IN THE COURT OF APPEAL

CRIMINAL DIVISION

B E T W E E N:-

REGINA

-v-

ASIL NADIR

ADVICE & GROUNDS OF APPEAL AGAINST RULING IN THE PREPARATORY HEARING re ABUSE OF PROCESS 31ST MARCH 2011

INTRODUCTION

1. The applicant, Asil Nadir, is charged on an indictment (No T19920238 known as indictment F) alleging 13 counts of theft. He had been arrested on the 15th December 1990 and was charged the following day with offences that broadly mirror the current indictment save that allegations of false accounting have now been abandoned.

2. The case was transferred from the Bow Street Magistrates Court to the Central Criminal Court on the 7th February 1992. On the 22nd June 1992 the first trial judge (Tucker J.) ordered a preparatory hearing and Mr Nadir pleaded not guilty to the indictment. Section 8 of the Criminal Justice Act 1987 provided that the trial commenced on that day.

3. The initial proceedings came to an effective conclusion when Mr Nadir left the jurisdiction in May 1993 some four months before the trial was due to commence. The trial did not proceed in his absence and was effectively adjourned until his return to the jurisdiction on the 26th August 2010. The trial then resumed initially before Bean J. and subsequently before Holroyde J. who was nominated as the trial judge.

4. On the 14th March 2011 Holroyde J. commenced an abuse of process application advanced on behalf of the applicant. He directed that the hearing be a preparatory hearing within the meaning of the Act. He had already been served with written submissions by each of the parties and a response from the applicant[1]. He heard evidence over seven days, received final submissions in writing from the parties, heard oral submissions on the 29th March 2011 and delivered judgement on the 31st March 2011.

5. Relevant transcripts and skeletons are enclosed with this advice.

BASIS OF APPEAL

6. The trial judge found as a fact that Mrs Lorna Harris, the case controller during the period 1990 – 93, lied to him on oath during her evidence on the voire dire. He also found as a fact that she had behaved dishonestly in relation to the investigation during the period when she had been the case controller. She had failed to tell the defence solicitors the truth about breaches of the applicant's legal professional privilege (LPP), failed to inform her superiors of the circumstances surrounding the breach and misled the Attorney General who, in reliance on what she had said, misled the House. It is submitted that these findings are crucial to the decision as to whether the proceedings ought to have been stayed.

7. The application was advanced on the twin grounds that it would not be fair for Mr Nadir to stand trial and/or he could not have a fair trial. The trial judge ruled that Mr Nadir could have a fair trial and that it would not be unfair to try him.

8. The background to these findings is set out in the enclosed skeletons[2] and the ruling of the trial judge[3]. It is submitted that the learned trial judge erred in law and/or in the exercise of his discretion in distinguishing this case from that of R v Early [2003] 1 CAR 19: *"Furthermore, in our judgement, if, in the course of a public interest immunity hearing or an abuse argument, whether on the voire dire or otherwise, prosecution witnesses lie in evidence to the judge, it is to be expected that, if the judge knows this, or this Court subsequently learns of it, an extremely serious view will be taken. It is likely that the prosecution case will be regarded as tainted beyond redemption, however strong the evidence against one defendant may otherwise be. Such an approach is consistent with the view expressed by this court in R v Edwards [1996] 2 CAR 345 @ 350F"* (per Rose LJ @ para 10).

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[1] Dividers 1-3
[2] Defence skeleton, divider 1 para 5-32; Prosecution skeleton divider 2 para 69-80
[3] Ruling p3 line 5-p11 line 4

9. It is submitted that the facts of the instant case do not give rise to any legitimate distinction from the principle expressed in *Early*. In the instant case, Mrs Harris had been advised by counsel on the 19th February 1991 that *"the principle of legal profession privilege is one of cardinal importance. Its importance in the context of legal proceedings has been emphasised and enshrined in the provisions of PACE"*[4]. Yet, despite this clear advice, Mrs Harris continued on her dishonest course of conduct right through to the Attorney's statement to the House on 30th June 1993; conduct which she persisted in when she lied on oath during the voire dire.

10. It is correct that the trial judge stated that *"I cannot and do not condone her conduct. On the contrary, I condemn it"*[5]. However, he then went on to seek to distinguish the case of *Early* and found that it would not be an affront to the public conscience for Mr Nadir to stand trial despite the actions of the case controller. It is this ruling that forms the first basis upon which it is suggested that the trial judge fell into error.

11. Mrs Harris was the case controller; she described herself as the "*chairman of the board*"[6] and accepted that she was in overall charge of both the investigation and the prosecution. As such, there could be no more vital person in the prosecution team. She was engaged full time on this one case and was the focal point for all prosecution decisions. She managed to keep her dishonest actions in relation to LPP from everyone else in the team.

12. No case can be found where a member of the prosecution team has lied to a judge on the voire dire and the case has been allowed to proceed to trial. Obviously such instances are rare, but the principle that *"justice must not only be done but be seen to be done*" is difficult to reconcile with the decision to proceed with the trial where the person in overall charge of the prosecution lies to court on the voire dire about a matter that they knew would impact on the decision about whether or not the case ought to proceed.

