such a matter and it is unnecessary to consider what power the court might have in such an unlikely event. I have some doubt about the correctness of Moore-Bick LJ's obiter dictum in *Geary* that on the facts of that case the defendant could have

been charged with an offence of converting or transferring criminal property contrary to section 327, for the same reasons as I have given in differentiating that case from the present. However, the object of Moore-Bick LJ's observation was to make the broader point that it is undesirable to give a strained and unduly broad interpretation to section 328, particularly where the conduct would fall within another section of the Act, and with that broad proposition I am in full agreement.

50. The phrasing of the certified question is not entirely apt because it asks whether the arrangement to receive and retain money in a bank account can be treated as both rendering the property "criminal property" and facilitating its retention, use or control. What rendered the property which the respondent received from the victims "criminal property" was not the arrangement made between B and the respondent, but the fact that it was obtained from the victims by deception. For the reasons explained, the arrangement between B and the respondent for its retention is capable of constituting an offence under section 328.