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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 4 March 2014

B e f o r e:

LORD JUSTICE FULFORD

MR JUSTICE HOLROYDE

HIS HONOUR JUDGE LAKIN
(Sitting as a Judge of the CACD)

R E G I N A

v

ANNETTE JABETH
OLUKUNLE BABATUNDE

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Miss A Omideyi appeared on behalf of **Jabeth**
Mr E Amoah-Nyamekye appeared on behalf of **Babatunde**
Mr D Hughes appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. MR JUSTICE HOLROYDE: These applicants admitted involvement in a substantial international conspiracy which involved the obtaining of bank account details and other confidential data by the use of disguised emails in the criminal activity known as phishing. They each renew their applications for leave to appeal against sentence following refusal by the single judge.

2. Sketching the outline of the facts as briefly as is appropriate, we note that there were two key figures in this conspiracy. Tamer Abdulhamid was based in Egypt and operated as a hacker. He obtained confidential account details of many persons around the world, which he sold to other criminals. The evidence showed that he did so for a fee of between three per cent and five per cent of the value of the credit balances in the accounts concerned. Abdulhamid ultimately pleaded guilty to three offences of conspiracy to defraud and was sentenced to six years' imprisonment, that sentence being based upon a total starting point of nine years. Rilwan Oshodi ran the criminal operation in the United Kingdom. He used confidential data sold to him by Abdulhamid and at least one other hacker. When funds were successfully extracted from a victim's bank account, they were transferred into the accounts of co-conspirators and then rapidly withdrawn. Oshodi was convicted after a trial of two offences of conspiracy to defraud and an offence of conspiracy to conceal criminal property and was sentenced to eight years' imprisonment. It should be noted that even after he had been remanded in custody he continued to contact Abdulhamid using an illicit mobile phone from within a prison.

3. We consider first the renewed application by Mr Babatunde. He is now 27 years old. He has a number of previous convictions for offences less serious than these. He pleaded guilty to four offences. Count 1, conspiracy to defraud, related to his purchase of confidential account details from Abdulhamid. The evidence showed that he made payments to Abdulhamid totalling £23,810, from which it could be inferred that he had dishonestly obtained access to bank accounts with credit balances totalling between £476,000 and £793,000. Count 2, conspiracy to defraud, related to his purchasing confidential account details from another hacker. Count 3, conspiracy to transfer criminal property, related to the monies which he had paid to Abdulhamid. Count 4, concealing criminal property, related to sums totalling £40,725 which he deposited into two separate bank accounts.

4. Further evidence of the scale of Mr Babatunde's criminal activity was provided by data found to be stored on his mobile phone and on a computer in his possession. In all, he had the details of 765 bank accounts which had been obtained by criminal means. It was not possible to put any precise figure on the potential losses which could have been suffered by those accounts, and certainly nothing said or done by Babatunde himself contributed to the court's knowledge in that regard. On the basis of historical evidence as to the average losses suffered by the victims of internet crime of this nature, an estimate was made that the potential losses in relation to the 765 account holders could have totalled somewhere between £284,000 and £1,564,000.

5. On the applicant's behalf the point is rightly made by Mr Amoah-Nyamekye that there may well be duplication and overlap between the dishonestly obtained account details

to which the payments to Abdulhamid relate and those account details which are found on the computer. We accept that that is so. It leaves however a residual and large category of other fraudulently obtained account details which are not represented by the specific payments to Abdulhamid.

6. Mr Babatunde initially pleaded not guilty. He changed his pleas to guilty on the day of his trial. However, he had given an earlier indication of his intention to plead guilty and the judge allowed him 25 per cent credit for those late pleas.

7. In his sentencing remarks on 30th September 2013, His Honour Judge Fraser referred to the international scale of the offending of which Babatunde was an important part. He estimated the potential loss which could have been caused by Babatunde's crime as "at the lower end of the estimates in excess of three quarters of a million pounds". He observed that crimes such as these cause harm on two levels. First, they damage and undermine confidence in the banking industry and give rise to the need for ever more sophisticated and expensive security measures. Secondly, they cause harm to the individual account holder who suffers even if his or her financial loss is ultimately met by the bank concerned.

