Case No: 20114174 C2 & 20114218 C2

Neutral Citation Number: [2012] EWCA Crim 2357

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SNARESBROOK CROWN COURT
His Honour Judge Bing
T20097937

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2012

Before :

LADY JUSTICE RAFFERTY DBE
MR JUSTICE McCOMBE
and
MRS JUSTICE THIRLWALL DBE

- -

Between :

Munaf Ahmed ZINGA **Mukundan PILLAI**	**Appellants**
- and -	
REGINA	**Respondent**

- -
- -

William Clegg QC (instructed by **Neumans Solicitors**) for the **Appellant ZINGA**
Ali Naseem Bajwa QC (instructed by **David Phillips & Partners Solicitors**) for the **Appellant PILLAI**
David Groome & Ari Alibhai (instructed by **Wiggin LLP**) for the **Respondent**

Hearing date: 18th October 2012

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Judgment

Lady Justice Rafferty :

1. Munaf Ahmed ZINGA (40) and Mukundan PILLAI (42) on 29th June 2011 in the Crown Court at Snaresbrook were convicted of conspiracy to defraud and on 14th July 2011 sentenced, Zinga to eight and Pillai to six years imprisonment. Consequential orders were imposed.

2. Salim Ismail Patel pleaded guilty and was sentenced to 12 months imprisonment. His appeal was dismissed on 28th October 2011. Yasmin Zinga and Jose Sreeraman were acquitted. Paul Boswell pleaded guilty at an earlier hearing in the Crown Court sitting at Liverpool and on 8th April 2009 was sentenced to two years imprisonment. He repaid £120,000.

3. Zinga appeals against conviction by leave of Astill J. Pillai's application for leave to appeal against sentence was deferred to enable the application to be heard at the same time. We give leave.

4. This was a private prosecution by Virgin Media Limited ("VM"), the sole major cable broadcaster in the UK, relating to the unlawful use of set top boxes (STBs) which allowed the user to unscramble all channels without authority or payment of fee and thus view all VM's television channels free of charge. The STBs were sold by Rayyonics Limited, which was set up in late 2004/2005 by Zinga, the company director, and his wife Yasmin, and marketed under the brand name Eurovox. Co-defendants were all employees of Rayyonics, a company at least in part fraudulent, and the sale of the decoders part of a conspiracy to breach the copyright of VM.

5. The STBs were sold blank and flashing software ("firmware") either e-mailed to wholesale customers or posted on the internet for dealers to download. The Crown alleged that Zinga was the founder and prime mover of the business, Pillai his technical expert.

6. Occasionally, VM broadcast "electronic counter measures" (ECMs), designed to disable Eurovox STBs. Whenever this was done Zinga commissioned new firmware to overcome the ECMs then secretly distributed it to his dealers and/or placed it on an internet forum for them to find. The Crown's case was that there were several periods in which Eurovox was trading: 2005 to September 2007, September 2007 until April 2008, and April 2008 until November 2008. Zinga defrauded VM of some £10.4 million per month between June 2005 and November 2008. Rayyonics grossed £25-30 million from the sale of STBs and Zinga personally profited to the tune of millions.

7. Business methods altered in 2008 following arrests. In an attempt to disguise criminality those involved with Rayyonics modified the firmware and marketed it as an STB capable of receiving free-to-air channels but continued to distribute the illicit firmware to wholesale customers.

8. In August 2008 a VM investigation unit began covert observations of activity at Rayyonics.

9. On 19th September 2008 VM told the Metropolitan Police ("MPS") it intended to prosecute and sought assistance for arrest and search. On 11 November 2008 PS Smith of the MPS on oath applied to the magistrates for warrants. He and Paul Davies

of VM gave evidence. Paul Davies summarised the VM investigations to date. The Bench was not told it was anticipated VM would prosecute. The warrants were executed on 19th November 2008.

10. The appellant was first interviewed in November 2008. In an interview in August 2009 he declined to answer questions.

