IN THE COURT OF APPEAL

CRIMINAL DIVISION

**[2020] EWCA Crim 1009**

No. 201903185 B1

Royal Courts of Justice

Tuesday, 19 May 2020

Before:

LORD JUSTICE POPPLEWELL
MR JUSTICE GOOSE
MR JUSTICE HILLIARD

REGINA
V
GEORGE TWUM-BARIMA

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MR B. V. O'TOOLE appeared on behalf of the Appellant.

MR R. MILNE appeared on behalf of the Crown.

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**J U D G M E N T**

**NOTE – THE RETRIAL IN THIS CASE HAS NOW TAKEN PLACE. ACCORDINGLY THIS JUDGMENT IS NO LONGER SUBJECT TO REPORTING RESTRICTIONS PURSUANT TO S.4(2) CONTEMPT OF COURT ACT 1981. IT REMAINS THE RESPONSIBILITY OF THE PERSON INTENDING TO SHARE THIS JUDGMENT TO ENSURE THAT NO OTHER RESTRICTIONS APPLY, IN PARTICULAR THOSE RESTRICTIONS THAT RELATE TO THE IDENTIFICATION OF INDIVIDUALS.**

LORD JUSTICE POPPLEWELL:

1 On 30 July 2019 in the Crown Court at Woolwich before his Honour Judge Shorrock and a jury, the appellant was convicted of transferring or converting criminal property contrary to section 327 of the Proceeds of Crime Act 2002. He appeals against conviction with leave of the single judge. He was one of eight defendants each charged with the same offence and was represented at trial by Mr O'Toole, who has also appeared before us. Four of his seven co-accused were also convicted. Amongst the three acquitted was Marco Crooks, whose position was of some importance in the appellant's case.

**The facts**

2 The prosecution arose out of a fraud perpetrated on a church between 30 October and 12 November 2014 whereby the treasurer was persuaded, through fraudulent emails, to transfer a total of £98,550 to various bank accounts. The money was then laundered through the bank accounts of the eight defendants at trial. £39,900 of the proceeds of the fraud were received into bank accounts in the name of Crooks in three payments between 31 October and 7 November 2014. Of this a total of £12,400 was paid into the appellant's bank account in four payments between 6 and 10 November 2014. £10,200 of this £12,400 was transferred out of the appellant's account in three on-line transfers: £4,500 was transferred from his account on 6 November 2014 to an account associated with the co-defendant Andrews and two transfers were made of £700 and £5,000 on 7 and 10 November respectively to an account associated with the co-defendant Lodge. The other £2 200 of the £12,400 received from Crooks into the appellant's account was not transferred out but remained as a permanent benefit to this appellant as the account holder. The effect at the time was to turn what was an overdraft of a little under £2,000 into a credit balance of some £300. Between 10 and 14 November, £1,061 was withdrawn from the account in cash from ATMs.

3 It was not suggested that the appellant, or indeed any of the other defendants, was responsible for the original fraud on the church. Each was charged with money laundering the proceeds of crime. Although there was originally an additional charge of conspiracy, the counts were ultimately pursued individually against each defendant as separate substantive offences.

4 The prosecution case against the appellant relied on the following features of the evidence. First, the movements of the money through his account - large sums for a student on a student loan - and the improbability of the defence put forward by the appellant in interview and maintained in his evidence at trial that he was unaware of any of the transfers in or out, that he did not notice that the money left in his account had turned his overdraft of a little under £2,000 into a credit balance of £300 and that he knew nothing of the withdrawal of more than a thousand pounds in cash at the ATMs, despite not having lent his bank card to anyone. Secondly, the prosecution relied on the transfers from the appellant’s account to accounts associated with Andrews and Lodge against whom there was other evidence that they knew or suspected that they were the proceeds of crime. Thirdly, there was no evidence that anyone else had access to the appellant’s bank account, the appellant's evidence being that no-one else had his password for online transfers and the unchallenged