8. With specific reference to Babatunde, the learned judge said of the offences:

> "These were, I have no doubt, professionally planned, and there was a clear sophistication in the way they were conducted. The relevant factors affecting sentence in your case are obviously the potential losses from your criminal activities … at least three quarters of a million pounds and indeed in excess of that. Because of their nature they were fraudulent from the outset. They were again quite obviously multiple frauds carried on over a significant period of time, and the most significant aggravating factor is that they involved the use of not just one but many victims' identities, and that is a particularly serious matter given the position that the financial system has to deal with so far as criminal activity is concerned."

The learned judge imposed concurrent sentences of five years six months' imprisonment on each count.

9. Turning to Miss Jabeth, she is now 27 years old, the mother of a six-year-old daughter and of previous good character. In 2011 and 2012 she was in a relationship with Oshodi. She pleaded guilty to one count which charged her with conspiracy to defraud, the particulars being that between 1st October 2011 and 5th April 2012 she conspired with Oshodi and others to defraud Karen Budow and/or Santander Bank Plc by dishonestly accessing bank accounts and making fraudulent and/or unauthorised transfers of funds exceeding £1 million.

10. The evidence showed that Miss Karen Budow held two accounts with Santander Bank. She had a facility to make electronic transfers from those accounts which would be authorised by the use of a one time passcode. Such a one time passcode would be sent, when needed, by the bank by way of a text message to a mobile phone number recorded

in the customer's file. By some dishonest means, Oshodi came into possession of all the necessary personal details of Miss Budow.

11. On Christmas Eve 2011, Miss Jabeth telephoned the bank masquerading as Miss Budow. She did so using an unregistered pre-paid mobile phone. It was accepted by the prosecution that Oshodi was with her when she made the call and doubtless directed her as to what to say. Miss Jabeth succeeded in passing herself off as Miss Budow and managed to change the contact number to which the one time password would be sent. Armed with that information and using a computer at her home, the conspirators were able to transfer funds out of Miss Budow's accounts. They made in all 376 transfers in the space of about 24 hours, until they reached the point at which both accounts had been emptied of funds. In all, £1,051,967 was obtained. Those monies were transferred to 64 other accounts using an internet service which effectively anonymised and concealed the holders of the accounts. Within 36 hours of the transfers out from Miss Budow's accounts, all the monies had either been transferred or spent from the 64 receiving accounts.

12. Miss Budow made a statement describing the shattering effect which this crime had upon her. The bank ultimately bore the financial loss, but Miss Budow's evidence indicated clearly the damaging effect which it had had upon her and her continuing fear, now that her personal account details had been obtained, that they would be used for some further fraud against her or another innocent victim.

13. Miss Jabeth was arrested on 5th April 2012. In interview she pretended only to know Oshodi by a nickname and denied any involvement in the crime. She was later re-arrested and on this occasion put forward a prepared statement again denying involvement and claiming to have received an inheritance which left her in a financially comfortable position. She eventually pleaded guilty on the day of her trial. Other counts against her were left to lie on the file on the usual terms. The learned judge did not indicate precisely what credit was given for the very late guilty plea but we infer that it was of the order of 10 per cent.

14. In his sentencing remarks on 10th May 2013 His Honour Judge Robbins referred to the extent and sophistication of the overall offending. He said:

> "Courts must be seen to crack down on this type of crime which is becoming ever more prevalent in this age of internet technology and sentences should be designed to deter others who may be tempted to employ their IT skills to defraud victims all around the world in this and similar ways."

Dealing with Miss Jabeth specifically, he went on to say this:

> "... you were closely associated with Oshodi. You assisted him however and whenever was required, especially when he was in custody on remand and you made the vital phone call to Santander that set the fraud of over £1 million pounds rolling."

It may be noted that earlier in his sentencing remarks when dealing with Oshodi, the learned judge had made the point that even after remand in custody, Oshodi had continued "his activities" with illicit mobile phones, making contact with Abdulhamid and Miss Jabeth. He sentenced Miss Jabeth to four years' imprisonment, giving credit for 29 days in relation to time when she had been subject to a qualifying curfew.

15. Turning to the grounds of appeal, it is common ground that the sentencing guidelines for fraud offences do not apply to the common law offence of conspiracy to defraud, but are informative as to the level of sentencing for related substantive offences.