11. Rayyonics computers when interrogated yielded 102 emails between Zinga and Pillai between 29th November 2005 and 13th November 2008. In early September 2007 Zinga sent to Pillai two illegal firmware files, a Dnupman and bin file designed to decrypt TV signals without payment. He asked Pillai whether the two files could be combined.

12. Zinga, a married man of previous good character, gave evidence. He set up Rayyonics in 2004/2005. He thought there was no problem in connecting his boxes to a VM cable to obtain free-to-air programmes and understood that stocking free-to-air is or was legal. Rayyonics was a legitimate company selling to wholesalers imported unflashed STBs. He had no intention to trade in a product for use in obtaining pay-per-view channels and did not expect his dealers to do that. He accepted that some did, but not approved by him or his company.

This appeal

13. Parties accept that the sole issue for determination before us is the circumstances surrounding the application for the warrants. If the conduct of VM and of the police is without legitimate criticism the appeal will fail. If legitimate criticism is made out this Court must consider whether the effect of impermissible conduct means that proceedings should have been stayed

The legal framework

14. The law as to applications for warrants is not controversial. The statutory scheme is found within SS 8, 15 and 16 PACE:

> "s.8
>
> (1)
> If on an application made by a constable a justice of the peace is satisfied that there are reasonable grounds for believing
>
> (a)
> that an indictable offence has been committed; and
>
> (b)
> that there is material on premises mentioned in subsection (1A) below which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence; and
>
> (c)
> that the material is likely to be relevant evidence; and

(d)
that it does not consist of or include items subject to legal privilege, excluded material or special procedure material; and

(e)
that any of the conditions specified in subsection (3) below applies in relation to each set of premises specified in the application,

he may issue a warrant authorising a constable to enter and search the premises.

…

(2)
A constable may seize and retain anything for which a search has been authorised under subsection (1) above.

s.15

(1)
This section and section 16 below have effect in relation to the issue to constables……..of warrants to enter and search premises; and an entry on or search of premises under a warrant is unlawful unless it complies with this section and section 16 below.

(2)

Where a constable applies for any such warrant, it shall be his duty

(a)

to state

(i)
the ground on which he makes the application

(ii)
the enactment under which the warrant would be issued

……..

(c)
to identify, so far as is practicable, the articles or persons to be sought……..

(3)
An application for such a warrant shall be made ex parte and supported by an information in writing.

(4)
The constable shall answer on oath any question that the justice of the peace or judge hearing the application asks him.
…….

(6)
A warrant—

(a)
shall specify-

(i)
the name of the person who applies for it;

(ii)
the date on which it is issued;

(iii)
the enactment under which it is issued; and…….

(b)
shall identify, so far as is practicable, the articles or persons to be sought.

s.16
(1)
A warrant to enter and search premises may be executed by any constable.

(2)

Such a warrant may authorise persons to accompany any constable who is executing it.

(2A)
A person so authorised has the same powers as the constable whom he accompanies in respect of

(a)
the execution of the warrant, and

(b)
the seizure of anything to which the warrant relates.

(2B)
But he may exercise those powers only in the company, and under the supervision, of a constable."

15. It is immediately plain that a constable making an application for a warrant has the duty of full disclosure of relevant matters. If there were doubt as to that, the judgment of Hughes LJ in ***R v Stanford*** [2010] 1 WLR 941 dispels it: "In an ex parte application the applicant should put on his defence hat." It is equally apparent that the statutory provisions do not require that any potential prosecutor be identified.

The impugned decision

16. Submissions to the Judge were that he should stay the prosecution as an abuse of the process of the court. Justifications were several, but only one is advanced before us by Mr Clegg QC who did not appear below. He argues that in finding that the identity of the likely prosecutor is not a matter the applicant is required to explain to the Bench the Judge fell into error. With a lighter touch he further argues that, if the Judge were wrong in concluding there was no duty to inform the Bench of the possibility or likelihood VM would prosecute, the Appellant was denied an argument to exclude the evidence pursuant to S78 PACE.