police evidence being that the devices he used to access his account, namely his iPad, mobile phone and laptop, showed no trace of anyone having hacked into them when they were examined. Fourthly, there were entries on his mobile phone which suggested contact with Andrews who was the ultimate recipient of a large portion of the money traceable back to the fraud on the church. Fifthly, there were messages on the appellant's mobile phone with Crooks in March 2016, together with messages with his housemate O'Keefe, at the time when Crooks was due to be interviewed by the police. Those messages were to be interpreted, the prosecution suggested, as expressing concern, and were to be explained by a concern on the appellant's part that Crooks might say something to the police which implicated the appellant. There was also evidence of calls from the appellant to Crooks and to Andrews on the day in September 2015, some six months earlier, when there was to be, and was, an attempt to arrest Crooks. A similar motive was attributed by the prosecution to those calls in September 2015 with Crooks and Andrews. Sixthly, there were contact details on his mobile for a co-defendant, Stephenson, who the appellant said he did not know, but whose account had in fact been being used by Andrews; the prosecution pointed to what it said was the improbability of the appellant's explanation that it was in order that he could send his CV to this unknown third party at Andrews' request. Seventhly the prosecution place reliance on Crooks' account in evidence, denied by the appellant, that in September 2015 Crooks had called the appellant because he thought Andrews might have been responsible for the misuse of his, Crooks', account and was thereafter told by the appellant that he, the appellant, had phoned Andrews who had assured him it was nothing to do with him. Crooks' evidence was that the appellant did his best to reassure Crooks that he should accept Andrews' denials, which Crooks doubted.

5 The defence case and the appellant's evidence was that he had no knowledge of the transfers in question into or out of his account. He was at the time a student living in a rented shared house in Bournemouth where others would have had access to his devices. He met Crooks when he was at university and met Andrews while he was a waiter during the same period. He accepted that he introduced Andrews to Crooks and that he had provided Andrews with details of both of their bank accounts. He did not know that his bank account was being used to launder stolen money and he did not receive payment for knowingly allowing it to happen. He did not notice these transfers which went into and out of his account because he did not receive bank statements and he only checked his account occasionally.

6 Expert evidence was adduced on behalf of the appellant from a computer specialist on the question of hacking into computers and mobile phones. The expert had not examined any of the appellant's devices and did not challenge the conclusions of the police officers who had examined them that they had not been hacked into. However, he identified methods of hacking in (jailbreaking or keylogging) which would enable someone to use the device without the appellant's knowledge and which might not be evident on subsequent examination. He also testified that the bank cards used to make the cash withdrawals from the ATMs could have been cloned.

**The course of the trial**

7 After the conclusion of evidence at the trial, the judge was due to discuss legal directions with counsel on 18 July 2019 before final speeches commenced the following day. Mr O'Toole was not in court on that occasion. With his client's and the court's consent, he was released to fulfil a professional commitment in a Family Court hearing elsewhere, which, as matters turned out, took longer than he had anticipated. Counsel for one of the co-defendants had agreed to look after the appellant's interests in his absence in the discussion that was to take place about legal directions.

8 Prior to the discourse between counsel and the court on legal directions there was a brief

exchange about the length of final speeches. Prosecuting counsel, Mr Milne, indicated that he thought two hours would suffice for his speech and the judge said two and a half hours was permissible. The judge went on to say:

> "I would hope that counsel as experienced and competent as those who defend in this case are not going to need more than an hour. Does anyone disagree with that?"

One counsel indicated that he had been planning to take a day, but would reduce it to an hour on that basis. No other counsel raised disagreement and the dialogue moved to other questions of timing in relation to proceedings the following day and then legal directions. Mr O'Toole took steps to inform himself about the legal directions which had been decided upon in his absence, by having discussions with several of the other counsel who had been present. He was not, however told of the exchange about the time to be taken on defence speeches. He had no reason to suspect that there had been any limit imposed because it had not been canvassed before then as a possibility, nor had the length of speeches been identified as something which was going to be discussed on 18 July when he was to be absent.

