

LEGAL AID AGENCY

High Cost Crime Appeal Decision – Single Adjudicator

R v D – Categorisation: examining the issue of whether and to what extent a case that not charged as a statutory fraud may be categorised as a fraud for the purposes of VHCC according to its facts. CM decision upheld

Case: [REDACTED]
Appellant (firm/counsel): [REDACTED]
LAA Respondent: [REDACTED]
Date of decision: 25th March 2023

Case Manager's original decision:

Case was a non-fraud one for the purposes of the VHCC Regulations.

Adjudicator's Decision:

Reasons:

In the matter of the appeal
(Re : [REDACTED])

[REDACTED]
v.
The Legal Aid Agency [REDACTED]
(March 2023)

Introduction

1. This is an appeal by [REDACTED] Solicitors, who are instructed by [REDACTED] in relation to a Crown Court trial that he is facing.
2. I have been provided with the following documents:
 - VHCC appeal form
 - Trial indictment
 - Case Summary for Trial 1 ([REDACTED] not a defendant) – 273 pages
 - Case Summary for Trial 2 (where [REDACTED] is a defendant) – 89 pages
 - The case of Environment Agency v Flannigan & Others (SCCO 215/13)
 - The case of Murria v Lord Chancellor
3. Mr [REDACTED] is facing one count of taking revenge, contrary to section 51(2) Criminal Justice and Public Order Act 1994.

Background

4. The backdrop to the case is a number of joint ventures entered into between [REDACTED] City Council and [REDACTED] County Council and [REDACTED]. The prosecution is the culmination of a long running investigation stretching back a decade ('Operation [REDACTED]'). There are two trials scheduled, with [REDACTED] [this defendant] featuring only in Trial 2. There are three defendants in each trial, with [REDACTED] co-defendants also being indicted in the first trial.
5. Of relevance to this case is a fleet maintenance contract that was operated as part of a joint venture between [REDACTED] CC and a company called [REDACTED]. The value of the contract is approximately £5 million. The allegations that the other defendants in Trial 2 face is, in brief, that they secured the procurement of the contract by acting in breach of the Nolan Principles in such a manner as to amount to a criminal offence.
6. Mr [REDACTED] was a councillor on [REDACTED] CC from 2005 to 2021. In 2013 it is alleged that he (as the then leader of the Council) approved the process leading to the contract being given to [REDACTED] and then signing off on the contract (although that decision was reversed following a change in the political makeup of the Council at an election shortly afterwards).
7. The trial indictment for Trial 2 is a 9 count indictment. Mr [REDACTED] features on Count 9 only, the taking revenge Count, and he is the only defendant on that count. The other defendants feature in Count 1-8 which alleged misconduct in a public office (or similar variants) concerning the awarding of the contract.
8. Mr [REDACTED] is not alleged to have been involved in any dishonesty or impropriety in the awarding of the contract, although the Prosecution alleged that he was aware that (at the least) corners were being cut in awarding the contract. Following the cancellation of the contract, he is alleged to have interfered with the investigation being conducted by [REDACTED].
9. However, Mr [REDACTED] was aware of the investigation, having been first interviewed by the police in February 2014, at that point on relating to an allegation that he had been involved with the procurement process. He was formally told in March 2016 that he was no longer a suspect in relation to that matter.
10. Count 9 relates to Mr [REDACTED]'s alleged behaviour following the launch of Operation [REDACTED]. Although there were concerns raised as to his behaviour in 2016, the indictment period starts on 25 May 2017. This was shortly after he had been interviewed by the police in relation to that conduct and bailed with conditions not to contact a number of the prosecution witnesses. It is also the date which he was re-elected as leader of the Council following an election earlier that month.
11. The allegation is that he was 'determined to rid himself of those people who had assisted the police investigation and to do so under the guise of a re-structure'. He followed through with a 'campaign of bullying'.

Issues

12. [REDACTED] Solicitors submit that this should be assessed as a Cat 2 Fraud VHCC case. The case manager has categorised it as a Cat 4 Non-Fraud case. [REDACTED] The Appellants accept that if it is not a fraud case, then it is properly categorised as Cat 4.
13. The case manager accepts that the background is alleged corruption, which provides the motive to the alleged offending. However, this is not sufficient to say that the case is one of fraud.

