



THE COURT OF APPEAL

Record No. 202/2015

Birmingham J.  
Mahon J.  
Edwards J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

CATHERINE CALLANAN

APPELLANT

**JUDGMENT of the Court delivered on the 25th day of May 2017 by Mr. Justice Mahon**

1. The appellant pleaded not guilty to two counts, namely:-

*Count No. 2:* Obtaining services by deception contrary to s. 7 of the Criminal Justice (Theft and Fraud Offences) Act 2001, and

*Count No. 4:* Obtaining services by deception contrary to s. 7 of the Criminal Justice (Theft and Fraud Offences) Act 2001

2. The appellant was tried before a jury at Waterford Circuit Criminal Court, and was found guilty on the 10th July 2015 in respect of both counts. On the 23rd July 2015, the appellant was sentenced to four months imprisonment on count no. 2, and count no. 4 was taken into consideration. The four month sentence was suspended in its entirety for a period of one year. A further two similar counts were withdrawn from the jury by direction of the learned trial judge. This is the appellant's appeal against her conviction.

3. The appellant relies on a single ground of appeal, as follows:-

"The learned trial judge erred on the law and / or on the facts in failing to direct the jury to return verdicts of not guilty on each and / or either of the counts upon which the verdicts of guilty were returned."

4. The appellant was at the time of the commission of the offences a school completion officer in the employment of the Vocational Education Committee (VEC) in Waterford.

**The bouncy castle hire**

5. Count no. 2 related to the hire of a bouncy castle on the 8th September 2012 for use in the housing estate in which the appellant resided, at a cost of €180. Mr. Jerome Waters, a part time employee of the company which owned the bouncy castle (and which was his sister's business), gave evidence to the effect that he had been instructed by the appellant to send the invoice for the hire of the bouncy castle to the VEC. The invoice was subsequently paid for by the VEC, and was in turn repaid to the VEC by the appellant.

6. The fact that the bouncy castle was ordered, delivered and erected at a location close to the appellant's home, and was used by her for a private purpose was not in dispute.

7. Crucial evidence was given by Mr. Waters. His evidence was that he had taken the order for the bouncy castle from the appellant and had written certain details into a diary for the date of delivery, being the 8th September 2012. He was unsure as to the exact date of the placing of the order, or whether he had taken it by telephone or in person. The relevant diary entry stated as follows:-

"Cathy Callanan, 112 Pairc Na mBlath, Ballinroad. Invoice 2 County Waterford VEC, Unit 13, Dungarvan Shopping Centre, care of Cathy Callanan."

8. Mr. Waters stated that the normal practice in the business was to be paid in cash on the delivery of the bouncy castle and to have the client sign an insurance document. The request or direction from the appellant that the cost of the bouncy castle be invoiced to the VEC prompted him to telephone his sister, Ms. Lenane, which he did, and obtain her permission to deal with the booking on that basis. Mr. Waters was unable to say whether he had contacted his sister at the time the order was placed with him some days before the 8th September 2012, or on the morning of delivery.

9. Ms. Lenane also gave evidence. She told the jury that she was informed by Mr. Waters about the bouncy castle delivery to the appellant "after he had delivered it". She said that her brother had telephoned her seeking her permission "to connect the castle that evening but not take payment, that payment would be made by the VEC through an invoice being sent to the VEC and then payment being received". She gave her permission.

10. At the conclusion of the prosecution's evidence, counsel for the appellant applied for directed verdicts of not guilty in respect of each of the four counts on the indictment. In relation to the bouncy castle count, prosecuting counsel submitted to the learned trial judge that the service provider had not given evidence "that they were induced into providing the service by the alleged deception; (it was stated) that the service would not have been provided absent the alleged deception; and (it was not) said that they were influenced in the provision of the service by the alleged deception."

11. Counsel also submitted:-

"...the deception alleged here again is that Ms. Callanan claimed the service was for Waterford VEC and the evidence from Mr. Waters of that organisation was that he believed the bouncy castle, deliver the bouncy castle, set it up, and then enquired about method of payment and Ms. Callanan at that stage enquired as to whether she could pay by pay of purchase order from the VEC or indicated that was her preference. He was not accepting of that position at that stage."