17. Mr Clegg QC submits that private prosecutions should not be the vehicle for the resolution of private inter partes disputes, as he characterises the trial. With his first contention the Respondent agrees, but it argues that if such proceedings are brought improperly the trial process is well equipped to bring them to an end. It submits that since there was at application stage no requirement for disclosure of the identity of the prosecutor the appeal founders on that ground alone. In the alternative, were it concluded that the police should have informed the Bench of the identity of the anticipated prosecutor, nothing undermines the interpretation that they merely considered the ultimate identity of the prosecutor irrelevant. The Respondent relies on HHJ Bing's findings of fact which led him *"unhesitatingly [to] conclude that no mala fides on the part of the prosecution exists in this case"*.

18. Mr Clegg QC was appropriately cautious in his submission in that regard. He went so far as to say that though there is no evidential basis for the suggestion of mala fides, nevertheless the decision-making of those seeking and supporting the application was far from exemplary.

19. He argues that by permitting themselves to be used as an agent of VM the police acted in a manner which left their conduct on the cusp of acceptability. By persuading them to seek warrants VM's conduct left it open to adverse comment. It is also instructive, he submits, that Paul Davies of VM gave oral evidence during the application but stopped short of sharing with the Bench a decision already made as to which body would prosecute. It is in our view facile to suggest that this was a decision not yet made. Mr Clegg points to the Judge's ruling where it reads:

> "It was also agreed that VM would privately prosecute the case…"

20. Submissions to the contrary were advanced below, albeit with an element of the academic about them, but it was unnecessary before us for the Respondent to trouble itself with something so self-evident.

21. The Judge had identified whether the Bench should have been told that this was already agreed to be a private prosecution. He said:

> "It is conceded by the Crown that in the application…….for the warrant it was not revealed (1) [that] it was anticipated VM would prosecute the case privately….[that] point…has more substance and I will return to it later."

And later, in what Mr Clegg QC described as a drawing back;

> "My findings
>
> …Merely because it was envisaged that VM would prosecute the case privately …There was no legal obligation in my judgment for Sgt Smith to have declared explicitly to the [Bench] that VM were the likely prosecutors. Such a requirement is absent from the statute and at the warrant application stage the identity of the prosecutor is not a relevant consideration for the [Bench] to consider."

22. We should perhaps make clear that before the Judge the emphasis of the submissions for the Appellant was upon financial arrangements between VM and the MPS or the Metropolitan Police Authority. Consequently the ruling is discursive as to that aspect, which did not feature in submissions by Mr Clegg QC, and terse as to matters which did.

23. The contention is that the Bench was denied information to which it was entitled and, moreover, for the withholding of which it is difficult to see the justification.

24. To succeed in his arguments before the Judge the Appellant did not have to demonstrate prejudice, simply that the facts surrounding the prosecution offended the court's sense of justice and propriety: ex parte ***Bennett*** 1994 1 AC, 42 or that the

prosecution would undermine confidence in the criminal justice system and bring it into disrepute, ***R v Latif*** 1996 1 WLR, 104

25. Mr Clegg QC relied upon what he described as cumulative difficulties consequent upon silence as to the known identity of the prosecuting body. The Bench had a discretion to grant or withhold a warrant. It might had it known VM was to prosecute have asked why VM had not pursued a remedy in the civil jurisdiction. It might have been so taken aback by what it might have deemed a material omission capable of having an impact on the exercise of its discretion that it might differently have exercised it.

26. It must, argues Mr Clegg QC, have been blindingly obvious that this was to be a private prosecution was relevant and should have been put before the Bench. The application was unusual in that private prosecutions are themselves unusual. The Bench was not on notice that it was anything other than routine. The fundamental and uncontroversial proposition of law that disclosure of all relevant matters must be full was ignored.