9 Mr O'Toole commenced his final speech, which was the fourth given on behalf of the defendants, a little before 11.45 on the morning of 22 July. It followed the speech by a counsel for the co-defendant, Lodge, Miss Crillion, who took 69 minutes and who was reminded by the judge towards the end of it that the she had exceeded the one hour allowed and should conclude it, which she did. At about 12.47 there was the following exchange:

> "THE JUDGE: Mr O'Toole, you have been going an hour. I wonder if you would draw your address to its conclusion. Thank you.
>
> MR O'TOOLE: Can I have ten minutes?
>
> THE JUDGE: No. Everybody was given an hour you have had yours. Please draw your address to its conclusion.
>
> MR O'TOOLE: Well, members of the jury, let us go on to the interviews.
>
> THE JUDGE: Mr O'Toole, did you hear what I said?
>
> MR O'TOOLE: I'm sorry. I thought your Honour (inaudible).
>
> THE JUDGE: Did you hear what I said?
>
> MR O'TOOLE: Yes, I-- Forgive me-- I--
>
> THE JUDGE: Right. Then would you please bring your address to a conclusion. Members of the jury, before speeches started, the Bar and the Bench discussed the matter. Mr Milne was given two and a half hours in which to address you. As you will recall, he managed it in two. I took the view, having discussed it with counsel, that one hour per defendant was more than adequate. As you recall, when Miss Crillion came to the end of her hour, I invited her to bring her speech to a conclusion. She did so. Mr O'Toole has had his hour and that is why I invited him to sit down.

MR O'TOOLE: May I in drawing to a conclusion—

THE JUDGE: Yes.

MR O'TOOLE: May I have a minute or two to—

THE JUDGE: Another minute you may have, certainly."

10 Mr O'Toole then continued for what appears from the transcript to have been about a minute and a half when the judge again intervened.

THE JUDGE: Mr O'Toole, you are making no effort to bring this speech to a conclusion.

MR O'TOOLE: I am.

THE JUDGE: I do not take kindly to barristers who ignore what I say. Five past two, members of the jury."

The judge then immediately stood up and walked out of court, leaving the jury and counsel in court.

11 After the luncheon adjournment and before the jury were brought back into court the following exchange occurred:

"MR O'TOOLE: Your Honour, it is just to say that I am sorry that I overshot. I was not here when the direction was made about it and I am afraid I had not realised. I have to concede that when Ms Crillion was just in court your Honour did give an indication then. I should perhaps have picked that up at that stage. But I had not realised before. I did not prepare on the basis of only one hour. I do say that is not unreasonable. That is how this came about and I was not intending to trespass beyond the time allowed.

THE JUDGE: Right. Well, there we are. As you know I am a great believer in the old adage "least said, soonest mended" so we will take the matter no further.

MR O'TOOLE: Your Honour, is that the end of my address?

THE JUDGE: Yes... We will now pass on to the case of Mr Agaruru."

12 In this court Mr O'Toole has not suggested that there is anything wrong in principle with a judge limiting the length of final speeches or that this was a case in which it was wrong of the judge to seek to impose some limit or guidance. He is right not to have done so. Rule 3.11 (d) (ii) of the Criminal Procedure Rules 2015 gives the trial judge power to limit the duration of any stage of the hearing. In the Review of Efficiency in Criminal Proceedings in 2015, the Right Honourable Sir Brian Leveson, then President of the Queen's Bench Division, stated at paragraph 281:

> "Robust case management at all stages is absolutely essential and can be conducted without justifiably giving rise to any criticism of unfairness either to the parties or to the process. This relates to the need to call witnesses, the extent of the evidence to be obtained through each witness and cross-examination, as well as to speeches of all parties. A change of culture, so as to use the Criminal Procedure Rules to ensure that trials proceed expeditiously and commensurately with the issues in the case is essential. Trial judges should approach each case with these principles in mind and actively manage the case accordingly. The Court of Appeal Criminal Division should support the judges in this endeavour."

13 We would be the first to support judges in encouraging them to engage in efficient and robust case management for the reasons given by Sir Brian Leveson, and this can of course quite properly involve placing a limit on the length of closing speeches. Counsel must comply with the time guidance which judges give in the exercise of these powers.

