Neutral Citation Number: [2016] EWCA Crim 1588

Case No: 201502822 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
HIS HONOUR JUDGE PONTIUS
T20147409

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/10/2016

Before :

LADY JUSTICE HALLETT
VICE PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
MR JUSTICE KING
and
MR JUSTICE DOVE

- -

Between :

Anthony Jonathan France	**Appellant**
- and -	
R	**Respondent**

- -
- -

Mr R Kovalevsky QC and Mr J Hodivala (instructed by Mandip Kumar of **Hansards Solicitors**) for the **Appellant**
Ms Z Johnson QC and Mr S Biggs (instructed by **CPS Organised Crime Division**) for the **Respondent**

Hearing dates: Thursday 6th October 2016

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Approved Judgment

The Vice President:

Introduction

1. The applicant was one of a number of journalists and public officials whose conduct was investigated by police during Operation Eleveden. He was employed as a junior crime reporter at The Sun newspaper. The Sun openly advertised the fact it would pay money for stories. Between 31 March 2008 and 1 July 2011, Timothy Edwards, then a serving police officer at Heathrow airport, sold them thirty-eight pieces of information. The applicant wrote the articles that followed and submitted the necessary forms to his employers for Edwards to be paid. The forms had to be approved first by the news editor and then by an editor or deputy editor. In total, The Sun paid Edwards over £20,000.

2. The applicant was charged with encouraging Edwards to commit the offence of misconduct in public office and stood trial alone at the Central Criminal Court before His Honour Judge Pontius. On 22 May 2015 he was convicted and sentenced to 18 months' imprisonment suspended for 24 months with a requirement to carry out 200 hours' unpaid work and ordered to pay £34,618.10 prosecution costs and a Victim Surcharge of £100. He applies for an extension of time (120 days) in which to renew his application for leave to appeal against conviction. Fresh Counsel (Mr Kovalevsky QC and Mr Hodivala) have abandoned the grounds submitted by trial counsel and submitted fresh grounds of appeal based entirely on the judge's directions.

Prosecution case

3. Ms Zoe Johnson QC for the Crown put her case on the basis that Edwards was clearly guilty of misconduct in a public office and that the manner in which he provided information, as a serving police officer, damaged the public interest. However, she conceded that the mere fact a journalist bought information from a public official would not suffice for the offence. In the context of a public official selling information to the media, the Crown must still prove the requisite standard of seriousness by reference to the harm caused to the public interest.

4. She relied upon a number of factors to establish harm:

    i. the fact that Edwards was employed airside at Heathrow;
    ii. the fact that he was employed in the two highly sensitive commands of aviation security and anti-terrorism;
    iii. the fact that a high degree of trust is placed in an employee in his positon;
    iv. the fact that it is essential to maintain confidence in the integrity of those employed in such commands;
    v. the fact that he accessed a confidential data base to retrieve information.

5. Having not only accepted but positively asserted that the stories bought and sold were mostly trivial and likely to find their way into the public domain in any event, she maintained there could be no public interest in buying and publishing them.

Defence case

6. The defence did not dispute that Edwards' conduct would merit internal disciplinary sanction and that the applicant was aware Edwards may have lost his job if caught. They did not claim that Edwards was acting as a "whistle-blower". However, they did not concede that Edwards' conduct amounted to wilful misconduct, that he had acted without reasonable excuse or justification, or that his actions were so serious as to constitute an abuse of the public's trust. The defence argued that publication of the stories a. did not harm the public interest and b. was positively in the public interest.

7. The issue of mens rea for both Edwards and the applicant, if not the primary issue, also remained live.

R v Chapman

8. All parties were aware of the then recently published judgment in *R v Chapman and others [2015] 2 Cr App R 10* in which the court reviewed the *Attorney General's Reference (No 3 of 2003) [2004] 2 Cr App R 23, [2005] QB 73* and re-affirmed the four elements of the offence of misconduct in a public office namely:

> i) A public officer acting as such
> ii) wilfully neglects to perform his duty and/or wilfully misconducts himself
> iii) to such a degree as to amount to an abuse of the public's trust in the office holder
> iv) without reasonable excuse or justification.

9. In relation to mens rea, the court concluded that for the holder of a public office to be convicted of the offence, it is sufficient to prove that he had the means of knowledge available to him to make the necessary assessment of the seriousness of his misconduct albeit the actual assessment is for the jury. Similarly, the aider and abettor/encourager must be aware of the relevant facts. He does not have to know or intend that the consequence of all of those facts will be so serious as to amount to the third element of the offence of misconduct in public office.

