Re-opening an appeal against conviction after determination (R v Ibori and others)

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Corporate Crime analysis: The Court of Appeal (Criminal Division) has the power to re-open an appeal against conviction once determined in exceptional cases, however, in R v Ibori, it declined to accept its jurisdiction to do so. Dan Bunting, barrister at 2 Dr Johnson's Buildings, examines the case and looks at when the court will exercise its powers to re-open conviction appeals when abuse of process is alleged.

R v Ibori and others [2018] EWCA Crim 2291, [2018] All ER (D) 104 (Oct)

What was the background?

These were applications for permission to appeal against conviction on behalf of five applicants who either pleaded guilty to, or were convicted of, money laundering, fraud and other offences. This appeal followed on from the judgment in *R v Gohil; R v Preko* [2018] EWCA Crim 140, [2018] All ER (D) 97 (Feb) and there is a factual overlap.

There is an extremely lengthy factual background to the appeal—both in terms of the allegations themselves—as well as the criminal proceedings (which lasted several years), so this is, of necessity, a whistle stop tour of the issues.

James Ibori was the Governor of Delta State in Nigeria between 1999 and 2007. His lawyer in England, from 2005, was Bradresh Gohil. It was alleged that Mr Ibori had abused his position in Nigeria to siphon off public money for his own purposes. He laundered much of this money with the assistance of Mr Gohil. The other applicants were involved with assisting the money laundering in one way or another.

Mr Ibori—as well as Daniel McCann and Lambertus De Boer—pleaded guilty, while Udoamaka Onuigbo and Christine Ibori-Ibie were convicted after a trial. All the convictions date back to 2010, apart from that of Mr Ibori, who pleaded guilty in 2012; his subsequent appeal against sentence being dismissed a year later.

In a separate case, Mr Gohil was convicted of money laundering in 2010 before pleading guilty to a further set of allegations later that year. He unsuccessfully applied to appeal that conviction in 2014.

Mr Gohil remained aggrieved and tried to set out to prove that he was the victim of police corruption. Arising from his endeavours, he was charged with perverting the course of justice. That trial came to an abrupt halt when the prosecution offered no evidence. They subsequently accepted that there had been a failure of disclosure in that case, as well as the other cases involving Mr Ibori.

This lead to Mr Gohil applying to re-open his appeal against his conviction in 2016. The application was not heard until 2018, and it was refused. The legal issue for that court was whether there was a power to re-open an appeal against conviction once determined. With reference to *R v Yasain* [2015] EWCA Crim 1277, [2015] All ER (D) 181 (Jul), the court accepted that there was power to do so. However—provided the original order was not a nullity—this would be exercised sparingly, and only where it is necessary to avoid real injustice and there is no alternative remedy (to which the existence of the CCRC will generally be a bar). In practice—though not in theory—this will be limited to clear procedural errors. The court held that Mr Gohil's case did not fall into that category.

What did the court in Mr Ibori's case decide?

The law on abuse of process is clear, even if it is not always easy to apply. There are still the two different categories of abuse:

- firstly, where a defendant cannot have a fair trial
- secondly, where it is unfair to try him.

It was the second category that was said to be in play here.

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In assessing this, there is a balancing exercise to be undertaken between the different competing interests. Non-disclosure, of itself, cannot amount to an abuse of process. However, once a defendant can establish an abuse, it will generally not matter if they have entered a guilty plea.

The Crown and the court accepted that there had been failures in disclosure—both in this case and in the earlier case involving Mr Gohil. The court adopted the previous court's conclusion that this was not enough to find an allegation of abuse of process. There was a further problem for Mr Ibori, and that was that his application was based, in part, on an allegation of corruption against a police officer. However, the court concluded that if the officer had been corrupted, then Mr Ibori was 'instrument in that corruption', which would be fatal to the application.

The applications of the other defendants likewise failed.

What are the practical implications of this case?

The case is a further reminder of the difficulties in succeeding in an appeal against conviction where there has been a guilty plea. Anybody advising on an appeal after a plea of guilty must be aware that it is an uphill task and be sure to identify the grounds.

The authorities have not always been consistent—the distinction between when a conviction is a nullity—and so therefore unsafe without consideration of the merits of the case, and when it is unsafe on other (potentially similar) grounds is not always clear (see *R v Nightingale* [2013] EWCA Crim 405).

It is unlikely that, in future, there will be further attempts to re-open settled convictions by a direct approach to the court. It is now clear that the jurisdiction is a very narrow one. That, of itself, is not a problem—any of the grounds that would be put forward in those circumstances will be able to find an application to the Criminal Cases Review Commission (CCRC) and will—or, at least, should—have a higher chance of success.

Interviewed by Evelyn Reid.

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