27. Finally Mr Clegg QC took us to recent authority. ***R (on application Rawlinson and Hunter Trustees et al) v Central Criminal Court et al*** [2012] EHWC 2254 (Admin) reinforces the need for full disclosure, including of anything which may militate against the grant of a warrant. It cites with approval ***R v Crown Court at Lewes, Ex parte Hill*** (1991) 93 Cr.App.R. 60 when Bingham L.J. held *"the judge should be shown such material as is necessary to enable him to be satisfied of the matters of which he is required to be satisfied before making the order"*.

28. The Respondent maintains that search warrants merely facilitate investigation into crime. This purpose is apparent from s8(1)(b) of PACE which requires that the Bench be *"satisfied that that there are reasonable grounds for believing … that there is material on premises … which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence".*

29. Since the sole complaint is of the failure to inform the Bench that VM would or at the lowest would be likely to conduct any prosecution, the Respondent maintains this information would have been irrelevant and asks, rhetorically, had it been provided, what additional considerations would the Bench have given to the application?

30. In ***Rawlinson*** matters not disclosed went to the central issue of whether criteria for the grant of a warrant were satisfied. In contrast, the information the Appellant claims was wrongfully withheld, namely that VM would have conduct of any prosecution, does not.

31. Even if this court were to conclude that the MPS should have informed the Bench of the agreement with VM, it does not follow that the search warrants were obtained unlawfully: ***Rawlinson*** paragraphs 172 and 173;

> "172 …. it was submitted …that the test to be applied when considering whether to quash a warrant issued under s.2(4) of the CJA 1987 was whether the errors and non-disclosure might have made a difference to the grant of the warrant. Mr Eadie on behalf

> of the SFO submitted that the test was whether they would in fact have made a difference. …
>
> 173 …..in a criminal case the authorities and consideration of public interest point, in our view, to the test being whether the errors and omissions would in fact have made a difference to the decision of the judge to grant the warrants."

Conclusion

32. We do not understand why it was felt acceptable, during an ex parte application with its duty of full disclosure, to keep from the Bench that a private prosecution was expected. We would wish to emphasise that the obligation on an applicant for a warrant is the same as that imposed on any person making a "without notice" application to a court, namely one of "full and frank disclosure". That is what Hughes LJ was saying in *R v Stanford*. The obligation is not necessarily fulfilled merely by an information demonstrating that the bare statutory minima for the grant of the warrant are met. The disclosure must be as "full and frank" as the circumstances of each case requires.

33. The Bench, once informed, might have probed the reason for the CPS not bringing the case. It might have taken an interest in why the MPS thought it appropriate to lend assistance to a large commercial entity in this fashion at this stage. There was, after all, oral evidence before it from a senior representative of VM, the company which would bring the prosecution, and yet he stopped short of explaining an uncomplicated and we suggest an uncontroversial fact. We struggle to see what was the advantage – to anyone – of silence. If nothing else it would seem a natural progression from explanation of VM's legitimate sense of grievance to explanation that VM would have conduct of the case. What harm would it have done? None, so far as we can tell. It would not have been surprising had the warrants in any event been granted after full and frank disclosure, especially as we agree with the Respondent that mala fides is not made out.

34. That said, the Appellant has not demonstrated that the Bench would have refused the applications had it known, as it should have done, of the agreement with VM: Rawlinson. What was the harm in openness? Given our conclusion that there was none and that the Bench, as many do when private prosecutions are brought, would have granted the application, it cannot be said that these warrants would have been quashed as a result of material non-disclosure.

35. That of course is not the end of the matter. An application in reliance upon S78 PACE would have come nowhere near affording arguable grounds for a developed submission. The discretion available to the Judge is so wide that a decision not to exclude the evidence would we suspect have been very difficult successfully to challenge.