10. The principal focus in *Chapman and others* was on the third element, the threshold test for the misconduct to be sufficiently serious to amount to an abuse of the public's trust. This is an issue for the jury to decide but the court emphasised the importance of providing the jury with proper assistance on how to approach their task and determine the level of seriousness. The judge must direct the jury that only conduct worthy of condemnation and punishment and that harms the public interest is criminal conduct. Any direction must take into account the context in which the misconduct has occurred. At [33] Lord Thomas CJ, giving the judgment of the court, observed:

> "In a democratic society the media carry out an important role in making information available to the public when it is in the public interest to do so, not simply (as the judge pointed out) because the public may be interested in it. Those employed by the state in public office will generally be in breach of the duty owed by them to their employers or commanding officers by providing unauthorised information to the press. However, information is sometimes provided by such persons in breach of that duty where the provider of that information may benefit the public interest rather than harm it. The provision of the

> information may well in such a case be an abuse of trust by the office holder to his employer or commanding officer, even if the disclosure of the information may be in the public interest. It may therefore result in disciplinary action and dismissal of the officer holder. That is because the abuse of the trust reposed in the office holder by the employer/commanding officer in such a case is viewed through the prism of the relationship between the office holder and his employer or commanding officer. That is not the prism through which a jury should approach the issue of the abuse of the public's trust in an office holder. [33]

He continued at [36]:

> "In the context of a case involving the media and the ability to report information provided in breach of duty and in breach of trust by a public officer, the harm to the public interest is in our view the major determinant in establishing whether the conduct can amount to an abuse of the public's trust and thus a criminal offence. For example, the public interest can be sufficiently harmed if either the information disclosed itself damages the public interest (as may be the case in a leak of budget information) or the manner in which the information is provided or obtained damages the public interest (as may be the case if the public office holder is paid to provide the information in breach of duty)."

11. In this case, Ms Johnson pinned her prosecution colours firmly to the mast of the second limb: the manner in which the information was provided or obtained.

Judge's directions

12. It is necessary to consider the judge's directions in some detail. There is no dispute that the judge did his best to ensure they met the requirements of *Chapman and others*.

13. In his summing up of the elements of the offence, the judge began with a clear direction that if the jury concluded:

> "that what Constable Edwards did by selling stories to the defendant amounted to a serious abuse of the public's trust in him and therefore to misconduct in his public office and consequent harm to the public interest, that does not mean that this defendant in arranging payment for those stories must be guilty of encouraging him to do so because that decision must depend on your assessment of all the relevant evidence put before you in relation to Anthony France including of course his own evidence of his knowledge at the time of what Constable Edwards was doing."

14. Having stated that the public placed trust in those who hold public office and that the public expects and deserves high standards, he continued:

> "if that trust is abused in some way for example by the person holding public office improperly taking advantage of their position to enrich themselves then that abuse of trust is likely to harm the public interest."

15. He explained that the jury must decide whether the public interest had in fact been harmed and gave the jury the example of the altruistic "whistle blower" as a situation where providing information to the media might be in the public interest. He directed the jury that the misconduct must be worthy of condemnation and punishment and summarised the offence at page 121 letter E:

> " So the prosecution must establish that an abuse of the public's trust by Timothy Edwards occurred there being no reasonable justification for it, that abuse amounting to deliberate misconduct at such a level that it is properly be described by you as representatives of the public as both potentially and actually harmful to the public interest."

16. He emphasized the high threshold of seriousness and that the prosecution must prove misconduct going beyond conduct worthy simply of internal disciplinary proceedings stating: "It is the breach of the public's trust and consequent harm to the public interest that must be proved not merely the breach of the employer's trust".

17. His written directions to which he then turned were as follows:

> "1) Are we sure that TIMOTHY EDWARDS, whilst holding public office as a constable in the Metropolitan Police, **wilfully**, (i.e. deliberately) **misconducted himself, without reasonable excuse or justification**, in the three ways numbered (i), (ii) & (iii) in the Particulars of Offence in the Indictment?
>
> If the answer to that question is NO then the defendant must be found Not Guilty.
>
> If the answer to that question is YES go on to ask
>
> 2) Are we sure that P.C Edwards' misconduct was, in our judgment, **sufficiently serious as to amount to an abuse of the public's trust in him** (i.e. that it was a blameworthy departure from accepted standards of behaviour in his public office, falling so far below those standards as to amount to behaviour calling for condemnation by right-minded members of the public and for appropriate punishment)?
>
> If the answer to that question is NO then the defendant must be found Not Guilty.

