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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 23rd March 2011

B e f o r e:
LORD JUSTICE MOSES
MR JUSTICE DOBBS DBE
HIS HONOUR JUDGE GORDON
(Sitting as a Judge of the CACD)
R E G I N A

v

NASEEM IQBAL

Computer Aided Transcript of the Stenograph Notes of
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(Official Shorthand Writers to the Court)

Mr A Dowden appeared on behalf of the **Appellant**
Mr J Pavry appeared on behalf of the **Crown**

J U D G M E N T
(As Approved)

1. LORD JUSTICE MOSES: Irwin Mitchell was a firm of solicitors who was granted a representation order to represent this appellant in September 2005. It received the prosecution case in February 2006. The papers were sent to this appellant, Naseem Iqbal, on 1st March 2006. As a result of numerous discussions and conferences and a study of the papers, a full defence case statement was delivered on 18th December 2006.

2. By 6th September 2007 two counsel had spent some 300 hours each in preparing this case and one of the fee earners at Irwin Mitchell, some 300 hours but on one aspect only of the prosecution case.

3. It was on that date that this appellant sought to change his representation. The judge refused. Eventually, while this appellant's co-defendants were fully represented by solicitors and counsel, this appellant was left to conduct this case on his own in September 2008. He now contends that the judge's refusal was a material irregularity which should lead to the conclusion that his conviction for conspiracy was unsafe.

4. In the light of the nature of this appeal, it is unnecessary for us to detail with full particularity the nature of the case. The allegation against Mr Iqbal was that he and other members of his family conspired to commit fraud through the dishonest abuse and manipulation of a programme known as the Individual Learning Accounts Programme. This was a programme designed at considerable public expense to provide financial assistance to adult students on a range of courses.

5. Mr Iqbal and other members of his family chose to register themselves as learning providers. By this means they received direct payments under the scheme. Between July 2001 and November 2001 they were paid £723,678 in respect of a total of 3717 students.

6. The prosecution contended that many of the so-called students were not in fact students at all but members of the public who had never enrolled as students and many of whom had never received any course work apart from a CD which had been pirated.

7. There were six defendants: three of them were convicted; this appellant, his brother, Waheed Iqbal, and a man, Zafar Iqbal.

8. This appellant had applied personally, in his own name, for registration on the Individual Learning Accounts Programme. The course work provided was, it was alleged, obtained without the permission of the distributor. Some of the claims for payment in respect of students predated the actual availability of the course work. Typically, the students themselves made no payments; some of them indeed had not even signed up for the course. Those who did sign up for the course were offered a £5 inducement. They made no financial contribution themselves and as a result, so it was alleged, this appellant and others received contributions from the scheme to the amount we have identified.

9. The appellant contended that he had legitimately operated the programme, that he was never party to any conspiracy to defraud and, as far as he was concerned, he and his

brother and other members of his family were conducting a legitimate operation. He said to the police that he had indeed employed managers to recruit students and that the students had been paid £5 but that was not in pursuance of an unlawful incentive.

10. There were a number of discussions between this appellant, counsel and Irwin Mitchell, who were, as we have said, acting not only on his behalf but on behalf of the other defendants.

11. On 19th April 2007 an application was made by one of the defendants, Zafer (to be distinguished from Zafar Iqbal) asking for transfer of legal aid from Irwin Mitchell, whom he had previously instructed, to other solicitors. This application was granted by the trial judge, the judge who was subsequently to try these defendants, His Honour Judge Hammond, and the result was that the original trial date of 9th May 2007 had to be vacated and a new date was set for 7th January 2008.

12. On 19th July 2007 Irwin Mitchell received a letter from solicitors, David Phillips & Partners. This recorded that their client wished to transfer his representation from Irwin Mitchell to David Phillips & Partners. The reasons set out in the letter were:

> "(1) There has been a complete breakdown in your professional relationship with him.
>
> (2) You have not responded to his e-mails and failing to act on his instructions(sic).
>
> In a nutshell, Mr Iqbal has desired a change of representation for a long time now but matters came to a head when following a conference with his counsel, he was advised to plead guilty, he felt there was pressure for him to plead and in the conference he expressed the view that he would rather represent himself than continue to instruct a legal team who did accept that he had a defence in his forthcoming trial."

13. On 25th July 2007 Irwin Mitchell set out a full response to those allegations. In response to the allegation that there had been a complete breakdown in the professional relationship they said:

> "We are currently at a loss to explain this statement since Mr Naseem Iqbal has over the last few months attended the office regularly to give instructions, the last of these being on 11 July 2007, when the fee earner spent five and a half hours discussing the case and taking instructions. No indication was given then or has ever been given previously that he considered there to be difficulties in our professional relationship or that he had lost confidence in us representing him."