14. In deciding this, she took account of the fact that the two co-defendant's cases have been assessed as being fraud cases.

The appeal

15. [REDACTED] Solicitors have submitted a notice of appeal, along with representations in support.
16. There refer to the case summaries for both trials (which are extremely lengthy) as well as the trial indictment for Mr [REDACTED]. In addition, they have provided the two cases mentioned above.
17. There was no application no application for an oral hearing, or for the decision to be referred to the Committee. Having considered the case, I do not consider that there are any reasons for either course of action.
18. I remind both parties that I am independent from the LAA and that my task is to apply the criteria to the point that is in dispute.

Decision

19. The right of appeal is under Reg 6.4(b) 2013 VHCC Specification for organisations. I note the following definitions from the Very High Cost (Crime) Cases Arrangement 2017:

"Fraud VHCC" means a Very High Cost Case in which the offence with which the Client is charged is primarily, or substantially, founded on:

- (a) allegations of fraud or other serious financial impropriety; and
- (b) involves complex financial transactions or records;

"Non-Fraud VHCC" means a VHCC that does not satisfy the definition of a "Fraud VHCC";

"Serious Fraud Work" means work done on a Case in which the main offence with which the Client is charged is primarily or substantially founded on allegations of fraud or other serious financial impropriety and involves complex financial transactions or records;

20. I will start with the two cases referred to.
21. The case of ***Murria v Lord Chancellor*** concerned a murder of an accountant with the motive being that he had spoken to the police about a fraud connected with cigarette importation. The solicitors for one of the hitmen claimed an enhanced uplift on the basis that the *'proceedings relate[d] to serious or complex fraud'*. This had been refused on appeal by the Costs Master on the basis that the indictment contained a single count of murder, and no count relating to fraud.
22. On a further appeal, Buckley J held that that was too narrow an interpretation, albeit that whilst there will be some cases where fraud is not pleaded, these will be rare. Specifically, it was said in relation to the above definition:

It is capable of comprehending proceedings which, or part of which, can sensibly be said to be "about" serious or complex fraud whatever may be charged in the indictment. For guidance, I would suggest that proceedings or a part of proceedings are "about" serious or complex fraud if it has been necessary for the Solicitors to investigate or prepare for the proceedings or part of them as if the proceedings did

involve serious or complex fraud in the sense that the phrase is used in Section 1 of the Criminal Justice Act, 1989. In other words it has been necessary for the Solicitors to prepare the fraud issue in as much detail and with as much expertise as if it was a fraud trial. That may be, for example, because the prosecution, for their own ends, set out to prove the serious or complex fraud as if it was a fraud trial.

23. The case of **Environment Agency v Flannigan** was another case relating to the classification of offences. The defendants were charged with illegal dumping. This was not listed in the table of offences for the purposes of Graduated Fees as it then was. As a result, the case was paid as a Cat H, although it had been claimed as a Cat K (Fraud over £100,000) on the basis '*that what was charged was a dishonest enterprise*'.
24. On appeal it was concluded that (para 17) '*As I suspect is so with most dumping cases the enterprise that was alleged was about avoiding the cost of legal dumping and evading the landfill tax that would be payable*', which fell most naturally into the fraud and other offences in Cat F, G and K. The appeal was allowed.
25. Neither of these cases are in relation to the VHCC scheme that is applicable here, although they do set out the framework that I should follow.
26. It is clear from **Murria** that the offence charged is not determinative of the outcome, and it is necessary to look at the underlying facts of the offending and the way that the case is put.
27. It seems to me that **Flannigan** is of limited assistance. Under the Graduated Fees Scheme that was operating at the time, each offence was put into one of 12 categories, with Cat H including any offence not categorised elsewhere. The categories other than Cat H covered most criminal offences, with the issue being the proper approach to a non-listed offence. I consider that that is different to re-categorising an offence, which is the issue here, where there are a wider range of factors to take into account.
28. In relation to VHCC cases there are only two different categories; fraud and non-fraud, with a relatively clear line between them, at least in most cases.
29. [REDACTED] submit that had the case remained within the LGFS scheme it would have been a Class H offence, which they are confident would have been re-classified as a Cat K following **Flannigan**. I do not consider that given the different structure of the Graduated Fee Scheme such an equivalency analysis would help, but in any event the s51(2) offence would likely have fallen within Cat I of the old scheme, rather than Cat H. I do note that the offence is named specifically in Category 17 of the new scheme, but if it were to be recategorized, then it would appear to be most likely recategorized as Category 8 – Offences Against the Public Interest. Therefore, whilst I do not consider that that approach is a helpful one, if I were to follow it, it seems to me that it would not assist [REDACTED]
30. In the case of **Murria**, the words being interpreted are "*proceedings relate[d] to serious or complex fraud*". It seems to me that that is wider than the definition for a VHCC fraud which requires that the allegation is '*primarily, or substantially, founded on*' a relevant fraud. A case can be related to a serious fraud, even if it is not primarily or substantially founded on the fraud.
31. However, even if **Murria** were to be the correct test, it does not seem to me that in Mr [REDACTED]'s case it would be '*necessary for the Solicitors to prepare the fraud issue in as much detail and with as much expertise as if it was a fraud trial*'. He is being tried with