36. Grateful as we are to Mr Clegg QC, this appeal is dismissed.

37. Pillai challenges the length of his sentence. He contends that six years is manifestly excessive as failing to reflect his position in the conspiracy. His Grounds are that the Judge erred in sentencing him on the basis that he was Zinga's partner in, and the

technical brains behind, the fraud. There was no sufficient evidence to support that finding and considerable uncontroverted evidence, principally in the form of emails and testimony from Zinga, to contradict it.

38. Imposing sentence the Judge said this was a clever and audacious fraud over a considerable period and the potential market enormous. The aggravating features were the degree of planning and professionalism, the high level of profit and the three and a half years over which the fraud operated. Zinga and Pillai had combined their undoubted talents in a thoroughly devious and dishonest manner. Zinga ensured the imported boxes were described as digital satellite receivers, indicating to Customs that the product was entirely lawful. He then gathered a network of dealers who would flash the product to sell to the public.

39. Pillai had elected not to give evidence so the Judge had to draw his own conclusions from available material. There were 360-odd pages of highly incriminating material found mainly on his computers. Computer know-how was essential. The evidence strongly suggested it was provided by Pillai, since he held himself out as being an experienced IT professional. "Key roll issues" could only mean ways of overcoming VM counter-measures. Zinga was asking for his help in combining loaded software with a bin-file. Pillai had a CD listing good links on the internet, including reference to transmission codes. He had an interest in chat-rooms, which, at the very least, were discussing illicit firmware. None other had been identified as capable of providing the technical know-how for this very technically-based conspiracy. He occupied a desk at Rayyonics.

40. He and Zinga were, effectively, partners and it was inconceivable Pillai did not benefit financially. Trade was so good Zinga registered Eurovox as his trademark and devoted time to eliminating competition. His aim was to become a monopoly enabling paid TV to be stolen.

41. The potential loss to Virgin was immense, running into millions. Zinga was the principal and main beneficiary. Pillai played a crucial but less prominent role.

42. Pillai now 43 was born on 3rd July 1969 and was of previous good character.

43. Developing his submissions Mr Bajwa QC who also appeared below invited close attention to the 102 e mails led by the Crown. He contended that they reveal a man working long hours and unlikely to have had time to perform the role attributed to him at the level the Judge identified. Indeed the Crown closed its case on the basis of a lesser role, that he assisted Zinga with IT relating to the Rayyonics website and email system knowing he was unjustifiably risking the economic interests of the providers of encrypted subscription-based television services.

44. We were urged to the view that Pillai's role was relatively minor, particularly in comparison to Zinga's. Save for an initial payment of £1,500 (shared between him and Mark Liptrott a website designer) in late 2005, he was not paid for IT services. He was working extremely hard during the period of the conspiracy to establish his own legitimate business Marius/Sembience.

45. Mr Bajwa QC suggested another man, Stuart Cox, was a respectable candidate for the epithet technical director, not least since his business card proclaimed him as just

such. Set against all his persuasive arguments however was a compelling list of incriminating material found in items Pillai owned or used.

46. We accept that this conviction has dealt him a crushing blow, everything he had worked for since late 2005 thrown away. His own business, in which he had invested approximately £100,000 (a redundancy payment, a remortgage on his family home and his earnings/savings), will almost certainly not survive. All that said, we remind ourselves that those consequences flow from actions he took, and which led to a conviction. The likelihood of his re-offending is extremely low.

47. He is a committed father to his two children. Both have Autistic Spectrum Disorder. His wife will struggle to cope on her own.

48. We were reminded that the recoverable amount in the confiscation proceedings brought against the appellant Zinga was in excess of £8m. This appellant's assets amounted to a personalised car number plate acquired some years ago. We found this a difficult decision. We are not inclined to find that the Judge fell into error in ascribing to Pillai the role as he set it out but on the information available by the confiscation proceedings it was clear that the difference in role between Zinga and Pillai was greater than was reflected in the two years difference in sentence. In our judgment a greater distinction could, and we think should, be drawn.

49. We quash the sentence of six years and for it substitute one of four years. Any consequential order remains unchanged. To that limited extent this appeal succeeds.