14. In response to the specific allegation that Irwin Mitchell had failed to respond to Mr Naseem Iqbal's emails and failed to act on his instructions Irwin Mitchell replied that they had only ever received one email, sent on the 18th May 2007. They recorded that it was followed by a phone call and then a meeting and recorded that their client! Mr Naseem Iqbal:

> "Firstly confirmed during this meeting that the e-mail had been sent following discussions he had with a third party, who had advised him on the contents of the e-mail."

They recorded that each of the points in the email were discussed and that some of the points had not even been understood by Mr Naseem Iqbal. They recorded that all of his concerns were fully dealt with. They then continued by denying that there had been any advice to plead guilty and went to deal with a further allegation, made in the letter of 19th July, namely that there was a potential conflict of interest. They recorded their view that there was no such conflict and that they had continued to fulfil their obligation to review the issue as to whether any such conflict had arisen.

15. Following that exchange of letters the letter of Irwin Mitchell was sent to the court and there was a hearing before the judge on 6th September 2007, at which a representative of David Phillips & Partners sought a transfer of representation. The judge recorded his view, which we hasten to underline, that Irwin Mitchell was a highly reputable firm. The judge expressed his cynicism as to the motive and heard from counsel instructed by Irwin Mitchell as to the time, which as we have already recalled, had hitherto been spent both by counsel and by the solicitors on his behalf.

16. The representative of David Phillips & Partners then made his submissions contending that there had been a breakdown between Irwin Mitchell and the defendant and that in the light of that the representation order should be revoked and the defendant should be free to apply administratively, as it was put, for a fresh grant of representation.

17. The judge, having listened to those submissions gave a full ruling recording the huge inconvenience that would result, bearing in mind that a trial was due in 3 months' time. He recorded his suspicion of why the appellant wanted to change his solicitors, particularly in the context of a previous defendant having done the same thing and the judge concluded that this defendant:

> "Has two straight options: he either continues to give instructions to his solicitors or he can be unrepresented. I am not going to allow Irwin Mitchell to be removed."

He repeated that the defendant had a straight choice.

18. The application for a transfer of legal aid to the other solicitors, David Phillips & Partners, was renewed on 26th November 2007. On that occasion Mr Phillips represented David Phillips & Partner; he said to the court that there was a danger that the defendant would disrupt the trial if he was unrepresented and reiterated that there was a conflict between the interests of this defendant and the others, and went on as follows:

> "I know what the conflict is and I do not think your Honour, from me, should know those reasons. That would be a matter for the defendant if he wishes to disclose what it is (inaudible). I do not want to muddy the waters."

19. The judge recorded that it was an epidemic in the Leicester area that other defendants were seeking transfers of representation and then made a ruling again refusing a transfer of the representation order.

20. The statutory context in which the judge was required to consider the application to transfer representation is that which is set out at Regulation 16 of the Criminal Defence Service (General) (No 2) Regulations 2001, SI 2001 No 1437. That regulation provides:

> "16.—(1) Where a representation order has been granted an application may be made to the court before which the proceedings are heard to select a [litigator] [litigator is defined in regulation 2 as a person named on the representation order] in place of a [litigator] previously selected, and any such application shall state the grounds on which it is made.
>
> (2) The court may:
>
> ...
>
> (ii)there is a breakdown in the relationship between the assisted person and the [litigator] such that effective representation can no longer be provided and, in such a case, the [litigator] shall provide details of the nature of such breakdown;
>
> (iii)through circumstances beyond his control, the [litigator] is no longer able to represent the assisted person; or
>
> (iv)some other substantial compelling reason exists; or
>
> (b)refuse the application."

21. Mr Dowden, who appears now for this appellant, with conspicuous skill and economy relied upon Regulation 16(2) (a)(iv), namely that there was some other substantial compelling reason for the transfer of representation.

22. In our view, that is a misconstruction of the regulations. The case advanced by this appellant was that there had been a breakdown in his relationship with Irwin Mitchell and that he could no longer effectively be represented by Irwin Mitchell. In those circumstances, before the judge could allow the transfer, it was incumbent that the litigator should provide details of the nature of such a breakdown. Irwin Mitchell was unable do so; they had been faced with the specific allegations made by David Phillips & Partners and had responded to them in such a way as to make clear their view that there had been no such breakdown. In those circumstances, it is not possible for a defendant, in the position of this appellant, to circumvent the requirement of Regulation 16(2)(a)(iv) by relying on the absence of details of the nature of the breakdown, for the purpose of contending there was some other substantial compelling reason. So to do subverts the structure of that regulation.

