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[1987] 2 All ER 758

## R v Mavji

COURT OF APPEAL, CRIMINAL DIVISION

MAY LJ, MICHAEL DAVIES AND HIRST JJ

19, 24 JUNE 1986

*Criminal law - Cheating the public revenue - Ingredients of offence - Fraudulent conduct resulting in diverting money from public revenue - Defendant charging value added tax but failing to account for it - Whether positive act of deception required - Whether prosecution merely required to prove failure to account for tax - Whether fraudulent evasion of value added tax more appropriate offence to be charged - Theft Act 1968 s 32(1)(a) - Finance Act 1972, s 38(1).*

The appellant was the director of a company trading in gold which failed to make value added tax returns and charged tax on sales for which it failed to account. The Crown estimated the tax lost at £1,240,000. He was convicted of cheating the public revenue in that, over a period of some eight months, he traded in gold on a large scale but kept for his own use value added tax which he had charged on sales. He was sentenced to six years' imprisonment and was made criminally bankrupt in the sum of £629,000. The appellant appealed against conviction and sentence. On his appeal against conviction he contended that, although the offence of cheating, for which the penalties were at large, was preserved as regards offences relating to the public revenue by s 32(1)(a)<sup>a</sup> of the Theft Act 1968, its use was anomalous if no more had to be alleged and proved than was necessary for a conviction for fraudulent evasion of value added tax under s 38(1)<sup>b</sup> of the Finance Act 1972, which provided for fixed penalties, and accordingly that a distinction was to be made between the common law offence and the statutory offence of fraudulent evasion. The appellant further submitted that to establish cheating there had to have been a positive act of deception, not merely an omission such as the failure to make a return, and no such positive act had been alleged. In his appeal against sentence the appellant contended that six years' imprisonment was excessive in view of the maximum penalty of two years for the alternative statutory offence.

<sup>a</sup> Section 32(1), so far as material, is set out at p 760 *h*, post

<sup>b</sup> Section 38(1) is set out at p 760 *j*, post

**Held** - (1) Cheating the public revenue required no positive act of deception but could include any form of fraudulent conduct which resulted in diverting money from the revenue. The appellant had a statutory duty to make value added tax returns and to pay the money due, and his dishonest failure to do so amounted to the offence of cheating and no further act or omission was required to be alleged or proved. The appeal against conviction would therefore be dismissed (see p 761 *h* to p 762 *b*, post); *R v Hudson* [1956] 1 All ER 814 followed; dictum of Viscount Dilhorne in *Scott v Comr of Police for the Metropolis* [1974] 3 All ER at 1039 explained.

(2) The common law offence of cheating was in practice reserved for serious and unusual offences rather than conventional cases of value added tax fraud, and the court would not be inhibited by s 38(1) of the 1972 Act from upholding what would otherwise be a proper sentence. Since the appellant had set out deliberately to avoid payment of value added tax on a massive scale it was impossible to say that the sentence imposed was wrong in principle or excessive. The appeal against sentence would therefore also be dismissed (see p 763 *b to d*, post).

### Notes

For cheating the public revenue, see 11 *Halsbury's Laws* (4th edn) paras 1261, 1286, and for cases on the subject, see 15 *Digest* (Reissue) 1391-1393, 12153-12199.

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For fraudulent evasion of value added tax and offences in connection with false documents and statements for value added tax purposes, see 12 *Halsbury's Laws* (4th edn) paras 963-965, and for cases on the subject, see 49 *Digest* (Reissue) 37-38, 135-138.

For the Theft Act 1968, s 32, see 12 *Halsbury's Laws* (4th edn) 540.

As from 24 October 1983 s 38 of the Finance Act 1972 was replaced by s 39 of the Value Added Tax Act 1983. For s 39 of the 1983 Act, see 53 *Halsbury's Statutes* (3rd edn) 153.

### Cases referred to in judgment

*R v Hudson* [1956] 1 All ER 814, [1956] 2 QB 252, [1956] 2 WLR 914, 40 Cr App R 55, CCA.

*R v Tonner* [1985] 1 All ER 807, [1985] 1 WLR 344, CA.

*Scott v Comr of Police for the Metropolis* [1974] 3 All ER 1032, [1975] AC 819, [1974] 3 WLR 741, 60 Cr App R 124, HL.

