[2010–12 Gib LR 81]

MACASKILL v. R.

COURT OF APPEAL (Aldous, Parker and Tuckey, JJ.A.): September 17th, 2010

Criminal Law—false accounting—documents "required for an accounting purpose"—jury may draw inference of fact from contents of re-mortgage applications and accompanying bank statements that "required for an accounting purpose," within Criminal Offences Act 1960, s.200(1)

The appellant was charged in the Supreme Court with three offences of falsifying documents "required for an accounting purpose," contrary to the Criminal Offences Act 1960, s.200(1)(a) and (b).

The appellant property developer had applied to re-mortgage a property held by his limited company, to finance a development project. Counts 1 and 4 concerned false addresses put on the application forms. Count 3 was for producing three fraudulent bank statements that misrepresented the state of his account. Count 2 had been withdrawn from the jury at the close of the prosecution case.

In the Supreme Court (Prescott, J.), the judge rejected the appellant's submission of no case to answer on Counts 1 and 4, concluding that it was open to the jury to find that the application forms had been for an accounting purpose under s.200(1) of the Act. He was convicted on all three counts. As mitigation, he submitted that he had no previous convictions, was dyslexic and, shortly before he had made the applications, his wife had left him and he had suffered a series of nervous breakdowns. A consultant psychiatrist's report indicated that a lack of insight was a common symptom of the conditions from which he suffered. He agreed that he had acted foolishly in providing false information at the instigation of his broker, who had assisted with the applications, and that he would probably have obtained the money if he had made honest applications. He was sentenced to 12 months' imprisonment on Count 3 and, concurrently, 7 months' imprisonment on Counts 1 and 4.

The appellant appealed against his conviction on Counts 1 and 4, and against sentence on all counts, submitting that (a) the conviction was unsafe, as the jury had not been entitled to draw the inference that the application forms had been for an accounting purpose and the matter should not have been left to them; and (b) the sentences, particularly of 12 months' imprisonment on Count 3, had been manifestly excessive and had not given due weight to the personal mitigation available to the appellant.

The Crown replied that (a) the application forms had not merely been

requests for loans, but statements of financial information enabling creditworthiness checks to be completed. Whether they were documents required for an accounting purpose was therefore a matter properly left for the jury to determine. The judge had correctly directed that such an inference could be derived from the contents of the application forms; and (b) even if the sentence was harsh, it fell within the permissible range for offences of dishonesty involving similar sums of money and pre-meditation. It had sufficiently taken into account the mitigation available to the appellant and had not been manifestly excessive.

Held, dismissing the appeal:

(1) The appellant had been safely convicted on Counts 1 and 4 for falsifying documents "required for an accounting purpose." Re-mortgage application forms were not merely loan requests, but contained financial information that enabled lending authorities to assess creditworthiness, which was the basis of the prospective transaction. The judge had therefore properly allowed the jury to draw an inference that the forms were "required for an accounting purpose." The directions given that this had been a factual matter for the jury to determine, that conviction required the jury to be sure beyond reasonable doubt, and that the inference could be drawn from the contents of the forms themselves, had been correct (paras. 13–16).

(2) Further, the appeal against sentence would also be dismissed. Although harsh, given the personal mitigation available to the appellant, the sentences fell within the permissible bracket for offences of dishonesty, especially, as here, in cases of pre-meditation involving significant sums of money. The sentences of 12 months' imprisonment on Count 3 and, concurrently, 7 months' imprisonment on Counts 1 and 4 had not, therefore, been manifestly excessive (para. 21).

Cases cited:

(1) *Att.-Gen.'s Ref. (No. 1 of 1980)*, [1981] 1 W.L.R. 34; [1981] 1 All E.R. 366; (1981), 72 Cr. App. R. 60, followed.
(2) *Osinuga* v. *D.P.P.* (1998), 30 H.L.R. 853, followed.
(3) *R.* v. *Galbraith*, [1981] 1 W.L.R. 1039; [1981] 2 All E.R. 1060, followed.
(4) *R.* v. *Manning*, [1999] Q.B. 980; [1999] 2 W.L.R. 430; [1998] 4 All E.R. 876, followed.
(5) *Sundhers* v. *R.*, [1988] EWCA Crim 225, distinguished.