16. On behalf of Mr Babatunde it is submitted the judge must have taken a starting point in excess of seven years and therefore above the offence range of four to seven years which the guidelines indicate for the most serious type of banking fraud. It is submitted that the starting point was too high in all the circumstances. It is further submitted that the judge wrongly assessed the potential loss which could have flowed from Babatunde's offending as being in excess of £750,000.

17. We agree that the judge did take a starting point somewhat higher than the guidelines would indicate for a substantive offence. Indeed he said in his sentencing remarks that he regarded Babatunde's offending as sitting at the top of or just above the most serious category. In our judgment however he was entitled to do so. The applicant Babatunde had not simply admitted substantive offences. He had admitted conspiracies to defraud and was thus admittedly part of a wider overall offending.

18. In our judgment, the judge was also entitled to make the estimate he did of the financial loss which could potentially have been caused. The nature of the criminal activity, and Babatunde's own silence on the topic, made it impossible for the prosecution to assist the court with a precise figure. But the judge was entitled to reach the conclusion he did from the evidence as a whole. As we have indicated, the payments made to Abdulhamid form the basis of an estimate of part of the potential loss. Even making a generous allowance for the possible overlap of account details, the hundreds of account details stored on the computer gave rise to a further estimate of potential loss. It seems to us that the learned judge properly erred on the side of caution in taking an estimated figure which was very much at the lower end of a range which could have exceeded £1 million by a substantial margin. We add that the judge was generous in allowing as much credit as he did for the very late change of pleas. In those circumstances, we agree with the conclusion reached by the single judge when he refused leave, namely that the overall sentence of five-and-a-half years' imprisonment cannot be said to be manifestly excessive. On the contrary, it was the right sentence. If we had thought otherwise we would have granted the applicant the extension of time which would be needed; but as it is, we see no merit in his applications and they are refused.

19. We should add that the single judge specifically invited the court, if leave were again refused, to consider a loss of time order. We have done so. The applicant may count himself fortunate that we have decided it is not necessary to exercise that power in this case.

20. On behalf of Miss Jabeth, it is submitted by Miss Omideyi that the judge took too high a starting point, failed to give sufficient weight to the applicant's personal mitigation and in particular fell into error in sentencing on a partially incorrect factual basis. It is argued on this applicant's behalf that the judge erroneously found that Miss Jabeth continued to help Oshodi whilst he was in prison, something which the applicant had always denied.

21. We have been assisted by the submissions not only of counsel for each of the applicants, but also of Mr Hughes for the prosecution. It is clear that the prosecution in relation to the sentencing of Miss Jabeth did not pursue a specific allegation that she had continued to assist Oshodi in dishonest activity whilst he was remanded in custody. Moreover, the period of offending covered by the one count to which Miss Jabeth pleaded guilty was a period which ended before Oshodi was remanded into custody. As we have already indicated, Miss Jabeth herself denied the allegation initially put forward by the prosecution in written form that she had continued to assist Oshodi in dishonest activity whilst he was in custody.

22. We see merit in the submission clearly and cogently made by Miss Omideyi. On the information before us, we are not able to say that the judge was entitled to make a finding against Miss Jabeth to the effect that she had continued to render criminal and dishonest assistance to Oshodi after the period covered by the charge against her. Moreover, it seems to us impossible to say that the error into which the learned judge fell in this regard was not a material one for sentencing purposes. The passages which we have quoted from his sentencing remarks show, it seems to us, that he did regard it as a significant part of the overall criminality of Miss Jabeth.

23. It is in our judgment clear that Miss Jabeth was a willing participant in the conspiracy which she admitted and so far as her personal mitigation is concerned, the unfortunate reality is that she has brought upon herself and her child the consequences which flow from her imprisonment. Nonetheless, it is essential to focus upon the specific offence which she admitted.

24. We endorse the generality of the learned judge’s sentencing remarks, but we qualify our endorsement in this way. It seems to us that the learned judge did fall into error in the one respect which we have identified. In those circumstances, it seems to us that justice will be done if we make a reduction in the sentence of this applicant to reflect the point identified by counsel. We therefore grant leave to appeal and we allow the appeal to the extent that we reduce Miss Jabeth's sentence to one of three years six months' imprisonment.