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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2

Date: Monday, 18th June 2007

B E F O R E:

LORD JUSTICE TOULSON

MR JUSTICE BUTTERFIELD

HIS HONOUR JUDGE WADSWORTH QC

(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

-v-

PAUL DARREN PASSMORE

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MR A HARRISON appeared on behalf of the APPELLANT

MISS B ROBERTS appeared on behalf of the CROWN

J U D G M E N T

1. LORD JUSTICE TOULSON: The Social Security Administration Act 1992 creates various offences to do with obtaining or retaining benefits under social security legislation to which the recipient is not entitled. This appeal involves a question about the meaning of the phrase "a change of circumstances affecting" a person's "entitlement to any benefit" in paragraph (a) of (1)A of section 111A of the Act. The subsection reads as follows:

"A person shall be guilty of an offence if --

(a) there has been a change of circumstances affecting any entitlement of his to any benefit or other payment or advantage under any provision of the relevant social security legislation;

(b) the change is not a change that is excluded by regulations from the changes that are required to be notified;

(c) he knows that the change affects an entitlement of his to such a benefit or other payment or advantage; and

(d) he dishonestly fails to give a prompt notification of that change in the prescribed manner to the prescribed person."

2. An offence under this subsection is punishable by a fine or by imprisonment up to a maximum of seven years, or both.
3. Section 111A(1)(a) is one of a matched pair of offences. 112(1)(a) creates an offence in identical terms, except that it omits the word "dishonestly" in paragraph (d). That offence is punishable by a fine up to level 5, or imprisonment up to a maximum of three months, or both.
4. Mr Harrison on behalf of the appellant submits that the language of paragraphs (a) to (c), being identical, must bear the same meaning in both sections. Miss Roberts for the prosecution does not dispute that proposition which we consider must be right.

The issue arises in this way. On 13th October 2006 at Isleworth Crown Court before His Honour Judge Powles, Paul Passmore was convicted of four offences under section 111A(1)(a) and also of three offences under section 111(1). Section 111(1) makes it an offence if a person makes a false statement or representation, or produces or furnishes any document or information which is false in a material particular with a view to obtaining any benefit or other payment or advantage under the relevant social security legislation. The appellant was acquitted of a number of other counts.

The argument before the court has concentrated entirely on the case against the appellant under section 111A(1)(a). It is accepted by the prosecution that in the particular circumstances of this case, if the appeal in relation to the appellant's convictions under section 111A(1)(a) is well founded, then his convictions under the other counts would be unsafe because of the manner in which the case was presented to the jury. There is therefore a single issue for us to address, which is the proper interpretation of the words of section 111A(1)(a).

At the relevant time the appellant was in receipt of housing and council tax benefit. He

formed a company called Obagong Limited in September 2000. He did not disclose to the benefit authority that he had formed this company. He was prosecuted for his failure to do so. It was his contention that his formation of the company was not a discloseable circumstance because it made no difference to the amount of benefit which he was entitled to receive, since he was not receiving any income from the company.

The judge directed the jury in these terms:

"Well, is setting up a company something which affects his entitlement to any benefit? You can see those words in the count.

The evidence from Miss Murphy ... is that it does affect it because it triggers further questions and investigation by the assessing officer and as a matter of law, I direct you that that is something which affects entitlement, whether or not at the end of the day, the amount of the benefit paid goes up, down or stays the same ..."

The issue was whether the judge was right in so directing the jury.

The appellant submits that a change of circumstances can only be said on its ordinary and natural meaning to affect a person's entitlement to benefit if it would cause a difference in the computation of that person's entitlement to benefit.

The prosecution submits that the phrase has a wider meaning. Miss Roberts submitted that a change of circumstance affects a person's entitlement to benefit if it is something which a benefit officer would properly wish to know in order to compute or check that person's entitlement to the relevant benefit, whether or not at the end of such enquiries and computations as the benefit officer carried out the amount of the entitlement was found to be the same.

The construction of the relevant words was considered by the Divisional Court in the case of King v Kerrier District Council [2006] EWHC 500 Admin. That case arose from a decision of the Truro Magistrates' Court who convicted the appellant of two offences under section 112(1)(a). According to the case stated, the magistrates found that the appellant either knew that there had been a change in circumstances which affected her entitlement to benefit, or closed her eyes to the obvious, but they went on also to find that the lack of information from the appellant "could have" affected the amount of benefit paid.

In allowing the appeal Newman J said:

"It has been submitted, in my judgment correctly, that if the magistrates had merely concluded that the lack of information from the appellant could have affected the amount of benefit paid, it must follow that despite their stated conclusion to the contrary, they could not have reached the conclusion to the criminal standard of proof that the change in circumstances had affected the appellant's entitlement to benefit."

He then went on to set out the question, which had been stated for the opinion of the High Court, as being:

"The prosecution having conceded that before the justice could convict they had to be satisfied that the change of circumstances which the defendant failed to notify would have affected her entitlement to benefits, whether the justices were right to convict in view of their finding that the

change of circumstances could have affected her entitlement for benefits."