the co-defendants due to the background, but I consider that it is of significance that he is not charged with the same conduct as they are.

32. It appears that the allegations against the two co-defendants relate to the means by which the contracts were obtained. That is an allegation of corruption that forms the backdrop to the allegations against Mr [REDACTED]. Whilst that will need to be considered by his legal team, it does not seem to me that they would have to prepare the case as if it were an allegation of fraud against him.
33. The allegation that Mr [REDACTED] faces is a further step removed from his co-defendants. If, for example due to ill health, he could not be tried with his co-defendants then there would not appear to be any reason why his case not be severed and he could be subsequently tried alone. In those circumstances it would appear to be extremely unlikely that the full details of the alleged dishonesty would be led before the jury.
34. I fully accept that the jury will be told about the background, and will probably be told about it in some detail as it would be necessary to properly understand why it is alleged that Mr [REDACTED] behaved in the way that he allegedly did. Additionally, under s51(2) it is a necessary ingredient of the offence that there was an investigation. However, this would be by way of background, and it is unlikely that there would be a need to go into the details.
35. Mr [REDACTED]'s explanation for his behaviour is that it was driven by the need to cut costs as the Council was heading towards bankruptcy. Whilst that may require consideration of financial evidence, that would appear to be distinct from much of the evidence that the Prosecution would seek to lead against the co-defendants, and would relate to the political decisions that the Council would have needed to take from 2017 onwards, rather than an in-depth analysis of past allegedly fraudulent activity.
36. In *Murria* it is understandable why an allegation of fraud did not appear on the indictment given the seriousness of the murder charge. However, had it done so, then it appears that it would not have changed the position of the defendant Mr [REDACTED] or the course taken at the trial. Even then, it was not clear that his case was one of fraud. Rather, it was capable of being so.
37. It seems to me that even if the fraud allegation (or allegation akin to fraud) was necessary to explain the case, that is not of itself sufficient to say that the charges that are being pursued are akin to fraud. Were Mr [REDACTED] to be added to the other counts on the indictment (alleging misconduct in a public office) then it appears likely that this would change the shape of the case considerably, and it may require a large amount of work analysing the underlying transactions to assess what happened and what role (if any) Mr [REDACTED] played. That appears to me to be a further indicator that Mr [REDACTED] case is not a Fraud VHCC for the purpose of the Regulations.
38. I fully accept that his role would appear to be more significant than that of the hitman in *Murria*, where there was likely no connection at all between that defendant and the underlying fraud. However, for the above reasons it does appear that Mr [REDACTED]'s position is removed from the fraud, at least in the sense that his offending exists independently of any fraud.
39. I consider that to say that because an allegation of fraud is in the background to, or the motive for, the offence is substantially founded on that fraud is not correct. It must be looked at on its own merits. In this case I am not persuaded that Mr [REDACTED]'s case is one which is founded on allegations of fraud (whether primarily or substantially).

40. Further, whilst it is clearly unusual (if not unique) for there to be seven advocates instructed for the CPS (even if three are disclosure juniors) for non-Fraud offences, that is not sufficient in my view to make this a Fraud offence. That does not form any part of the test in the Regulations.

Conclusion

41. For the above reasons I agree that this is properly categorised as a non-fraud case.

Single Adjudicator: [REDACTED]

Date: 20 March 2023