### Appeal against conviction and sentence

On 18 July in the Crown Court at St Albans before Drake J and a jury the appellant, Ramniklal Mavji, was convicted of failing to cause accounting records to be kept. The jury failed to agree on a further count alleging cheating HM The Queen and the public revenue. On 20 September 1985 at a retrial before his Honour Judge Goldstone and a jury also in the Crown Court at St Albans he was convicted on the further count. The appellant was sentenced to six years' imprisonment on the latter count and to a further twelve months' imprisonment on the count on which he had been found guilty before Drake J, both sentences to run concurrently, and a criminal bankruptcy order was made against him in the sum of £629,000. He appealed against conviction on the grounds that the prosecution had not alleged deception and that the judge at the second trial erred in law in ruling that deception was not a necessary ingredient of the crime of cheating the revenue. The appellant also appealed against sentence. The facts are set out in the judgment of the court.

*Ashe Lincoln QC and Paul Infield (neither of whom appeared below) for the appellant.*

*Paul Garlick (who did not appear below) for the Crown.*

At the conclusion of the argument May LJ announced that the appeal against conviction would be dismissed for reasons to be given later, but the court reserved its decision on the appeal against sentence.

**24 June 1986. The following judgment was delivered.**

**MICHAEL DAVIES J.**

On 18 July 1985 in the Crown Court at St Albans the appellant was convicted by a jury of failing to cause accounting records to be kept. The trial judge was Drake J. On that occasion the jury failed to agree on a further and more serious count which alleged that the appellant was guilty of cheating HM The Queen and the public revenue. At a retrial at the same court before his Honour Judge Goldstone and a jury the appellant was on 20 September 1985 convicted on that count. He was sentenced by the judge to six years' imprisonment for that offence and a further 12 months' imprisonment on the count on which he had been convicted before Drake J. The sentences were ordered to run concurrently, making six years' imprisonment in all, and he was made criminally bankrupt in the sum of £629,000.

The appellant appealed against his conviction on the cheating count by leave of this court and also against sentence. On 19 June we dismissed the appeal against conviction and announced that we would give our reasons and announce our decision on the appeal against sentence today. This we now proceed to do.

Because of the nature of the appeal against conviction, the facts may be very shortly

*[1987] 2 All ER 758 at 760*

stated. The indictment covered the period from 31 October 1981 to 1 June 1982, and it was alleged by the prosecution that during that period the appellant was trading in gold on a large scale at prices which would have inevitably produced a loss but for the fact that the appellant pocketed value added tax moneys which he charged but for which he did not account. The appellant was a director of a company called Princeve Ltd which traded from a shop with workshop and flat attached in North Wembley.

There was evidence of three different types of transaction. First of all, it was alleged that between October 1981 and March 1982 the appellant bought Canadian coins of pure gold to the value of well over £2m. During the same period he sold gold bars in great quantity which the Crown alleged consisted of the melted down coins. He properly was not required to pay value added tax on the coins; he charged value added tax on the gold bars produced from them, but did not account for it. The appellant had equipment for melting gold although he denied that it was used to melt down coins. The jury obviously disbelieved him.

Secondly, the appellant bought from a French company quantities of gold on which value added tax was either not liable to be paid or the payment of which could properly be deferred. The appellant sold the gold on very quickly, according to the Crown on the face of it at a loss, although in the result it was alleged he profited because he charged value added tax which it was said would have amounted to something over £600,000, and which he did not account for.

The third fraud on the Revenue, the Crown claimed, was that the appellant bought gold at low prices from companies which it was alleged to his knowledge were not going to account for value added tax.

The appellant's case in general terms was that he was an honest trader, and if and in so far as he had not made value added tax returns or paid over value added tax to the authorities it was because of the loss or mislaying of documents. Again, it is quite plain that the jury disbelieved him, which is not surprising in the circumstances which have been briefly set out, to which it may be added that during the relevant period the appellant and his wife drew something like £90,000 in directors' remuneration, which the state of his business if it had been honestly conducted would not have justified.

The basis of the argument advanced by counsel for the appellant, who did not appear at either of the trials on behalf of the appellant, although the same point was urged before Drake J and Judge Goldstone without success, is conveniently set out at para 1 of the perfected grounds of appeal against conviction as follows:

'At neither trial did the prosecution allege either in the particulars of offence, in its evidence or in its submissions that the appellant had used deception. The learned judge at the second trial erred in law in ruling that deception was not a necessary ingredient of the crime of cheating the Revenue. The learned judge therefore further erred in failing to withdraw Count 1 [ie the cheating count] from the jury.'