23. The reality was, in our judgment, that neither in September 2007, nor in November 2007 was the judge given any details of the nature of the breakdown, such as to justify any change of representation. The judge had no alternative but to make the order he did and refuse the change of representation as he was required to do by Regulation 16(2)(b).

24. We should however draw attention, not just to the structure of the regulations but the clear warnings given from time to time by this court, as to the need to scrutinise with rigor, applications such as these. It is all too easy for defendants to seek to disrupt a trial by expressing a desire to change representation. The courts are under an obligation to see that the good administration of justice, and the public purse are protected against spurious and unwarranted applications.

25. As long ago as 1982 in R v Kirk 76 Cr App R(S) 1983, 194, at 199, Lawton LJ warned that:

> "... experience of the operation of the Legal Aid Act has shown that many accused in criminal cases, when they get advice from the lawyers who are assigned to them under the Legal Aid Act 1974 which is unpalatable - particularly when they get advice that they have no defence to a charge - want to shop around until they can find some gullible or inexperienced lawyer, who is willing to put up a defence which is hopeless and which may occupy a court for days at considerable expense to the public. It follows therefore that when somebody does want to get rid of his legal aid representation the court is under no obligation whatsoever to assign new legal aid representation. Judges should be very careful about assigning new representation if there is any reason to think that the object is to shop around until such time as someone can be found, who will be willing to conduct a hopeless defence."

26. In R v Ulcay [2008] 1 WLR 209, [2007] EWCA Crim 2379, the then President (Sir Igor Judge) was considering whether a barrister should have stood down on the grounds that he was professionally embarrassed and went on to say:

> "The purpose of this part of the regulations is to ensure that the client does not manipulate the system, seeking to change his lawyers for dubious reasons which include, but are not limited to the fact that the lawyer offers sensible, but disagreeable advice to the client. Claims of a breakdown in the professional relationship between lawyer and client are frequently made by defendants, and they are often utterly spurious. If the judge intends to reject an application for a change of legal representative he may well explain to the defendant that the consequence may be that the case will continue without him being represented at public expense. The simple principle remains that the defendant is not entitled to manipulate the legal aid system and is no more entitled to abuse the process than the prosecution. If he chooses to terminate his lawyer's retainer for improper motives, the court is not bound to agree to an application for a change of representation."

(see paragraph 31).

27. If the absence of the representation is due to the defendant's own deliberate acts, he may properly be described as the author of his own misfortune (see R v Haroon Shahebzada [2006] EWCA Crim 2853 at paragraph 9.) It is to be observed that in the 2011 edition of Archbold, which sets out Regulation 16, there is no direct reference to the statement of principle by Sir Igor Judge in Ulcay although it is referred for other purposes elsewhere in that volume. It is incumbent upon judges considering Regulation 16 to bear well in mind those principles. We repeat that there was no basis at the end of 2007 for allowing any change of representation. The judge would have been wrong to have allowed the defendant's application.

28. The trial date was vacated on two further occasions: January 2008 and May 2008. The defendant continued to tell the court that he would represent himself but did not wish to do so and set out the understandable difficulties he was facing in trying to represent himself.

29. On 1st September 2008 counsel on behalf of one of the other defendants informed the court that Irwin Mitchell would represent this appellant at trial. The appellant was not there. On 4th September 2008 the appellant approached Irwin Mitchell. The defence version of the chronology says that he did so "as a last resort. They refused to represent him despite representation order being still in place." We shall have to consider the accuracy of that account in the chronology later.

30. The appellant now appeals with leave of the judge on the basis that he was denied a fair trial. He was, as he says, undoubtedly placed under difficulties during the course of the trial. All the other defendants were represented, although there is abundant material to suggest that those representatives did attempt to assist this appellant.

31. He gave no evidence and, it is plain, that he was unable to make any final submissions to the jury, in any way approaching a standard that any advocate on his behalf would have achieved. But there is no basis for suggesting that he was not given a fair opportunity to challenge the prosecution witnesses or to make an informed decision as whether he would give evidence or not. None of the allegations as to the unfairness of the actual conduct of the trial were pursued before us today.

32. The essential question for us is whether this appellant was unfairly deprived of the opportunity to be represented and thus his ability to defend himself was unfairly impeded or whether what in fact occurred was the result of his unsuccessful attempt to manipulate the system.

