Judgments

R v Wearing

Criminal law - Social Security - Income support - False accounting - Dishonestly failing to give prompt notification of change of circumstances - Defendant applying for income support as single parent - Investigation revealing possible co-habitation with partner - Defendant charged with false accounting and dishonestly failing to give prompt notification of change of circumstances - Prosecution alleging overpayment of £83,740 - Later finding by Social Security Appeals Tribunal that defendant not overpaid and overturning previous decision - Whether Crown Court bound by ruling of Social Security Appeals Tribunal - Whether conviction unsafe

[2011] EWCA Crim 3140, (Transcript: Wordwave International Ltd (A Merrill Communications Company))

CA, CRIMINAL DIVISION

RAFFERTY LJ DBE, MACDUFF J, JUDGE PETER JACOBS (sitting as a judge of the CACD)

17 NOVEMBER 2011

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T Parry-Jones for the Appellant

R Jones for the Crown

Registrar of Criminal Appeals; Department for Work and Pensions

RAFFERTY LJ DBE:

(reading the judgment of the court)

[1] On 17 November 2009, in the Crown Court sitting at Liverpool, the Appellant, now 53, was convicted of two counts of false accounting (counts 4 and 5), two of dishonestly failing to give prompt notification of a change of circumstance, contrary to s 111A(1A) of the Social Administration Act 1992 (counts 6 and 7) and on 16 December 2009, she was sentenced to nine months' imprisonment on each, the terms concurrent. On 8 October 2010, in confiscation proceedings, under the Criminal Justice Act 1988 and, to which we shall come in due course, properly under the Proceeds of Crime Act 2002 in relation to count 7 her benefit was fixed at £68,326.22 to be paid by 7 April 2011, six months' imprisonment in default. She was acquitted of three counts of false accounting. By leave of the Full Court she appeals against conviction and against the confiscation order.

[2] She claimed income support on 14 April 1993 as "a single parent, separated from her partner and with no income save child benefit". She was investigated when inquiries revealed her husband had a credit history at the same address. Philip Wearing was shown, with his employer and with the children's schools, as resident there. The Appellant was, with his employer, shown as his next of kin. Philip had made finance and loan applications citing their home address, some in joint names with the Appellant. Department of Work and

Pensions surveillance from 8 October to 2 November 2008 showed Philip frequently in and out of the home.

[3] The Appellant was arrested on 25 November 2008 and charged on 27 February 2009. The alleged total overpayment was £83,740.

[4] The Crown's case was that the Appellant had dishonestly falsely represented that she was separated from Philip (counts 1 to 5) and failed to declare that the two were living in a common household (count 6), or that they had received funds following the remortgage of their family home (count 7).

[5] In the contention of the Crown the Appellant and Philip remained married and lived together. It relied upon adverse inferences from her silence in interview under caution. Her case was that she and Philip did not live together albeit he visited and paid some of the household bills.

[6] The issues on counts 1 to 5 was whether she and Philip were living together. If they were, was the claim required for an accounting purpose and had the statements she had made been misleading and had she acted dishonestly? Next, had there been a material change of circumstances from those previously notified? If there were, did she know that change affected her entitlement to income support and was she dishonest when she failed to give notice of it (counts 6 and 7)?

[7] Correspondence had been sent to her when benefit amounts changed by legislation, reminding her that she was to report any change of circumstance. Against that backdrop the Crown sought to prove Philip's constant presence at their home. On 10 October his work vehicle was parked on the drive at 6.55 in the morning. A man drove it away at 7.40, returned at 6.15 and used a key to go into the house. On Sunday 12 October, at 10.00am the car was on the drive. For some five days it was not there but by 21 and 22 October it was there and driven away by the same man. On the 24th it was 6.45am and at 7.45 driven by the same man. On Monday 27th, it was on the drive at 6.38am, gone by 7.56am.

[8] The forms the Appellant had completed in 1997 did not show any change of circumstance. Philip was employed by Scottish Power and could be called out at any time. With his employer, his contact telephone number was listed at her address and was the same number she used. Philip had a dormant MBNA card registered at the Appellant's address. Insurance policies for the mortgage on the address were in joint names. His pension policy recorded his address as hers.

[9] Until 2008 she had not claimed a single person's discount in respect of her council tax. On the electoral roll, Philip declared his address as hers. Her home address had been remortgaged and the proceeds invested in the purchase and renovation of a property in Spain held in joint names.