*His preference was for cash. He went away. He telephoned his sister, got the ok, and when he came back to collect the bouncy castle later that evening told Catherine Callanan that that was ok, but he indicated that had the answer from his sister being otherwise he would have gone back to Catherine Callanan and looked for cash and he indicated that the practice in this business was you looked for cash either on collection or on delivery of the bouncy castle, at the end of the day. So, the first question then, Judge, is what evidence there has been in respect of deception and in this case there is the suggestion from Mr. Waters certainly at the occasion of delivery of the castle, that Catherine Callanan has raised the prospect of payment by Waterford VEC... But moving on to the second leg of the test, is there evidence that the alleged deception, or that this query, operated on the minds of Jerome Waters in the provision of the service? Is there evidence that the service was provided by reason of the enquiry? I think it is clear, in my respectful submission, Judge, that there is not evidence under either heading. Mr. Waters, in fact, told the court that the suggestion of purchase order was one of which was troublesome for him, he wasn't keen on it and he wasn't willing to accept it until he went back to his sister, and that acceptance of that was only communicated to Ms. Callanan on his return... He gave no evidence that the service was provided by reason of the alleged deception. In fact his evidence was to the contrary. He gave no evidence that the alleged deception had operated on his mind in a positive way in terms of the decision to give the bouncy castle to Ms. Callanan. In fact, on the contrary, Judge, he said it was a problem for him."*

12. Prosecuting counsel submitted to the learned trial judge that:-

*"In any case it is clear that before the service was provided it was represented to him that the VEC would pay it and he confirms in others. My friend seeks to suggest that the section needs to operate at that point to require him to provide the service. That is not the reality in which services are provided but when he comes back to take down the castle whether it is in my garden, yours or in this case, Ms. Callanan's community green, it is the end of the service that in the normal course the payment is obtained or agreed. It might have been in a different atmosphere as far as he was taken down the bouncy castle if he had not being paid for it but here it was that he was given a purchase order instead."*

13. In the course of her ruling, the learned trial judge stated that she was satisfied "...that the deception must either precede (the conferring) of the benefit or coincide with it".

14. In relation to the bouncy castle count specifically, she went on to state as follows:-

*"By contrast, in relation to the evidence concerning count 2, there was evidence that there was considerable engagement between the accused and Mr. Jerome Waters concerning payment and there is evidence that a clear and false impression was conveyed to him that the VEC was the client and that the VEC would be paying the bill for the bouncy castle. This evidence establishes that the deception was perpetrated before the service was conferred."*

15. The learned trial judge refused the application in relation to count 2 and expressed her satisfaction that there was evidence from which the jury could convict.

#### **The minibus hire**

16. Count 4 related to the use of a mini bus to transport the appellant's son and a group of his friends from Dungarvan in Co. Waterford to "Kart World" in Co. Cork on the 27th October 2012, and the appellant's instructions that the cost of the transport be invoiced to the VEC. The mini bus was owned by the VEC. Its driver on the date was Mr. Peter Hayes who was ordinarily paid for driving the bus on an hourly basis by that organisation. Mr. Hayes knew the appellant from her involvement in the VEC's School Completion Programme.

17. Mr. Hayes gave evidence that the appellant contacted him a couple of days in advance of the 27th October 2012, and booked him to drive the mini bus to Co. Cork on that date. Mr. Hayes confirmed his availability to drive and the necessary arrangements were made. Approximately fifteen young people travelled in the mini bus, while the appellant travelled separately. Mr. Hayes was told by the appellant that the occasion related to her son's twenty first birthday. Having completed the journey to 'Kart World', and having left his young passengers there, Mr. Hayes went for a walk. On returning to Kart World for the purposes of picking up his passengers and returning them to Dungarvan he asked the appellant "what group do I put them down to". He asked this question in order to provide himself with information to complete a form for submission to the VEC for payment to himself in respect of driving the mini bus to and from Co. Cork. Mr. Hayes was requested by the appellant to put it down to the "School Completion Programme". This he did, and in due course he was paid for his work by the VEC. Mr. Hayes said that he had always assumed that the trip had been authorised by the VEC, "...that it was above board, like, that it would have been sanctioned". Subsequently, when the matter was raised with the appellant by the VEC she reimbursed that organisation for the relevant amount.

