



In The Supreme Court of Bermuda
CRIMINAL JURISDICTION
22CR00408

BETWEEN:

THE KING

-and-

MARCAL BURROWS

Before: The Hon. Mr. Justice Juan P. Wolffe, Puisne Judge

Appearances: Mr. Alan Richards for the Prosecution
 Mr. Marc Daniels for the Defendant

Date of Hearing(s): 19th August 2024 & 4th September 2024

Date of Sentence: 20th September 2024

SENTENCE

Assisting Another to Retain Criminal Property – Section 44(1)(c) of the Proceeds of Crime Act 1997

WOLFFE J:

1. On the 27th May 2024 the Defendant, after a fully ventilated trial, was found guilty by Magistrate Craig Attridge for the offence of assisting another to retain criminal property, contrary to section 44(1)(c) of the Proceeds of Crime Act 1997 (“POCA”). In particular,

that between the 1st August 2021 and the 14th December 2021 he became concerned in an arrangement which he knew or suspected facilitated the use of criminal property, namely money, by and on behalf of another person.

2. From the Magistrate's written Judgment dated the 27th May 2024 it can be distilled that during the trial the Court heard and reviewed evidence (by way of oral testimony and Agreed Facts) from several prosecution witnesses who stated that they were scammed or duped by others (who were not before the Court) into "investing" various sums of money. They were directed to pay their monies into a Bermuda based HSBC account which undisputedly had been opened by the Defendant and it was their understanding that they would receive a sizeable return on their investments. However, they did not receive any returns on their investments whatsoever despite extensive communication and pleading with those other persons for their monies.
3. The Defendant elected to give evidence at trial and he stated that at the material time he had an account with the Bank of Butterfield but that he opened the said HSBC account because he wanted another account to put a little bit of extra money into it. The Defendant said that he too, like the duped Prosecution witnesses, invested some money with the same persons in the hopes of also receiving an attractive return. He said that it was the first time that he done an investment and that he did not know the names or addresses of the persons to whom he was sending money to via MoneyGram and Western Union but that he believed that he was sending money to Jamaica. The Defendant went on to say that even after he was not receiving any returns on his investment he still continued to send money to Jamaica.
4. The Court heard that the Defendant sent two of his HSBC bank cards (which were attached to his HSBC account) to Jamaica on two separate occasions. The Defendant said in evidence that he did so because "they" told him that in order to get his money back then they were going to put it through his HSBC account. He added that he sent one of the bank cards secreted in a magazine but, he said, he never really checked his account and did not know whether he eventually received any money into his account. He stated that he never

received the first bank card back because “they” told him that they had lost it. So, he applied for a new bank card and sent it to Jamaica because they said that they would put his money on the card. He was skeptical that this would occur but he was desperate and so he did as “they” asked.

5. The Defendant also gave evidence that he knew nothing about the other Prosecution witnesses who said that they were scammed, and nor was he aware of any withdrawals being made from his bank account. He did say however, that before he sent the second card to Jamaica that he realized the scheme was a scam.
6. In his Judgment the Magistrate stated that the primary issue at trial was whether the Prosecution proved beyond a reasonable doubt that the Defendant permitted his bank account to be used “as a conduit through which monies were clearly being moved out of Bermuda, knowing or suspecting that the monies constituted or represented a person’s, or persons’, benefit from criminal conduct” (see paragraph 99 of the Judgment). To this, and “adopting” the submissions of Crown Counsel (see paragraph 106 of the Judgment), the Magistrate concluded that:
 - (i) It could be inferred from the totality of the evidence that the Defendant was at least suspicious that the sum of \$18,600 which flowed through his account was the proceeds of crime, and that on occasions the Defendant appeared to admit being suspicious.
 - (ii) There was a pattern of cash withdrawals in Jamaica of funds deposited into the Defendant’s bank account, and prior to that there was no evidence of any use of the bank cards in Bermuda.
 - (iii) The Defendant sent two debit card to an address in Jamaica on two separate occasions and before doing so he sent someone a photograph of the cards and the PIN so that they may perform purchases and/or ATM withdrawals from the Defendant’s bank account.