[10] The Crown called a number of neighbours. None had ever been inside the Appellant's address nor she in theirs, but they explained the vehicles owned by the Wearings and the frequency with which they saw Philip at the address as the years ticked by. Mr Guyer said Philip lived at the address, he had been with the Appellant at local shops, he would leave from the address for work in the mornings. Mr Hughes thought them a normal happily married couple with two children. Philip's car was in the drive three or four times a week. They would shop together. They owned a caravan, albeit there was conflicting evidence over how many years ago it had been enjoyed by the Appellant. More recently they had bought a property in Majorca. Mrs Hughes saw Philip's car most days. Mr Fearns, although he did not know how often Philip was at the address, had the impression he came and went but did not live there.

[11] Interviewed under caution the Appellant declined to answer any questions. Her defence was that she

lived with her two daughters at the address and was separated from Philip from April 1993 onwards. In her evidence she added that during their marriage Philip had dealt with the finances. The marriage was not without its turbulence and she had not applied for benefits immediately after he left. She existed on money from her parents and from rent from the caravan.

[12] Philip had initially lived at his parents and then been involved in a variety of relationships. She and he did not have a good relationship and for some 12 years there was very little contact. She told the jury she had notified the Department of Health and Social Security when she became pregnant with her second child. A September 2008 accident left her reliant on crutches and Philip, as a consequence, had stayed at her address to help her out and that was during the surveillance period.

[13] The Crown's witnesses called as to surveillance had not in cross-examination been tackled on that topic. She contended that Philip's post at her address she either left in the hall unopened or, if he failed to collect it, moved to the loft bedroom. She relied on the search of the house as failing to reveal his toothbrush or any clothing belonging to him.

[14] Philip had put her under, she said, a good deal of pressure to remortgage their United Kingdom address so that he could buy a property in Spain. The house had been registered in joint names because the funds from the remortgage were paid in joint names. She thought the time would come when it would be transferred into her sole name and Philip would pay off the mortgage by way of proceeds of the sale of his father's address. She produced a letter, which she said she had written to Philip, in which she expressed concern about the security of her home address. She telephoned the Department of Work and Pensions and told someone about the remortgage and about Spain and had been reassured that they would write to her, but they never did. She denied receiving the correspondence on which the Crown relied generally, adduced by agreed evidence which was read, confirming changes in payments and reminding her of the need to notify the department of any change in her circumstances. When arrested she had been in shock. In interview, on the advice of her solicitor, she had not answered questions.

[15] Philip Wearing gave evidence on her behalf. He told the jury he did not live with her. When he did stay at her home it was in the loft bedroom. He had bought the Spanish house but mistakenly thought it had to be in joint names. He paid the household bills, the television licence and for Sky. He would visit the children and collect his post. He had a mobile telephone number for contact when on standby at work.

[16] Nicola Wearing, their daughter, said her father had not lived with them throughout Nicola's schooling; he would simple visit.

[17] Barry Smith, the Appellant's brother, told the jury he visited his sister two or three times weekly and Philip was never there. He confirmed her injury in the September 2008 accident. Brenda Fearns, a neighbour, did not think Philip lived at the address or at least had not done in the recent past. She took post for Philip to his father's address. Jacqueline Johnson, a friend of the Appellant's, never saw Philip at the address. Her impression was that he and the Appellant did not get on. Sandra Mather, a very good friend of the Appellant, had only known Philip there when the Appellant was in hospital as a consequence of the 2008 accident. Mrs Mather never saw any evidence that Philip lived there with her.

[18] In 2006 she knew Philip intended to buy a house in Majorca and the Appellant said to her that she, the Appellant, had to fly there to sign papers. On 20 September 2008 Mrs Mather could also confirm, with some confidence, that the Appellant had been on crutches because that date was Mrs Mather's birthday.

[19] Confiscation proceedings followed the conviction and were begun in November 2009. The 4 October

2010 the Social Security Appeal Tribunal, in a judgment by District Judge Newton, heard evidence from the Appellant, her brother, her daughter, two friends and neighbours and found that she had discharged the reverse burden of proof to the civil standard and established she was not cohabiting with Philip.

[20] There was an application to the Crown Court judge in Liverpool that he should adjourn the confiscation hearing. In July he agreed and put matters back to a date beyond the anticipated decision of the lower tier appeal tribunal but none was made by the expected date.

[21] The Appellant sought a second adjournment (28 days) so as to consider the evidence before the tribunal.

[22] The Crown, resisting the application, pointed out that the tribunal decision had no relevance to confiscation proceedings. At the same time the Appellant submitted to the judge that he had raised a legitimate expectation by his previous accession to the application for an adjournment.

[23] The judge made clear that it was not appropriate for him to take judicial notice of an inferior tribunal with different rules of evidence and standard of proof. Such did not create exceptional circumstance so as to postpone confiscation proceedings. He had allowed in July proceedings to be adjourned to see the result of the tribunal and so that skeleton arguments could be lodged, so as to indicate what, if any, relevance those proceedings might have to confiscation. He had never expressed the view that a favourable tribunal decision would result in his setting aside the confiscation order. The Appellant had been convicted by a jury and the court was bound by its verdict.