33. The appellant advanced his appeal on the same basis that he had sought to change his representation. There is little either in the perfected grounds other than a bare assertion that he was not getting the assistance to which he was entitled and that there was a conflict.

34. The bareness of the assertions is equally manifest in the appellant's skeleton argument, where all that is said at paragraph 17 is that in September 2007 the relationship had broken down and:

> "The appellant was of the view that Irwin Mitchell were not doing all the work required in his case and pressurising him to plead guilty as part of a plea bargain."

35. These allegations led the single judge in giving permission rightly to suggest that in order for this court properly to analyse and assess them it was necessary that the appellant should waive privilege. He failed to do so on a number of occasions when invited by the Criminal Appeal Office and did not do so until an order of the court was made. We are not surprised that he failed to do so until ordered, in the light of the material now advanced to us. The waiver of privilege led to two short statements from those who had been deployed by Irwin Mitchell to act on his behalf, Emma Windle and Paul Haycock, in statements of 2nd and 7th September. They include various letters with those statements. Those statements triggered a response from the appellant in which he made a number of specific allegations in relation to their failure.

36. Once he had done that the full picture emerged. We have had the benefit of the most careful and complete account of everything that Irwin Mitchell did on behalf of this defendant, including full and contemporary case notes responding to the particular criticisms that have been made. We have read those statements and the large number of notes exhibited to those statements, with the care and thoroughness that they deserve. It is not suggested that the evidence of those two solicitors was false, or that the contemporary notes were not accurate or gave anything other than a fair account of the relationship between the appellant and his representatives. Those notes and the statements demonstrate and establish a number of factual propositions.

1. That at no stage was the defendant advised or pressurised into pleading guilty. In long and detailed records of conferences with solicitors and counsel, there is nothing to be identified which comes anywhere near making good that suggestion. That suggestion was untrue.

2. That the defendant simply would not face the task of engaging with the evidence the prosecution sought to adduce against him. Time and again there is a contemporaneous record of the solicitors asking him to deal with the specifics of the evidence and of him declining to do so. In Mr Haycock's statement, for example, he records in a diary note that the appellant had confirmed that he had only opened the disc (containing the prosecution evidence) once and had really not done any detailed work on the appears. When asked why he had not done this he stated that he had not done anything wrong and therefore did not feel that there were any problems for him to address. The note records that the client was advised to review things in advance of the meetings and not look at witness statements for the first time when Mr Haycock was taking instructions. That is a record of a note made in a 4.5 hour long conference on the 12th April 2007.

37. On 29th May 2007, in the course of a conference with counsel, the appellant disclosed that he had "thrown loads of papers in the bin because they had nothing to do with him."

38. On 8th June 2007, during the course of another 4.25 hour conference, it is recorded that the appellant said that he would email the solicitors with requests, "so that he could prove he has asked us" and that was agreed.

39. There was no basis for suggesting that Irwin Mitchell was unwilling to pursue avenues of defence. The case notes, read, as a whole, proved that that allegation was false. The appellant has now seen fit, during the course of the appeal, to allege that there was a failure to disclose the password to the CD so that he could not obtain access. That that allegation is false is shown by a note of a conference of 12th March 2007, to which we have already referred, where he told the solicitors that he had only opened the disc once and had not done any work on the papers; nothing to do with the an inability to access those papers.

3. There was no basis for suggesting that there was any conflict between him and the others for whom Irwin Mitchell were acting. The defence statements showed that that is so, as do the contemporaneous notes. Moreover, those notes demonstrate that Irwin Mitchell were well aware of their obligations should any conflict emerge. They did, as a matter of caution, consider from time to time whether such conflict had arisen. But nothing was ever shown, nor has anything even now, been advanced to show that there was a risk of conflict. The appellant suggested that he was under pressure from other members of the family. It is not uncommon for some defendants in a conspiracy to allege that others were seeking to influence what evidence was called or the way the evidence was given. But Irwin Mitchell, with overall control of the defence of this family, was in a far better position to kerb such influence than other solicitors might have been. It is untrue to suggest that there was any conflict. There is no basis for any such assertion and no conflict has ever been revealed then or now. During the course of the trial no such conflict emerged.

4. The defendant has persisted in alleging that Irwin Mitchell failed to respond to emails. But until September 2007 he had only sent one email on the 18th May 2007. The response to that email was both a telephone call and a 4-hour conference between the appellant and both Miss Windle and Mr Haycock on 25th May 2007.