Newman J said that in his judgment the answer to the question was plainly no. He added:
"... proof of the offence [under section 112(1)(a)] requires more than the possibility that the change could have affected the benefit."

Miss Roberts submits that that decision was per incuriam and wrong because it proceeded on a wrong concession. In this case that was the approach taken by the trial judge. He said, in giving a ruling on the interpretation of section 111(1)(a) before he came to sum up, as follows:

"He [that is counsel for the defendant] relies on the case of King [2006] EWHC 500 Admin. This was a case where a concession was made before the justices that they could only convict if they were satisfied that the change of circumstances, which the defendant failed to notify, would have affected her entitlement to benefit.

That concession is not made in this case. In the case of R v King, the concession having been made, it is unsurprising that the Divisional Court found the Magistrates who had only made a finding that the information not reported could have or might have affected the benefit, said that was not good enough and they should not have convicted."

We find it difficult to identify what is said to be the material erroneous concession. The concession quoted from the question posed in that case for the opinion of the court was that:

"Before the justices could convict they had to be satisfied that the change of circumstances which the defendant failed to notify would have affected her entitlement to benefits."

That language reflected and repeated the wording of the statute itself, which uses the term "a change of circumstances affecting any entitlement to any benefit".

The question is what is the meaning and effect of those words. The Divisional Court plainly read the words in the sense contended for by the appellant in the present case, namely that the change of circumstances must have made a difference to the amount of benefit which the recipient was entitled to claim in order for it to be characterised properly as a change of circumstances affecting his entitlement to benefit.

A decision of the Divisional Court is not binding on this court, but it is of persuasive authority. Moreover, we agree with it. We think that the meaning advanced by the appellant is the natural and ordinary meaning of the phrase.

Further, if we were in serious doubt about that matter, we remind ourselves that this is a penal statute. It is a well established principle that if a penal statute is reasonably open to rival constructions it should be construed in the defendant's favour.

Miss Roberts strongly pressed the argument that the appellant's construction would make the section in practice unworkable and would fail to protect the public adequately against non-disclosure.

We are not persuaded either of the premise or of the conclusion. Section 111(1)(a) and section 112(1)(a) are part of the armoury available for the protection of the public. We have already made reference in passing to the provisions also of section 111(1). These

are not the only provisions in the complex scheme of social security legislation designed to ensure disclosure of matters which ought properly to be disclosed. Reference has been made in the course of the argument to the Housing Benefit (General) Regulations 1987 SI No 1971. These regulations were made by the Secretary of State for Social Services under powers conferred by the Social Security Acts 1975 and 1986.

Part 10 of the Regulations deals with benefit claims. Regulation 75, which forms part of Part 10, provides as follows:

"(1) Subject to paragraph (2), if at any time between the making of a claim and its determination, or during the benefit period, there is a change of circumstances which the claimant, or any person by whom or on whose behalf sums payable by way of housing benefit are receivable, might reasonably be expected to know might affect the claimant's right to, the amount of or the receipt of housing benefit, that person shall be under a duty to notify that change of circumstances by giving notice in writing to the designated office."

We are told that in practice claimants for social security benefits of one kind or another are given a list of circumstances, change of which may affect their right to benefit and ought therefore to be disclosed. Such notification would obviously be material when considering what a claimant "might reasonably be expected to know might affect the claimant's right" to benefit.

Regulation 75 of the 1987 Regulations does not carry penal consequences, but non-compliance can trigger a right on the part of the Benefit Agency to recovery of any resulting over payment.

The relevance of the regulation in the context of the present argument is two-fold. First, it is wrong to look at section 111(1)(a), or even section 111(1)(a) and 112(1)(a), in isolation from the wider statutory framework and therefore wrong to conclude that, because particular conduct may not fit within section 111(1)(a), the public is insufficiently protected unless an extended interpretation is given to the wording of the statute.

Second, it is interesting to compare and contrast the express language of Regulation 75 with the interpretation which the prosecution asks this court to put on section 111(1)(a) by way of reading into the section words which are not there. The prosecution's argument requires the court to read the words "change of circumstances affecting any benefit" as not limited to a change of circumstance which would make a difference to the amount of the benefit, nor even limited to a change of circumstance which a person in the claimant's position ought to realise might make a difference to the computation of their benefit. It extends to disclosure of anything which might cause a benefits officer to make enquiries in order to satisfy himself or herself as to the claimant's entitlement to benefit. So we are asked as a process of interpretation to read in a duty enforced by criminal sanctions more extensive than the express duty imposed by Regulation 75 which carries only a civil sanction. This would go beyond any ordinary process of statutory construction.

For those reasons we reject the prosecution's argument on the construction of the section.

We conclude that the judge's direction to the jury was wrong. It follows that the appeal must be allowed and the convictions quashed.