14 Mr O'Toole submits, however, that in the particular circumstances of this case there was unfairness and prejudice. He submits that had he been aware of the intention to impose a limit on 18 July and been present, he would then have asked at that time for at least an hour and 20 minutes for his speech and that such a period would have been justified by the fact that the defence case for this defendant occupied a greater share of the trial time than that of others and had to deal with more of the Crown's evidence than was required of any of the other defendants. He submits, moreover, that no time would have been lost had the judge acceded to his request at 12.47 for an extra 10 minutes or so which would have involved finishing before or at about 1.00 pm when the luncheon adjournment would have been taken. He submits that the judge was wrong to deny that time to him in circumstances in which there were understandable reasons for his being unaware of what the judge had said about taking an hour when preparing his final speech. The judge, he submits, ought to have inquired and discovered that he had been unaware until shortly before the exchange took place of any limit or time guidance in relation to timing of defence speeches.

15 Mr. O'Toole goes on to submit that his client was unfairly prejudiced by his inability to cover the remaining matters which he wished to address in his final speech which included a number of important points upon behalf of his client. He also submits that the judge's criticism of him in front of the jury was likely to be prejudicial to his client's case in suggesting that he had knowingly defied a judicial direction. Moreover, he submits, it was in that respect not only damaging to the appellant in the eyes of the jury but also an unfair criticism.

16 We see considerable force in these submissions. The judge had not in fact on 18 July made clear that he intended to impose a strict guillotine after an hour as an absolute maximum for defence speeches and had indeed allowed counsel for Lodge, in her immediately preceding speech, to take 69 minutes. Even if Mr O'Toole had been aware of what happened in court on 18 July there was no good reason for refusing him an additional ten minutes or so and giving him the opportunity to take up until the luncheon adjournment. It would not have delayed the trial to any significant extent. Apart from Miss Crillion, none of the other defendants had needed nearly as much as an hour for their speeches and the speeches which followed also took well under an hour for the other defendants. There was therefore no great pressure of time and there was no danger of a total of eight hours being exceeded, or anything like it, for the totality of the speeches on behalf of the defendants. Mr O'Toole's request for an additional ten minutes was not a deliberate flouting of the judge's general

indication on 18 July that an hour should be sufficient, of which he was in any event unaware, and for the judge to criticise him in the terms which he did before the jury was likely to prejudice the appellant's case in their eyes. The criticism would have seemed all the more pointed by the judge peremptorily getting up and leaving court rather than following the usual and desirable practice of releasing the jury first.

17 In the particular circumstances of this case we have little hesitation in saying that this ill-tempered refusal to allow defence counsel time to complete his speech was unjustified and unfair to the appellant.

18 The question therefore arises as to whether this renders the appellant's conviction unsafe. There was a very strong case against him. On the other hand, it is clear from the notes of Mr O'Toole's speech which are reproduced as Appendix 3 to the Grounds of Appeal, that Mr O'Toole was prevented from dealing with a number of matters which he regarded as of importance to the appellant's defence. There were five matters identified in particular. First, he had yet to deal with the circumstances of the attempted arrest of Crooks in September 2015 and his interview in March 2016 and the communications which the appellant had with Crooks, Andrews and O'Keefe at those times on which the prosecution relied in the way identified above. Secondly, he had yet to deal with a piece of evidence from Crooks which had first emerged at trial and was inconsistent with Crooks' defence statement that in September 2014, not long before the transfers, the appellant and Crooks and Andrews had all three met in Croydon and that on this occasion Crooks had passed his bank card details to Andrews in the appellant's presence. As the judge observed in summing-up, Crooks' account of this incident was one which may have left the impression that he was tricked into allowing others to manipulate his bank account and that such manipulation may have involved this appellant as well as Andrews. The appellant's evidence had been that he did not recall any such meeting and Mr O'Toole wished to make the point that given the late emergence of Crooks' account it was doubtful that the appellant was there and this was Crooks seeking to exculpate himself by shifting the blame to others, including the appellant. The judge recognised that the evidence of the meeting could be treated by the jury as damaging to the appellant's case. In relation to this incident the judge gave the standard warning in his summing-up about the need for caution where one defendant's exculpatory evidence blames a co-defendant. Thirdly, Mr O'Toole had yet to deal with the appellant's relationship with Andrews or the existence of Stephenson's contact details in his phone upon which the prosecution relied in the way identified above. Fourthly, he had yet to deal with the expert evidence and to make the point that there was no expert evidence from the prosecution that the electronic devices could not have been hacked but that there was expert evidence from the defence as to how, in theory, that could have occurred. Fifthly, he wanted to reiterate the appellant's previous good character and draw attention to the character witness evidence which had been given on his behalf, although he had touched on that in the earlier stages of his speech.