Legislation construed:

Criminal Offences Act 1960, s.200(1):

"A person who dishonestly, with a view to gain for himself or another or with intent to cause loss to another—

(a) destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose; or

(b) in furnishing information for any purpose produces or makes use of any account, or any such record or document as aforesaid, which to his knowledge is or may be misleading, false or deceptive in a material particular,

is guilty of an offence and is liable on conviction to imprisonment for seven years."

C. Salter for the appellant;
R.R. Rhoda, Q.C., Attorney-General and *L. Yeats* for the Crown.

1 **TUCKEY, J.A.:** On June 21st, 2010, before Prescott, J. and a jury, the appellant, Keith Martin Macaskill, was convicted after a five-day trial of three counts of false accounting. He appeals against his conviction on two of those counts.

2 The appeal relates to Counts 1 and 4 of the indictment, which charged false accounting, contrary to the Criminal Offences Act 1960, s.200(1)(a), by falsification of a document required for an accounting purpose.

3 Count 1 related to a mortgage application form submitted to the Leeds Building Society on April 12th, 2007, in which the appellant gave a false address. Count 4 related to an application made to the Royal Bank of Scotland (Gibraltar Branch) on June 28th, 2007, in which the appellant gave the same false address. On each of these counts the defence had submitted that there was no case to answer because the Crown had not shown that the forms were required for an accounting purpose. The judge rejected this submission on the ground that it was open to the jury to infer that the forms were required for that purpose. The appellant, through his counsel, Mr. Salter, who appeared for him at trial, submits that she was wrong to do so and that in her summing-up she gave the jury no real assistance on this point.

4 Count 3 in the indictment, on which the appellant was also convicted, charged false accounting contrary to s.200(1)(b) of the Act, in relation to his mortgage application to the Leeds Building Society. The allegation was that he had produced three bank statements which to his knowledge misrepresented the state of his account. There is no appeal against conviction on this count, upon which he was sentenced to 12 months' imprisonment. This sentence, and if necessary the concurrent sentences of 7 months' passed on Counts 1 and 4, are the subject of an appeal against sentence. The judge withdrew Count 2 in the indictment from the jury at the close of the prosecution's case.

5 The facts relating to Counts 1 and 4 can be shortly stated. The appellant, who is a property developer, owned, through a limited company, a property in Sotogrande which had been mortgaged for €500,000. His two applications were to re-mortgage the property for €1m. so as to raise

further funds to enable him to proceed with the development. In each application form he gave his address as 1001 Euro Towers, Euro Port Road, Gibraltar, where he said that he had been living for five years. In fact, as the evidence of his former landlord showed, the appellant had vacated this flat on April 1st, 2007 after his tenancy had expired the previous day. A document produced to the building society and the bank purporting to show a tenancy in favour of the appellant until September 30th, 2007 was shown to be false.

6 The two mortgage application forms were produced at trial and we shall come to the detail they contain in a moment. But it was not disputed that the address given in each case was false. The appellant did not give evidence but made an unsworn statement from the dock.

7 We have the two mortgage application forms which, as one would expect, ask for detailed information from any applicant for a mortgage. In her ruling, the judge summarized the contents of the forms saying that they included (and we list them in the way they are set out in the Crown's helpful skeleton argument):

> "(a) Currency of the application; (b) personal details; (c) employment details; (d) employment history and shareholding; (e) income; (f) tax related matters; (g) the property which is to be mortgaged and details regarding purchase price, *etc*.; and (h) loan requirements and property details, which include mortgage term, amount of loan, repayment type, interest rate, mortgage balance, additional funds being raised, and similar details."