- (iv) There was no record of any travel for the Defendant during the material time and so it could be inferred that the cash withdrawals in Jamaica were not carried out by the Defendant.
- (v) The Defendant's evidence that he sent the debit cards in order to facilitate the repayment to him of monies that he says was obtained by deception was "deeply incredible". Primarily because (a) the Defendant did not check the account to see if the amounts he says were owed to him were even deposited into his account; and (b) it beggars belief that the Defendant, who says he was owed \$10,000, would wait from February until September for repayment but then send a second card overseas to Jamaica in the hope that this would facilitate reimbursement.
- (vi) The evidence clearly established that the Defendant played a crucial role in a scheme operated by fraudsters to remove the proceeds of fraud from Bermuda via his bank account.
- (vii) The Defendant "facilitated the acquisition, retention, use or control of the monies on the fraudsters behalf, and that his protestations of ignorance and/or naivety are so extreme and/or inconsistent with the documentary evidence as to be unworthy of belief" (see paragraph 15 of the Prosecution's submissions).

Sentencing Guidelines

7. The Defendant was tried and convicted in the Magistrates' Court but the matter was sent to the Supreme Court pursuant to section 43 of the Criminal Jurisdiction and Procedure Act 2015 ("CJPA"). Section 43 of the CJPA is usually invoked where it is deemed by the Court that the circumstances of the offence are so serious that the Supreme Court should, for the purpose of sentencing, deal with the Defendant as if he was convicted on indictment. However, there was an agreement by Counsel that since the Prosecution were also making

any application for a confiscation order under section 9 of POCA, which can only be heard in the Supreme Court, that the sentencing of the Defendant should in tandem also be heard in the Supreme Court. Mr. Alan Richards for the Prosecution stated though that the Prosecution was not seeking a sentence that exceeded the maximum available to the Magistrates' Court.

8. With this in mind, section 48(2) of POCA provides that on summary conviction that the maximum sentence for the offence for which the Defendant has been convicted is one of five (5) years imprisonment and/or a fine of \$50,000.
9. Mr. Richards submitted that in consideration of several Supreme Court and Magistrates' Court authorities, in which the money laundering related offenders were sentenced after a guilty plea or after a trial, that the appropriate sentence in this case should be one of eight (8) months imprisonment.
10. Mr. Marc Daniels, on behalf of the Defendant, submitted that any term of imprisonment imposed should be suspended in whole or in part as there are "good reasons" for doing so.

Decision

11. In terms of any mitigation the Defendant obviously cannot enjoy the benefit of any discount which he may have received had he pleaded guilty. However, in the absence of any previous convictions put before me, I will take into consideration his erstwhile good character which is reflected in his several character references. I further have regard to the purpose and principles of sentencing set out in sections 53 to 55 of the Criminal Code Act 1907.
12. In his submissions Mr. Daniels urged me to take into consideration the following:
 - The Defendant was not the orchestrator or mastermind of the scheme to defraud unsuspecting investors, and that he was immature and naïve.

- A lot of other persons (including doctors) were also scammed into investing large sums of money in the fraudulent scheme of the persons not before the Court, and that the Defendant was equally deceived.
 - The Defendant did not communicate with any of the victims and he did not access his HSBC account to withdraw monies.
 - The Defendant was only trying to get his money back, was not being dishonest, and that this was not a run-of-the-mill deception case.
 - The circumstances of this case are less serious than the cases cited by the Prosecution which involved drug related offences.
 - The Social Inquiry Report dated 1st July 2024 (“SIR”) indicates that the Defendant’s present level of risk and need for rehabilitative services is deemed to be “very low”.
 - There are “good reasons” for any sentence of imprisonment to be suspended, such as: the Defendant is hard working, gainfully employed and has just been promoted; the deteriorated health of his father who cannot now work; a mortgage still has to be paid at \$6,000 per month; a material change in circumstances since the date of conviction; and, his mother being made redundant.
 - Justice can be obtained by way of the requested confiscation order rather than imprisonment.
13. What stood out to me, and it was obvious in his scant allocutus and in the SIR, is the Defendant’s glaring lack of regret or remorse for what he did and his continued portrayal of himself as a victim. In the SIR he stridently maintained his innocence and he seems to