[24] The provisions of the Criminal Justice Act 1988 as to confiscation proceedings required a conviction and there was no provision they should not proceed if there were a finding by a tribunal. Mr Parry-Jones, who appears for the Appellant today, has reminded us that the old law under the Criminal Justice Act 1988 applied to all counts upon which a conviction sounded save count 7, which was caught by the provision of the Proceeds of Crime Act 2002, a distinction upon which the judge was not addressed. The new Act imposed upon him a duty in confiscation proceedings, the old extended to him a discretion.

[25] In an application on 8 October 2010 the Appellant submitted that as a consequence of the tribunal's decision and the judge's refusal to adjourn confiscations to await it, an abuse of process had occurred when the confiscation proceedings had continued. The judge ruled that the court had jurisdiction as was a consequence of the conviction. A decision to adjourn in July on the basis that the matter might receive further consideration did set up any material expectation. There was no reason for further delay. He refused the application.

[26] On 8 October 2010, in confiscation proceedings, it was argued, in reliance on the decision of the lower tribunal, that the Appellant had not received any benefit to which she was not entitled. The Crown argued that she had indeed benefited, having by now refined the sum to £68,326.22.

[27] Mr Parry-Jones relies on the fact that four days after the Appellant had been informed by letter that she had not been overpaid and there would be no recovery sought by the Department of Work and Pensions as a consequence of District Judge Newton's 4 October 2010 ruling, the same department before the Crown Court sitting at Liverpool pursued her in confiscation proceedings. The District Judge had ruled that the Appellant had not been overpaid, found as a fact that she was not cohabiting in contravention of Social Security guidelines and overturned decisions of 21 January 2009 and of 28 January 2009.

[28] In the Crown Court in confiscation proceedings the judge found as a fact that the calculation of the figure was accurate and rejected the argument that any remortgage meant that in no real sense had the Appellant benefited. Where her conviction in a trial could not be criticised and since she had not appealed the conviction, the tribunal decision was of no relevance. Nothing prevented his making the order, nor persuaded him to exercise any discretion not to make it. He considered the Human Rights Act and proportionality and found the making of the order did not give rise to any breach. The benefit figure was as we have rehearsed and her interests in her United Kingdom address and the Spanish property exceeded it. Accordingly in that sum he made an order.

[29] In Grounds of Appeal composed by Mr Parry-Jones the complaint is that in the light of the findings of District Judge Newton and the Social Security Appeals Tribunal on 4 October that there had been no cohabitation and no overpayment, the prosecution, had such been known, would not have been commenced in the Crown Court. By reason of the delay in hearing the appeal the Appellant was denied an appropriate determination and there exist two decisions in relation to entitlement and overpayment, that of the jury and the judge and that of the lower tribunal, and both cannot be sustained. They are oppositional. It follows that the conviction is unsafe.

[30] Mr Parry-Jones sensibly pursues that argument with the lightest of light touches. The thrust of his submission is as to confiscation.

[31] In written grounds he complains the court should have permitted an adjournment so as to enable the advancement of a proper argument and as a consequence of the decision of the tribunal judge the Crown should have been estopped in pursuing confiscation since the Department must be bound by the decision of the tribunal save that there existed a right of appeal. The Department, on the one hand, does not seek recovery of the sum and does not now suggest there is overpayment but the very same department, instructed the Crown to pursue confiscation proceedings. It cannot be right.

[32] The Crown contends that the prosecution would have commenced in any event. The Crown doubtless would have considered any tribunal decision but that would never have bound it, not least because it would have been entitled to reflect whether it might be argued to be perverse or unreasonable. It followed that the delay in the hearing of the appeal tribunal was of no relevance to this case. In any event, the Appellant had given evidence to the tribunal and close examination of it might well have led to the conclusion that it differed from that she had given to the jury. As to confiscation, the judge had no grounds to adjourn proceedings. The first adjournment had been so as to allow the Appellant to consider the amount of overpayment constituting the benefit figure. It could not follow that the Crown was estopped from seeking confiscation.

[33] We agree. This trial was conducted to the criminal standard, so that a jury had before it could convict if it were sure. Nothing less would do. There is, and there could not be any criticism of the trial, which as one would expect was conducted with scrupulous balance and fairness.

[34] It is surprising to hear it suggested that the brief judgment of District Judge Newton in a lower tier tribunal could be thought, binding on a superior court of record. Indeed arguably to the detriment of the Appellant, who was at risk of the contrast being pointed out to a jury.

[35] Grateful as we are to Mr Parry-Jones for the commendable reality in which he approached matters today, there is nothing in either of these points and this appeal is dismissed.

Appeal dismissed.