8 Earlier in her ruling, the judge had summarized the evidence which was before the jury as follows:

> "[It is not] in dispute that there has been no direct evidence as to what the accounting purpose was in relation to the use of the mortgage application forms, but there was evidence from Mr. Frendo, of the Leeds Building Society, that the application form would be sent to the underwriters for them to decide whether the applicant qualified for a mortgage. She gave evidence that the application form was extremely important as part of the underwriting process and as part of conducting checks on the applicant's financial background. Miss Smith, of the Royal Bank of Scotland, testified that the application form together with supporting documents was important in order to establish income and repayment possibilities."

9 Now the words "required for an accounting purpose," which also feature in the identical provision of the English Theft Act 1968, have been the subject of a number of decisions in the English courts, to which we were referred in the skeleton arguments submitted by counsel on both sides of this appeal.

10 The first case is the *Att.-Gen.'s Ref. (No. 1 of 1980)* (1). This was a case in which a salesman procured his customers to give false particulars in their applications to a finance company for loans to enable them to purchase domestic appliances. The court held that, as the statute referred to documents "made" or documents "required" for accounting purposes, (in the headnote to the report of the case in the *Criminal Appeal Reports* (72 Cr. App. R. at 60))—

> ". . . a distinction should be drawn between documents made specifically for accounting purposes and those made for some other purpose but required for accounting purposes; thus, such documents, as in the present case, would fall within [the relevant section of the Theft Act] if they were merely required for accounting purposes as a subsidiary consideration; further, the fact that the falsified information was contained in a different part from that required for accounting purposes was irrelevant, for the document must be examined as a whole."

This was, so the court said, even though, upon consideration, the finance company might reject the application.

11 The next case is *Osinuga* v. *D.P.P.* (2), a Divisional Court case, in which the appellant had been convicted of false accounting on the basis of false information about his employment and income given in his application for housing benefit. The court noted that whether a document is required for an accounting purpose is a question of fact which must be proved by the prosecution. It held that the evidence before the magistrates showed that the housing benefit claim form had a dual purpose: first, to enable the local authority to determine whether an applicant was eligible for housing benefit, and then to enable an applicant's income to be compared with his outgoings, there being no other source of that information. Even though there was no direct evidence which stated that the housing benefit form was a document required for an accounting purpose, there was sufficient evidence that it was being used for such purpose.

12 In *R.* v. *Manning* (4), the defendant insurance broker had been convicted of false accounting on the basis of false information contained in the cover notes which he issued to his clients. The court held that a cover note that set out the rate to be paid and the date on which the premium was due was a document which provided sufficient evidence from which the jury was entitled to infer that it was required for an accounting purpose. The court also distinguished the case of *Sundhers* v. *R.* (5), a case in which the appellant had submitted claim forms containing false information under three home insurance policies. In that case, there was no evidence as to whether or not such documents would be required by the insurers for an accounting purpose but the judge had told the jury that such documents might be looked at by the insurers' auditors. The

Court of Appeal had reluctantly allowed the appellant's appeal on the basis that jurors could not be expected to reach that conclusion themselves without the assistance of some expert evidence. In *Manning* ([1999] Q.B. at 986), the court said that that case was to be distinguished because—

> "the cover note is a different sort of document from the claim form. As we have said, it clearly sets out what the client has to pay and how he has to pay it. Although we have not found this issue an easy one, and regard it as being close to the borderline, we think on balance it would be open in this case to a reasonable juror to conclude, simply by looking at the document, that it was required for an accounting purpose, in that it sets out what the client owes. It differs from the claim form in *Reg. v. Sundhers*, from which any such conclusion could not be drawn without knowledge of audit practice, which the jury cannot be assumed to possess without evidence to that effect."

13 So the question on this appeal is simply on which side of the line this case falls. Was it open for the jury to conclude, after a proper summing-up on the point, that these application forms were required for an accounting purpose, or would it be impermissible speculation if they reached that conclusion without the benefit of expert evidence or some further evidence as to the accounting purpose to which such documents are put?

14 We think that it was open to the jury to infer that these forms were required for an accounting purpose and that they could do so from looking at the detailed contents of the forms themselves and to the other evidence to which the judge referred in her ruling. The judge said in the course of that ruling:

> "The completion of the mortgage application form was necessary for the mortgage request to be considered. Essentially, it marked the opening of the process, which would result in either the advance of funds or their refusal. Without the application form, the ability of the client to repay the loan, as well as the risk to be assumed by the lending authority, could not be assessed. It is not too great a leap therefore to conclude that the application form provides a credit picture of the applicant, a financial appraisal as it were."