If the answer to that question is YES go on to ask

3) Are we sure that P.C EDWARDS' misconduct **resulted in harm to the public interest?**
(**N.B**. When considering this question, the payment of money to P.C EDWARDS for information he supplied to the defendant is relevant but is not necessarily the deciding factor.

If the answer to that question is NO then the defendant must be found Not Guilty.

If the answer to that question is YES go on to ask

4) Are we sure that this defendant **intentionally encouraged and/or assisted** P.C EDWARDS to supply confidential information for payment?

If the answer to that question is NO then the defendant must be found Not Guilty.

If the answer to that question is YES go on to ask

5)Are we sure that, **in the circumstances of which the defendant was aware at the time** of giving that encouragement and/or assistance, P.C EDWARDS' behaviour (i) amounted, **in our judgment**, to wilful misconduct in his employment as a police officer and (ii) was, **in our judgment**, sufficiently serious as to amount to an abuse of the public's trust in him (for the meaning of which see question 2 above) **and** resulted in harm to the public interest?

If the answer to that question is NO then the defendant must be found Not Guilty.

If the answer to that question is YES then the defendant must be found Guilty".

18. He then directed the jury that they need not find deliberate misconduct in relation to every story sold and that payment for the stories was a relevant but not determinative factor in finding misconduct. His final summary of the prosecution and defence case would have left the impression that the real issue for the jury to determine was whether publication of the stories was in the public interest, as the applicant had maintained in his evidence.

Grounds of Appeal

19. The fresh grounds of appeal are:

(i) The judge failed adequately to direct the jury on the offence of misconduct in a public office.

(ii) The judge failed properly to direct the jury on the meaning or relevance of "confidential" information when assessing the seriousness of the misconduct.

20. As the argument developed before us, the two grounds merged into one: the judge's alleged failure to provide the jury with adequate assistance on the elements of misconduct in a public office in the light of the judgment of Lord Thomas in *Chapman and others*.

Discussion

21. The judge undoubtedly directed the jury in accordance with *Chapman and others* to the extent that he set out the elements that the prosecution had to prove and he did not commit the error identified in *Chapman* of failing to explain to the jury how, as a matter of law, they should approach determining whether the necessary threshold of conduct was so serious that it amounted to an abuse of public trust in the office holder. However, Mr Kovalevsky took exception to the order in which he set out the elements of misconduct in his written directions, his failure to provide greater assistance to the jury on the issue of harm to the public interest and the use of the word "confidential", without any elaboration, in both the summing up and the written directions.

22. Mr Kovalevsky accepted that the judge had both intended to follow *Chapman and others* and to provide the jury with a fair and balanced summing up but he contrasted the summing up in this case with those in other Operation Eleveden trials and claimed the judge had failed in his objective. It was his strong contention that the judge should have directed the jury in far greater detail in relation to relevant factors when assessing the seriousness of Edwards' conduct and the harm to the public and that, without that assistance, the jury could not safely reach their guilty verdict. The relevant factors were not limited to those listed above, upon which Ms Johnson placed reliance, but rather related to the nature of the information and the desirability of its being published. They included:

> i. Whilst there is a public interest in the maintenance of standards by public officials, there is a public interest in the public's right to receive information;
> ii. There is a public interest in a free and diverse press;
> iii. A newspaper is a commercial enterprise and can only flourish by selling newspapers. This includes the commercial reality of being the first to break a story and enhance its reputation;
> iv. The "public interest" is not confined to "whistle-blowing". Information which shows that the police are competently detecting or investigating crime can also be in the public interest;
> v. It was common ground that the information was trivial and inconsequential and likely to reach the public domain in any event.

23. Ms Johnson never suggested that the information supplied was in any way 'secret'; her case was based on the premise it was effectively "tittle tattle" so that there could be no public interest in its publication. If so, the jury had to determine whether the official's conduct in passing it to a journalist could properly be described as so serious as to amount to an abuse of the public's trust. Mr Kovalevsky complained that this issue was never addressed properly by the judge.