The appellant's conviction is claimed to have been unsafe and unsatisfactory on that, but on no other, ground.

'Cheating' is, as counsel for the appellant correctly submitted, a common law offence. As such, it was abolished by s 32(1)(a) of the Theft Act 1968 'except as regards offences relating to the public revenue'. Punishment for cheating the revenue at common law remains at large. Counsel for the appellant pointed out that by the provisions of s 38(1) of the Finance Act 1972 with reference only to value added tax--

'If any person is knowingly concerned in, or in the taking of steps with a view to, the fraudulent evasion of tax by him or any other person, he shall be liable to a penalty of £1,000 or three times the amount of the tax, whichever is the greater, or to imprisonment for a term not exceeding two years, or to both.'

(See now the Value Added Tax Act 1983, s 39(1).) So a statutory offence, the fraudulent evasion of value added tax, is created, with maximum penalties.

[1987] 2 All ER 758 at 761

It was submitted on behalf of the appellant that it would be anomalous if the common law and statutory offences stood side by side, with no more having to be proved to establish the former than the latter, and, in the former case, without limit of penalty. We see no anomaly. In our judgment s 38(1) of the 1972 Act was a 'catch-all' provision directed specifically to punishing evasion of value added tax when that tax was newly introduced and has no bearing on the general principles of cheating in relation to the public revenue, particularly as there is no counterpart to s 38(1) in the statutory provisions relating to other taxes.

The broader submission made by counsel for the appellant was that there is a fundamental distinction between the common law offence of cheating and the statutory offence of fraudulent evasion. To establish cheating, so it was submitted, there must be an actual deceit, a positive act such as a false representation and not merely an omission such as a failure to make a value added tax return, even if the purpose of the omission is to avoid the payment of value added tax lawfully due. No such deceit or misrepresentation or other positive act was alleged in this indictment or in the prosecution's evidence or argument at the trials.

The most helpful case of those to which this court was referred is, in our view, *R v Hudson* [1956] 1 All ER 814, [1956] 2 QB 252, not only for what it decides but also for the review of the older authorities which is to be found in the judgment of Lord Goddard CJ. The headnote is as follows (40 Cr App R 55):

'The offence of making a false statement tending to prejudice the Queen and the Public Revenue with intent to defraud the Queen is, and always has been, a common law misdemeanour, and includes the offence of causing to be delivered to an inspector of taxes accounts relating to the profits of a business which falsely and fraudulently state the profits to be less than they actually were.'

It was argued in *R v Hudson* that the making of a false statement to the Revenue did not disclose an offence known to the law. Lord Goddard CJ cited a passage from Hawkins's Pleas of the Crown (1 Hawk PC 322): '...

all frauds affecting the Crown and public at large are indictable as cheats at common law ...' (see [1956] 1 All ER 814 at 815, [1956] 2 QB 252 at 259). He said ([1956] 1 All ER 814 at 817, [1956] 2 QB 252 at 262):

'In our opinion, the appellant was properly convicted, and the law as stated by HAWKINS, by EAST, by LORD MANSFIELD, by BRAY, J., and by ANDREWS, L.J., in Northern Ireland [to all of whose views reference had been made in the judgment], remains exactly as it always has been. This is a common law offence and has always been a common law offence.'

Counsel for the appellant candidly conceded that if no distinction can be drawn in this context between an act and an omission, to use convenient shorthand, then this appeal fails. His submission was that this (as he would say, crucial) distinction did not fall to be considered in *R v Hudson* or indeed in *R v Tonner* [1985] 1 All ER 807, [1985] 1 WLR 344, to which we were referred by counsel for the Crown. No doubt that is right, except that in the opinion of this court the distinction is not crucial and, where it exists, as in the instant case, does not justify a departure from the conclusions reached by the Court of Criminal Appeal in *R v Hudson*. In coming to this decision we are influenced by the fact that in none of the cases or authorities such as Hawkins is the distinction between 'deceit' involving an act and 'non-deceit' involving no more than an omission canvassed or regarded as vital or indeed relevant. The distinction has always been and in our view remains between 'frauds affecting the Crown and public at large', to repeat the words of Hawkins, and those which affect only individuals.

In our judgment, 'cheating the revenue' can take place without any positive act of deceit or, to adopt and respectfully indorse the words of Drake J when ruling on this matter in the appellant's first trial:

[1987] 2 All ER 758 at 762

'The common law offence of cheating does not necessarily require a false representation, either by words or conduct. Cheating can include any form of fraudulent conduct which results in diverting money from the revenue and in depriving the revenue of money to which it is entitled.'