We agree.

15 In her ruling, the judge concluded by reminding herself of the test in *R.* v. *Galbraith* (3) and asked herself whether the prosecution's evidence was such that its strength or weakness depended on the view to be taken by the jury as to whether these documents were required for an accounting purpose and whether, on one possible view of the facts, there was evidence upon which the jury could properly reach that conclusion. Based on the evidence given and the nature of the document itself, she concluded

that it was safe to leave that question to the jury. We think she was right to do so. The form identified the reason for the loan, the amount sought, and, most importantly, the security available and information about the appellant's ability to repay the loan, to be derived from his personal, employment, and financial details. The form was not just a request for a loan. It contained the financial information which was to form the basis of the prospective transaction.

16 We can deal shortly with the criticism of the summing-up, since although the point is taken by Mr. Salter in his skeleton argument he did not pursue it orally before us. The judge gave careful directions on this point which followed the reasoning she had given in her ruling, to which we have referred. She made it clear that whether the forms were required for an accounting purpose was a matter of fact for the jury to decide and that it was necessary for them to resolve that issue in favour of the prosecution to the criminal standard before they could convict. She reminded them that there had been no direct evidence as to what the accounting purpose was but it was a matter for them whether they could draw the necessary inference from the evidence that they had heard, and from the forms themselves. We can see nothing to criticize in the directions that she gave to the jury.

17 For these reasons, we dismiss the appeal against conviction and turn shortly to the appeal against sentence.

18 The appellant is 48 years old and had no previous convictions. We have already referred to the facts giving rise to Counts 1 and 4. So far as Count 3 is concerned, in support of his application the appellant provided the Leeds Building Society with three bank statements which showed a monthly credit balance at the end of each of the months covered by the statement. But the statements had been falsified by copying them in such a way as to make it appear that there were large credit balances on the account in each of these months when in truth the credit balances were not anything like those which the documents purported to show.

19 Mr. Salter submitted that the false information had been provided at the instigation of the broker, who the appellant had instructed to help him with these applications, and that he had foolishly gone along with it. Had he made honest applications, the likelihood is that he would have been granted these loans and been able to meet the resulting repayment obligations. The appellant had much personal mitigation: he had left school without qualifications and pulled himself up, as Mr. Salter put it, by his bootstraps. Some time shortly before the commission of these offences his marriage had broken down. He had been dyslexic since birth, and during the period with which we are concerned he had a series of nervous breakdowns which had resulted in his being hospitalized three times between 2004 and November 2007. A report from a consultant

psychiatrist, which is before the court, indicates that lack of insight tends to be a common symptom of this type of illness. In those circumstances, Mr. Salter submits that 12 months was obviously too long and that the judge did not give sufficient weight to the mitigation available to the appellant.

20 The judge relied on a Gibraltar case in which a dishonest mortgage broker had been sentenced to 12 months for providing false information in an attempt to secure a loan of £600,000. Mr. Salter says that that case was more serious, since it involved a broker who had broken the trust and confidence that such professionals are expected to have, and so the instant case merited a lesser sentence than 12 months.

21 We have given anxious consideration to these submissions and have to say that this was a harsh sentence given the personal mitigation available to the appellant. However, at the end of the day, we have concluded that it was within the permissible bracket for offences of dishonesty of this kind and that this court should not, for that reason, interfere with it. It involved, so far as Count 3 was concerned, the dishonest falsification of bank statements as part of a pre-meditated attempt to secure a loan of €1m. and it cannot be brushed aside by saying that it was foolish. Maybe it was, but it was serious nevertheless and we do not think that this court should disturb the sentence that the trial judge, who was in the best position to assess the appellant's criminality, decided to pass.

22 For these reasons the appeal against the sentence is also dismissed.

23 **ALDOUS** and **PARKER, JJ.A.** concurred.

Appeal dismissed.