have convinced his father and mother that he is the innocent one and that he was the victim of a professional scam. It is still his dogged position to not accept responsibility for his criminal actions even after a full trial in which multiple witness were called upon to give oral testimony and after the Magistrate having roundly rejected the Defendant's defence.

14. This leads me to my next point. I decline to take into serious consideration any submissions that the Defendant was somehow duped or that he was naive. Firstly, the Magistrate already found that he was not duped. Secondly, the Magistrate found that the Defendant "facilitated the acquisition, retention, use or control of the monies on the fraudsters behalf, and that his protestations of ignorance and/or naivety are so extreme and/or inconsistent with the documentary evidence as to be unworthy of belief". To now seek to convince me at his sentencing that he was duped, naïve or immature is a non-starter and in any event futile.
15. Moreover, the fact that others were also defrauded is not a mitigating feature. Indeed, this only compounds the serious nature of the Defendant's conduct. The fact that multiple other persons were fooled into placing their monies into the Defendant's bank account on separate occasions over a four (4) month period is actually an aggravating factor in this matter. The Defendant cannot escape the stark reality that he allowed his bank account to be used an integral vehicle to deceive unsuspecting members of the public.
16. I also find that the circumstances of this case are as serious as or even more serious than the drug related matters cited by the Prosecution. It can be argued that the drug offences were victimless crimes, but through the offending conduct of the Defendant actual victims were deceived into parting ways with their money (which may have been hard earned). The Defendant and his unknown cronies exploited the understandable desire of their victims to improve their lot in life and quite frankly this is reprehensible.
17. In respect of whether there are any good reasons to suspend any period of imprisonment I find that there are none. This Court must steel itself away from reducing sentences based on the predicament of any offender's family members should the offender be incarcerated.

Indeed, offenders should think about any effects which their criminal conduct may have on others before venturing down the road of criminality. If they do so then maybe they would be deterred from offending in the first place. To be clear, there is scope for the Court to consider whether an offender will be leaving behind children who may be dependent on the offender and possibly factor this into any sentence which may be imposed. However, in this case, the Defendant's mother and father are grown adults and I am not satisfied that they rely significantly on him for their welfare (financial or otherwise).

18. Having said all this, I will take into consideration in the Defendant's favour that there does not appear to be any evidence that the Defendant was the primary architect of the fraudulent scheme. He played a vital part because were it not for his HSBC bank account the monies would not have flowed from the hands of the victims and into the hands of those who probably were the main players. However, there was no evidence before me to suggest that he accessed or substantially used the monies that were put into his bank account.

Conclusion

19. It is imperative that the Court sends an unequivocal message to offenders like the Defendant that their behavior cannot and will not be tolerated. Preying upon the hopes and dreams of others to improve their financial circumstances is unforgivable and should be dealt with seriously by the Courts. The Defendant may not have been a major player in this deceitful enterprise but he was a pivotal link. But for allowing others to use his bank account to funnel ill-gotten gains members of this community may not have been victimized.
20. Moreover, while the making of a confiscation order may provide some financial solace for the Defendant's victims there probably is nothing that can fully or at all repair the mistrust that they may have for financial institutions or for people in general.
21. In the circumstances, I sentence the Defendant as follows:

- (i) Six (6) months imprisonment.
- (ii) A Confiscation Order is granted pursuant to section 9 of POCA for the sum of \$18,600.

Dated the 20th day of September, 2024



The Hon. Mr. Justice Juan P. Wolffe
Judge of the Supreme Court of Bermuda