19 In his summing-up the judge covered the evidence on some of these points and he did so in an even-handed way. There is no ground for criticism of him on that score. However, that is not in our view sufficient to cure the unfairness involved in preventing Mr O'Toole from completing his speech. The summing-up by the judge performs a different function from that of a closing speech by counsel for the defence, in which the powers of advocacy are deployed to seek to persuade the jury to view the evidence favourably from the defendant's point of view and to provide a counterbalance to the advocacy adopted by the prosecution in its final speech.

20 We are unable to say that the points which Mr O'Toole was prevented from making might not have had a material impact on the jury's deliberations, particularly in the light of their

acquittal of Crooks. We also have in mind the prejudicial effect of the way in which the judge dealt with the position.

21 We have therefore concluded that despite this being a strong case, the course which the judge took in preventing Mr O'Toole from completing his final speech does undermine the safety of the appellant's conviction. Accordingly, the appeal is allowed and the conviction quashed.

Mr Milne, do you have any instructions in relation to the question of a re-trial?

MR MILNE: My Lord, yes, I do. The Crown will seek a retrial of Mr Twum-Barima.
MR JUSTICE POPPLEWELL: It will seek a retrial?
MR MILNE: Will seek a retrial, yes.
MR JUSTICE POPPLEWELL: Mr O'Toole, do you want to say anything about that?
MR O'TOOLE: My Lord, Mr Twum-Barima has served part of his sentence. He is on a suspended sentence of six months two years which is running. He has completed his community work and he has paid the statutory surcharge. It is a matter for the Crown what they wish to do. My submission would be that this is a very old matter now. We have been through five weeks effectively of trial process. It goes back to November 2014. I do wonder whether it is appropriate but I can say no more than that.
MR JUSTICE POPPLEWELL: Mr Milne, do you want to say anything further on that?
MR MILNE: My Lord, without going through all of the effects on the church as well as the devastating effect on (inaudible) unable to carry out many of their functions made clear at the trial itself in evidence, in my submission this was a serious case. The victim was a particularly vulnerable (inaudible) defrauded of a considerable amount of money, effectively all the money they had, and in my submission it is in the public interest, generally speaking, that those who perpetrated, or are suspected of perpetrating, should at least face trial. Those are my submissions on behalf of the Crown.
MR JUSTICE POPPLEWELL: Thank you. We will rise briefly.

**L A T E R**

MR JUSTICE POPPLEWELL: We will allow the appeal. We will quash the conviction on count 8 of the indictment, which is the count charging breach of section 327 of the Proceeds of Crime Act 2002. We will order a retrial on that count for that offence and we direct that a fresh indictment is to be proffered and served in accordance with Criminal Procedure Rules 10.82. That must take place within 28 days. The appellant is to be re-arraigned on the fresh indictment within two months. We make no direction as to where the trial should take place, other than that we say that the venue should be determined by one of the presiding judges for the south eastern circuit or. The appellant will remain on bail unless there is an objection from the Crown - unconditional bail - pending the retrial.

Is there any objection to that, Mr Milne?
MR MILNE: No objection. I do not know if your Lordship was going on to deal with reporting.

MR JUSTICE POPPLEWELL: Yes. There will be an order under section 4(2) of the Contempt of Court Act 1981 which restricts reporting of the proceedings until after the conclusion of the retrial. It will cease to have effect once the retrial is concluded or has been abandoned, and it is made for the purposes of ensuring that the jury are not prejudiced in the course of that retrial by learning of the matters that we have dealt with in this judgment or in the previous proceedings.

Mr Milne and Mr O'Toole, thank you very much for your help. Unless there is anything

further?
MR MILNE: No. Thank you very much, your Lordships.

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