13. The conclusion of the trial judge to distinguish the case of *Early* appears to stem from the fact that the lies told in the instant case *"did not result in any real harm to the defence case, and did not impinge on the trial process"*[7]. For the reasons set out below it is not accepted that the lies told by Mrs Harris were confined in the manner identified by the trial judge above. Even if it were to be true, the lies were still maintained over a period of years and also persisted with on the voire dire so that the judge himself was lied to. It is submitted that this grave and serious conduct by Mrs Harris falls squarely within the type of conduct contemplated by Rose LJ in *Early* and cannot sensibly be distinguished from it.

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[4] Ruling page 24 lines 18-21
[5] Ruling page 45 lines 6-7
[6] Transcript 17 03 2011 page 11 line 7
[7] Ruling page 86 lines 18-21

14. It must not be overlooked that in *Early* many appellants had pleaded guilty; the trial itself was never corrupted and never could be. The appellants knew whether they were guilty or not and by pleading guilty were accepting their guilt. There was nothing in any appeal to suggest that the pleas had been equivocal. Here the appellant has pleaded not guilty and unless a stay is ordered a trial will proceed. Furthermore the lies told relate to an issue that was recognised as important at the time and which the defence had clearly been focused on in correspondence. This was not a lie told about some minor peripheral issue that no-one was considering important, it was a repetition of lies told about a matter that Mrs Harris had herself given an undertaking in relation to and was certainly acknowledged at the time to be some importance.

15. The trial judge sought to gain support for his view from the judgement of the Privy Council in Warren v. Attorney General of Jersey [2011] UKPC 10. However, it is submitted that the facts of that case are very different from the instant case. In *Warren* no lie was told to the court or the defence; everyone was told the truth about what had occurred. The action said to have been an abuse was sanctioned by a Crown Advocate and had been made in haste when a quick decision was needed for operational reasons. Finally, the breach of the appellant's right to privacy was limited to listening to a short conversation.

16. It is submitted that the proven lies of Mrs Harris render it unfair to try Mr Nadir.

17. Further, the trial judge erred in ruling that Mrs Harris had failed to disclose the conclusions of Mantle 1 and 2. He found that Mrs Harris knew them and found as a fact that *"on the balance of probabilities there was at least some reference to the conclusions of Mantle 1 and 2 at the meetings on 3 and 27 July 1991, but it does not follow that those conclusions were expressed in the particular terms used in the reports"*[8]. Accepting that finding of fact, the trial judge does not go on to conclude whether or not Mrs Harris recorded those conclusions in her notes of the two meetings although he did find as further fact that *"I am not persuaded that Mrs Harris knew of any conclusion in the Mantle reports which would have raised in her mind any question of disclosure. It follows that I do not find that she was guilty of any deliberate non-disclosure in relation to any of the Mantle reports"*[9]. What was not the subject of any conclusion was whether the opinions, as expressed in the meetings, were included in her notes of the meetings. It is submitted that the notes palpably do not record the conclusions of the Mantle reports and that, as the trial judge held that the conclusions, albeit perhaps differently phrased, were known to her and spoken to at the meetings, the failure to record the same must have been dishonest; a matter that was not addressed in the ruling.

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[8] Ruling page 80 lines 15-20
[9] Ruling page 81 lines 17-22

18. The notes of the two meetings were the subject of considerable attention by those representing the applicant and if the judge had concluded that the notes reflected an accurate summary of what was said in the meeting then it is submitted that he would have said so. The findings of fact by the trial judge that Mrs. Harris knew of the conclusions, however expressed, of Mantle 1 must mean that her note of the meeting held 03 07 91 is seriously deficient in failing to record that conclusion. Indeed, nothing contained in Mantle 1 found its way into the note. It follows that the evidence of Mrs Harris must have been untruthful in relation to this as well as in relation to LPP. She stated that *"I would deny that Will would have made such a contribution because if he had I would have noted it....Had that document (Mantle 1) been presented to us, it would have been an incredibly important part of our analysis and our subsequent actions"*[10]. An analysis of this answer clearly reflects her denial of the knowledge of any of the conclusions of Mantle 1; in the light of the trial judge's finding of fact that there *"was at least some reference to the conclusions of Mantle 1"*[11] this must render her answer above also a lie. In addition it renders the note she prepared materially inaccurate in that it failed to contain conclusions that she acknowledged were *"incredibly important"*[12].

19. The failure of the trial judge to make a finding of fact in relation to the note made of the meeting of 03 07 91 was crucial and, it is submitted, that the only conclusion possible in the light of other findings by him was that the note was materially deficient. If that reasoning is correct then the note of the 27 07 91 needs to be examined against the fact that the earlier note was deficient. The only conclusion that can properly be drawn is that Mrs Harris lied about the Mantle reports as well as LPP.