The appellant was in circumstances in which he had a statutory duty to make value added tax returns and to pay over to the Crown the value added tax due. He dishonestly failed to do either. Accordingly, he was guilty of cheating HM The Queen and the public revenue. No further act or omission required to be alleged or proved.

In deference to counsel for the appellant we deal with two other arguments which he advanced.

First, he relied strongly on the House of Lords case of *Scott v Comr of Police for the Metropolis* [1974] 3 All ER 1032, [1975] AC 819. That concerned a conspiracy to defraud by the unlawful copying and distribution of copyright films. The Crown, ie the public, was not alleged to have been cheated. The House of Lords decided (and we read the first sentence of the headnote (see 60 Cr App R 124)) that 'In the common law offence of conspiracy to defraud deceit is not a necessary ingredient'. Counsel for the appellant in that case had contended that s 32(1) of the Theft Act 1968 had impliedly abolished the offence of conspiracy to defraud. The House rejected that submission and Viscount Dilhorne in his speech (with which all their Lordships expressed agreement) said ([1974] 3 All ER 1032 at 1039, [1975] AC 819 at 840): 'The common law offence of cheating is, it appears, far narrower in ambit than the offence of conspiracy to defraud ...'

It is plain in our judgment from the context of this observation that in using the word 'narrower' Viscount Dilhorne had in mind the need for the public to be affected before an offence of cheating could be said to have been committed whereas there was no necessity in the case of a conspiracy to defraud. Counsel for the appellant submitted that the House of Lords by Viscount Dilhorne must have been intending to say that deceit had to be proved to sustain a charge of cheating, although not of conspiracy to defraud. We disagree. *Scott's* case does not assist the appellant.

Second, counsel for the appellant drew attention to s 25 of the 1968 Act, of which the heading is 'Possession of housebreaking implements, etc.' 'Cheat' is mentioned in sub-ss (1) and (3) and then in sub-s (5) it is provided:

'For purposes of this section an offence under section 12(1) of this Act of taking a conveyance shall be treated as theft, and "cheat" means an offence under section 15 of this Act.'

Section 15(1) created the offence of obtaining property by deception in these words: 'A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall on conviction ... ' and the penalty is set out.

Section 15(4) provides:

'For purposes of this section "deception" means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person.'

It was submitted to us that ss 15 and 25 mean that 'cheat' involves 'deception' and so the same must apply to the common law offence of cheating. Again we do not agree. In these sections the word 'cheat' is a convenient word to use but in both sections the phrase 'For purposes of this section' is carefully included. These sections do not purport to have, nor in our view do they have, any bearing on s 32(1)(a) of the 1968 Act nor any relevance to the authorities referred to earlier in this judgment.

In our judgment there is no substance in these points and they do not persuade us to alter our conclusions as already stated. For these reasons we dismissed the appeal against conviction on the cheating count.

[1987] 2 All ER 758 at 763

Turning now to the appeal against sentence, the sentence of six years' imprisonment on the cheating count is said to have been excessive, in particular because the appellant was a family man of good character in his mid-forties and because of the maximum period of imprisonment (two years as we have stated already) for the alternative statutory offence.

To dispose of the last point first, no doubt the common law charge of cheating is in practice reserved for the serious and unusual cases rather than the run of the mill value added tax fraud (which may be a good reason in itself for retaining the two alternative offences) and we do not consider that the trial judge or this court ought to be inhibited by the provisions of the 1972 Act from imposing or upholding what would otherwise be a proper sentence.

This was indeed a serious case. The appellant set out deliberately to avoid the payment of value added tax on a massive scale: one only has to look at the sum in which he was made criminally bankrupt, namely £629,000, to realise how massive. It was said by the Crown that the total amount of avoided tax may well have been not less than £1,240,000.

In the view of this court it is impossible to say that the sentence in this case was wrong in principle or excessive and the appeal against sentence is also dismissed.

*Appeal against conviction and sentence dismissed. The court refused leave to appeal to the House of Lords but certified, under s 33(2) of the Criminal Appeal Act 1968, that the following point of law of general public importance was involved in the decision: to establish the common law offence of cheating the public revenue is it necessary for the Crown to establish that there has been a deception?*

*Solicitors: Filbys (for the appellant); Solicitor for the Customs and Excise.*

Sophie Craven Barrister.