[2020] JMCA Crim 44

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 17/2018

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE PUSEY JA (AG)

DEMETRI HEMMINGS v R

Mrs Carolyn Reid-Cameron QC, Chukwuemeka Cameron and Isat Buchanan for the appellant

Miss Paula Llewelyn QC, Mrs Christine Johnson-Spence and Miss Sophia Rowe for the Crown

22, 23 November, 14 December 2018 and 13 November 2020

PUSEY JA (AG)

[1] The Law Reform (Fraudulent Transactions) (Special Provisions) Act, 2013 ('the Act'), despite its unwieldy name, is an important recent addition to our criminal law. The Act is primarily aimed at dealing with modern advance fee frauds which are often carried out by electronic communications.

[2] On 22 July 2014, the police entered the house of the appellant and his co-accused armed with a search warrant. An officer found an Apple iPad in a pink case on the bedside

table. The female co-accused said to the policeman, "Officer, ah mi tablet weh mi buy fi mi work purpose". The iPad was examined by Sergeant Kevin Watson, an officer trained in cyber-crime investigations and, on his advice, the two persons were taken into custody.

[3] The iPad was taken away for forensic examination and the appellant and his co-accused were arrested and charged for a breach of the Act. They were eventually indicted for a breach of section 10(1) of the Act. Section 10 of the Act provides as follows:

> "10.-(1) A person commits an offence where that person knowingly obtains or possesses identity information of any other person in circumstances which give rise to a reasonable inference that the information has been used or is intended to be used to commit an offence under this Act or any other law.
>
> (2) A person commits an offence where that person transmits, makes available, distributes, sells or offers for sale, identity information of any other person, or has it in his possession in circumstances giving rise to a reasonable inference that the information has been used or is intended to be used to commit an offence under this Act or any other law.
>
> (3) For the purposes of this section, 'identity information' means any information, including –
>
> > (a) a fingerprint, voice print, retina image, iris image, DNA profile, or any other biological or physiological information; or
> >
> > (b) a name, address, date of birth, written signature, electronic signature, e-mail address, digital signature, user name, credit card number, debit card number, financial institution account number, health insurance number, driver's licence number, telephone number, taxpayer registration number, social security number, or any other unique personal identification number, or password,

> being information of a type that is used, alone or in combination with other information, to identify or purport to identify an individual, whether living or dead."

[4] This section is aimed at criminalising the illegal use of the tools of the most common advance fee frauds. Items of identity information as defined in section 10(3) of the Act are obtained by fraudsters who use that information to contact the identified individuals and mislead them into sending money to the fraudsters, in the hope of obtaining the balance of a fictitious windfall which has been promised to them.

[5] Section 10(1) prohibits the obtaining or possession of identity information and section 10(2) prohibits the transmission, distribution, sale or offering for sale of identity information. In both subsections it is an important element of the offence that the prohibited conduct is in circumstances where the circumstances give rise to a reasonable inference that the identity information has been or is to be used to commit an offence.

[6] Curiously, it appears however that section 10(2) also creates an offence of possession of identity information. This may be a draftsman's redundancy as it does not appear to be in any way different from the possession mentioned in section 10(1). The legislature may have intended section 10(2) to refer to possession of identity information with an intent to transmit, make available, distribute, sell or offer for sale. However, the placement of the phrase "or has it in his possession" after the words indicating the transactions in identity information appears to create a second subsection (2) offence: the first is transacting in identity information and the second is a redundant offence of possession, identical to the subsection (1) offence.

[7] On 8 March 2017, the trial commenced in the Trelawny Circuit Court before Brown-Beckford J sitting without a jury. The indictment was amended during the trial to read that the offence was in breach of section 10(2) of the Act, although the particulars on the indictment continued to indicate that the two accused persons "… had in his [sic] possession identity information of other persons with intent to use the said information to commit an offence".

[8] The evidence against the appellant was that, on examination of the iPad, the technician discovered emails on the device which indicated a trade in identity information. A digital forensic report was agreed as evidence before the trial court. That report stated that an email account on the device that was used to carry out this transaction was in the name of "dimetrih27". In some of the emails the name "Dimetri Hemmings" appears beside the email address "dimetrih27". In one email, "dimetrih27" indicates when he is open for business and goes on to say that -

> "The cost per name is $1.50 for database and $3.75 each for coupons.
>
> … My minimum order is $500.00. If you send less than $500.00 I will not pick up the payment.
>
> Orders ship the day after I [sic] your payment is picked up."

[9] Some of the emails had files attached to them, but the digital forensic examiner was not able to retrieve those files.

[10] The Crown's case was that the emails indicated that both accused were in possession of identity information: in the case of the appellant, because the email address connected the transactions to him and, in the case of his co-accused, because she indicated that the iPad belonged to her.

[11] Both accused denied knowledge of the emails and any fraudulent activity. The appellant indicated that he did not use the iPad, which belonged to the co-accused. The co-accused indicated that she runs a business applying make-up to local and international clients. She indicated that she and her workers used the iPad for business purposes only.

[12] On 10 March 2017, the learned trial judge found that the only logical and reasonable inference was that the appellant used the email address of "demetrih27", that he transacted the business of obtaining identity information, and that he did have in his possession identity information for a criminal purpose. However, the learned judge was of the view that the evidence against the co-accused was not connected to the emails and therefore found her not guilty.

[13] After a sentencing hearing held on 20 February 2018, the learned judge sentenced the appellant to three years' imprisonment.

[14] This court heard the matter on 22 and 23 November 2018, and, on 14 December 2018, we allowed the appeal, quashed the conviction, set aside the sentence and entered a judgment and verdict of acquittal. The court came to this conclusion primarily because it came to light during the submissions before the court that during the trial the Crown had failed to disclose to the defence the compact disc on which the information taken

from the iPad was stored. More importantly, this significant item of evidence was not exhibited at the trial. This oversight by Crown Counsel at the trial was in the court's view an incurable flaw which deprived the appellant of a fair trial.

[15] This court needs look no further than the well-known case of **John Franklyn and Ian Vincent v The Queen** [1993] UKPC 11, an appeal from this jurisdiction, where the Privy Council indicated that the provision of statements of the witnesses to the defence before the trial was a necessary element in ensuring that the accused obtains a fair trial. Even more so, in our view, the Crown's failure to disclose and put before the court the crucial compact disc which, on the Crown's case, held the record of the appellant's transactions and the electronic proof of the possession of identity information was an egregious and inexcusable failure.

[16] It is for the foregoing reasons that we made the order outlined in paragraph [14]. We apologise for the delay in delivering the reasons herein.

[17] We cannot end this judgment without recording the able assistance which we received from counsel in this matter. Mr Buchanan brought this matter to the attention of the court and worked diligently to have it heard. Mrs Reid-Cameron QC took on this assignment on very short notice. And, having done so, she adroitly sculpted her arguments to focus on the evidential oversight of the Crown as soon as it came to light.

[18] Miss Sophia Rowe for the Crown ably carried the bulk of the Crown's case when the learned Director of Public Prosecutions was called away to other duties during the course of the hearing of the appeal. Miss Rowe and Mrs Johnson-Spence were forthright

and frank about the Crown's omission at trial to disclose and exhibit the compact disc. In fact, in compliance with their roles as ministers of justice, they raised the issue before the court.