20. The trial judge however found that, whether the conclusions of the Mantle documents were disclosed or not, did not matter because the defence already knew what the Mantle reports said and that therefore the conclusions were not disclosable. He found that *"they provided some limited support"*[13] for the defence case but that the support was *"severely limited"*[14]. This was not a description used by any of the witnesses. The judge further found that *"such views and opinions as were expressed at the meetings would not have left Mrs Harris with the impression that.....seriously undermined the prosecution case"*[15]. This conclusion failed to take account of the evidence of Mrs Harris who had stated that if the conclusions were known to her then she would have recognised them as important and disclosed them. It is therefore necessary not to focus on whether the conclusions were in fact disclosable but whether Mrs Harris believed they would be and then failed to disclose them. This is particularly important as the judge concluded that she lied to him on oath about other

[10] Transcript 18 03 2011 page 29 line 18
[11] Ruling page 80 lines 15-20
[12] Transcript 18 03 2011 page 30 line 17
[13] Ruling page 77 lines 1-2
[14] Ruling page 7 line 4
[15] Ruling page 81 lines 7-11

parts of her evidence and maintained a dishonest stance in relation to LPP at the time of the investigation.

21. In any event, the finding of the judge that evidence which undermined the prosecution case did not need to be disclosed because it did not seriously undermine it was wrong in law. Any undermining of the prosecution case ought to result in disclosure; there is no qualitative exercise to undertake.

22. It is submitted that this error undermines the reasoning which followed although it is correct to observe that the judge did conclude that *"even if I had come to a different conclusion, I would not have found that non-disclosure of the Mantle report conclusions would have been a ground for staying these proceedings"*[16]. It is submitted that it is not the non-disclosure of the Mantle conclusions that is necessarily decisive but the failure to record them in the notes referred to earlier and disclose them to the defence. Whatever view the judge took of the need to disclose, Mrs Harris considered that she was bound to disclose the conclusions if known to her and, having found as a fact that she did know of those conclusions in relation to two reports, her failure to disclose can only represent a failure to disclose what she believed was disclosable and was acknowledged by her to be *"incredibly important"*[17].

23. Mrs Harris stated in relation to Mantle 1, that had it been *"presented to us, it would have been an incredibly important part of our analyses and our subsequent actions"*[18]. This does not sit easily with the finding that *"there was at least some reference to the conclusions of Mantle 1 .....at the meeting(s)"*[19]. The meeting concerned being a reference to the meeting on the 3rd July 1991.

24. It is submitted that, when properly analysed, the findings of fact made by the trial judge confirm that the notes made by Mrs Harris of both meetings, the 3rd and the 27th of July 1991[20], were seriously deficient and that no finding was made as to how those deficiencies arose. It is submitted that they could only have arisen deliberately and that as a consequence the trial judge erred in finding that "*I am not persuaded that Mrs Harris knew of any conclusion in the Mantle reports which would have raised in her mind any question of disclosure*"[21]. It is submitted that this finding is inconsistent with the evidence of the witness and the judge's other findings. It is submitted that the judge ought to have found that the notes of the meetings contained deliberate omissions and that Mrs Harris had also not been honest in relation to her evidence in relation to both meetings.

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[16] Ruling page 81 line 24 – page 82 line 2
[17] Transcript 18 03 2011 page 30 lines 17-20
[18] ibid
[19] Ruling page 80 lines 16-17
[20] Dividers 10 and 12
[21] Ruling page 81 lines 17-20

25. If the submission that the trial judge fell into error in relation to Mantle 1 & 2 is correct then it is submitted that the Court is entitled to look at Mantle 3 again. The conclusion that Mrs Harris did not know of the conclusions of Mantle 3 despite the note to the Attorney dated the 8th July 1991 stating that *"our accountancy analysis"*[22] indicated that the BDO report, if based on genuine documents, provided a defence to both current and proposed charges is difficult to sustain. In the absence of any evidence of any other accountancy analysis apart from that conducted by Mantle 3, and if the conclusion is that there was non-disclosure in relation to Mantle 1 and 2, then it is submitted that the conclusion in relation to Mantle 3 was also flawed.

26. The failure to disclose the conclusions in the Mantle reports is not just relevant to the issue of non-disclosure but must further reflect the character and honesty of Mrs Harris. It was her evidence that had she known of the conclusions contained in the three reports she would have disclosed them because she considered them to undermine the prosecution case; even if she were wrong as to that (and it is not conceded she was) it does not matter because she believed she was under a duty to disclose and did not do so.

27. This was a grave and serious breach of the Crown's duty to disclose, not the result of innocent error but the result of a deliberate course of action designed to prevent the defence having disclosed to them material which might undermine the prosecution case.

28. It is our opinion that the applicant does have grounds to appeal the ruling made not to stay the indictment. We consider that the finding that Mrs Harris lied about LPP ought to have itself formed the evidential basis for a stay, but that an analysis of the evidence and findings in relation to the Mantle documents also indicates that she has been guilty of material non-disclosure and that the combination of the two factors must lead inexorably to the conclusion that the prosecution is tainted and that the only remedy is a stay.

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5th April 2011

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[22] Defence file divider 11