40. At that conference, as we have already hinted, the appellant confirmed that he had not written the email himself, it had been written by a lawyer friend. He told Irwin Mitchell that he should not have written the email and he would like Irwin Mitchell to ignore it. Irwin Mitchell said they could not ignore it and sought to clarify the points raised in that email. In particular at that conference they confirmed that there was no cut-throat defence. The allegation that Irwin Mitchell failed to respond to the written instructions is untrue.

5. Towards the end of this unhappy history leading up to September 2007, it is apparent that Irwin Mitchell were highly suspicious of the application for the transfer. They were right to be suspicious. On 16th May 2007 a conference took place lasting 5 hours.

Again, this defendant confirmed he had still not read any of the papers. He referred to the fact that another defendant, Zafar Iqbal, had got his adjournment and this defendant said to Irwin Mitchell:

> "If Zafar hadn't left to get an adjournment, he would have. Nothing to do with legal representation. He was happy with us but would have been a means to an end. He asked whether I thought that an adjournment would be granted again if something similar happened, advised that His Honour Judge would not be prepared to adjourn again in similar circumstances as cases would be fully prepared and no reason to adjourn."

That contemporaneous note shows that the judge himself was right to regard the attempts by the defendant to change representation as a mere spurious manipulation of the system, with the view to some advantage to be gained irrespective of its justification. It shows, moreover, that the applications to the judge in September and November 2007, and the whole basis of this appeal is dishonest.

6. That dishonesty was maintained through to September 2008. The suggestion, repeated in the chronologically, drafted on behalf of the appellant, that Irwin Mitchell had declined to act for him in September 2008, although he was driven to ask them to do so was untrue. The suggestion that at that stage he wanted to be represented by Irwin Mitchell was untrue.

41. When the suggestion was raised Mr Haycock and Emma Windle saw the appellant in a conference room and the appellant confirmed:

> "That he had only said that [that is that he wanted to be represented by Irwin Mitchell] to the judge due to pressure being brought to bear on him from his family. He was clear he did not retract his unspecified allegations against Irwin Mitchell, it was thus clear to me that he had no desire to re-instruct us, despite what he had said to the judge."

Thus the whole narrative of what happened in September 2008 is shown to be dishonest and untrue.

42. This appeal demonstrates the importance of the strict observance by judges of Regulation 16. Had the judge not reached the view that he had done, applying Regulation 16, this defendant might have got away with a wholly unwarranted change of representation. The appeal also illustrates the importance in view of the fact that the appellant persisted in the appeal in ensuring that the Court of Appeal is in a position to assess the truth of the allegations by obtaining a waiver of privilege. Once privilege had been waived, this court was able to see the appeal for what it was, namely a dishonest attempt to manipulate the system of legal assistance for this appellant's own ends. There was no irregularity at all, and thus no basis for contending that the conviction of this appellant for conspiracy was unsafe.

43. MR PAVRY: My Lord the only other matter that arises is whether the court thinks it appropriate the appellant should make contribution towards the prosecution costs.

44. LORD JUSTICE MOSES: How would that be assessed, are you asking for that in a specific sum?

45. MR PAVRY: £1,000.

46. LORD JUSTICE MOSES: What about all Irwin Mitchell's costs? What did it cost to prepare this? Do you know? Mr Haycock, do you know what it costs?

47. MR HAYCOCK: Your Lordship, we are not particularly worried to pursue that.

48. LORD JUSTICE MOSES: I know, but I am interested in knowing what you think. It must have taken ages.

49. MR HAYCOCK: In the region of 3 weeks myself and Miss Windle.

50. LORD JUSTICE MOSES: Thousands and thousands of pounds in order to protect their good name. You ask for £1000 towards the prosecution costs, is that it?

51. MR DOWDEN: My Lord, he has served a relatively lengthy prison sentence.

52. LORD JUSTICE MOSES: How long was he in prison for?

53. MR DOWDEN: It was three-and-half years but he came about 10 months ago.

54. LORD JUSTICE MOSES: Do not worry. Has he got any money?

55. MR DOWDEN: He is trying to built-up a business, times of difficulties.

56. LORD JUSTICE MOSES: Has he paid off the confiscation?

57. MR DOWDEN: The shake of the head there. My Lord, in all the circumstances I would ask the court not to make any further order.

(The Bench Conferred)

58. LORD JUSTICE MOSES: It seems to us that he should pay at least that, but we think the trouble in trying to extract from him is going to be more than it is worth. We make no order.

59. We do want to reiterate our gratitude to all the work that Emma Windle and Mr Haycock did to assist the court because it was very thorough and very clear and showed the very hard work that had been done on behalf of this defendant when he was a defendant. Thank you all very much.