24. Furthermore, although the judge used the term "confidential" in his summing up and in question 4) of the Route to Verdict (which required the jury to be sure that Mr

France encouraged Edwards to supply "confidential information" in return for payment), he did not draw any distinction between information received 'in confidence' and 'confidential information' of a secret or sensitive kind. All material held by a public official which comes to him as a result of or in connection with his public office may be "held in confidence," but information "held in confidence" is not necessarily the same as "confidential information". Mr Kovalevsky gave as an example the menu in the works canteen. A public official may disclose information he holds in confidence (the menu example) without in any way harming the public interest. Trivial information, or information which is already in the public domain, or information which is bound to become public may not be "confidential" in the sense in which the judge appeared to use it. The judge failed to remind the jury of the relevance of this factor to the principal issues of seriousness and harm.

25. Finally, Mr Kovalevsky complained that although the judge made repeated references to the element of "without reasonable excuse or justification", he did not elaborate on what might be a reasonable excuse and gave only one example of a reasonable excuse: whistle blowing. This was not the defence raised, and he argued that it would have left the jury with the impression this was the only basis for establishing "reasonable excuse or justification". When one couples this with the fact that the judge directed the jury on the elements of the offence in what he submitted was the wrong order in his written directions, Mr Kovalevsky invited us to consider whether the judge has effectively divorced the issue of "reasonable excuse or justification" from the issue of seriousness. Accordingly, there is a real risk the jury may have wrongly concluded that Edwards was guilty of the offence simply by selling information of any kind obtained during the course of his employment.

Conclusions

26. There are a number of hurdles in the applicant's path. First, this a case in which the very experienced judge took the wise precaution of discussing his legal directions with trial counsel before he summed the case up and they did not object to this part of his summing up. Second, this court has said on numerous occasions it is a matter for the trial judge how he structures his summing up and that he is not obliged to rehearse all the evidence or the parties' arguments in the way the advocates would prefer, provided, of course, his summary is fair and accurate. Third, the applicant requires an extension of time.

27. On the other hand, this was a complex area of the law and the judge's task unenviable. The concept of the public interest, and in particular whether the conduct of the public official is so serious as to amount to an abuse of the public trust placed in him or her, is an unusual, and not always straightforward, one for a jury to determine. In this case, for example, one of the arguments deployed by the prosecution was that the naming of those arrested, but not yet charged, was against police policy and consequently harmed the public interest: a highly controversial issue. As was emphasised in *Chapman and others*, therefore, it was essential that the judge provide the jury with as much assistance as possible by putting the admitted conduct into its proper factual context.

28. We have not rehearsed the entirety of the summing up but we hope we have done justice to it in our summary. The judge took great care to be fair to the appellant. He repeatedly stressed the level of misconduct to be proved had to be so serious as to be

characterised as criminal, and he properly identified the other elements of the offence. However, he did not go further. He did not give the jury any help on how to assess seriousness and harm, for example, by providing them with a list of possible factors that they might wish to consider. He directed the jury that "abuse of trust is likely to harm the public interest" and that "it is the breach of the public's trust and consequent harm to the public interest that must be proved", as if the one (harm) automatically followed from the other (breach). He failed to elaborate on what is meant by "confidential" material, in circumstances where, as we have noted, the passing of information held in confidence is not in and of itself sufficient necessarily to pass the threshold of being so serious as to amount to an abuse of the public trust in the official.

29. In our judgment, more detailed instruction as to the factors relevant to the question of the public interest were required on the facts of this case so that the jury could weigh carefully the seriousness of the breach. As part and parcel of that direction, the jury should have been directed to consider whether the information passed was so trivial or inconsequential that the public interest could not, in the particular circumstances of the case, be harmed. The reference to "confidential information" in paragraph 4 of the written directions for the jury which we have set out above was potentially misleading: it should either have been removed or further explained. The written directions also placed the issue of "reasonable excuse or justification" as part of the second element from *Chapman*, as if consideration of that factor was not relevant to the last element.

30. Taking any one of those criticisms in isolation, we may not have been persuaded the summing up rendered the conviction unsafe. However, we must consider their cumulative effect and read the summing up as a whole. Having done so, we are driven to the conclusion that the jury were not provided with legally adequate directions tailored to the circumstances of the case and that the conviction is unsafe.

31. Accordingly, despite the hurdles in the applicant's path, we have decided to grant the extension of time, give leave to appeal and we allow the appeal. The conviction will be quashed. We will receive submissions on any consequential orders in writing.