18. When cross examined, Mr. Hayes said that he, on occasion, drove the mini bus "for outfits other than those operating under the VEC". But, in all instances he would claim payment from the VEC, and that it was a matter for the VEC to recover such payment from third parties where appropriate. He also said that had the appellant offered to pay him directly he would have refused and would have insisted that the payment go through the VEC as this was necessary in order to ensure insurance cover for the bus.

19. In her submission to the learned trial judge for a directed not guilty verdict in relation to count 4, counsel for the appellant maintained that Mr. Hayes, as the service provider, had not been induced into providing the service of driving the mini bus as a result of any deception on the appellant's part. She emphasised the evidence that Mr. Hayes would never have accepted payment directly from the appellant and would have insisted that it go through the VEC.

20. The learned trial judge ruled that the mini bus count should be left for decision to the jury.

#### **Discussion and decision**

21. It is submitted by the appellant that certain essential elements of the s. 7 offence are absent in this prosecution. They are:-

(i) that the accused was guilty of the deception alleged. The indictment particularised the deception (in both counts) in the following terms "by claiming the service was for official Co. Waterford VEC use and charging same to Co. Waterford VEC without permission";

(ii) that the deception operated in the mind of the service provider. It is contended that in order to satisfy this requirement the service provider had to have been aware of the deceit, believed it, and thought it relevant in terms of the decision to provide the service;

and

(iii) that the service was provided in consequence of the deception.

22. The cases of *R v. Collis Smith* (Court of Appeal, Criminal Division, 30th September 1971) and *R v. Coady* (Court of Appeal, Criminal Division, 11th January 1996) are cited as authorities, (albeit that they are both concerned with the offence of obtaining goods by deception contrary to s. 15(1) of the Theft Act of 1968), for the contention that the necessary ingredient of deception must be present at or before the provision of the goods or services.

23. Section 7(1) of the Criminal Justice (Theft and Fraud Offences) Act 2001 provides for the offence of obtaining services by deception, as follows:

*"A person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception obtains services from another is guilty of an offence."*

24. Dishonesty is defined under s. 2(1) of the same act as meaning "without a claim of right made in good faith", while s. 2(2) of the Act defines 'deception' in the following terms:-

*"A person shall be held to deceive if he or she:-*

*(a) creates or reinforces a false impression, including a false impression as to law, value or intention or other state of mind,*

*(b) prevents another person from acquiring information which would affect that person's judgement of a transaction, or*

*(c) fails to correct a false impression which the deceiver previously created or reinforced or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship, and references to deception shall be construed accordingly.*

25. Section 7(1) largely mirrors s. 1 of the U.K.'s Theft Act 1978.

26. Section 2(3) provides:-

*"2(3) That for the purposes of this Act:*

*(a) "gain" and "loss" are to be construed as extending only to gain or loss in money or other property, whether any such gain or loss is temporary or permanent,*

*(b) "gain" includes a gain by keeping what one has, as well as a gain by getting what one has not, and*

*(c) "loss" includes a loss by not getting what one might get, as well as a loss by parting with what one has."*

27. In the instant case, the bouncy castle was booked by the appellant, by all accounts some days prior to the 8th September 2012. It is beyond doubt that the appellant booked the bouncy castle in the name of the VEC because, she herself said in her statement to the gardaí that she was conscious of the fact that bouncy castles were in short supply and she was anxious to use the leverage of the VEC to ensure that the bouncy castle would be made available to her on the date in question. This was, in itself, an act of dishonesty on the basis of which, and on her own admission, she ensured the delivery of the bouncy castle on the date in question. Had the deception ceased at that point, and if upon its delivery she herself paid for it in cash or agreed to pay for it in cash, no offence could possibly have been committed because of the absence of an intention to make a gain at the cost of another.

28. While the preponderance of the evidence suggests that the direction by the appellant to charge the cost of the bouncy castle to the VEC was not made to Mr. Waters prior to the physical delivery of the bouncy castle on the 8th September 2012, that fact cannot be taken in isolation to its earlier booking in the name of the VEC. That instruction as to the mode of payment is, in the particular circumstances of the case, evidence of dishonesty and of forming the "*intention of making a gain*" and "*causing loss to another*", in the absence of subsequent events indicating otherwise (for example, if the appellant herself paid Mr. Waters), or, indeed, obtaining prior authorisation from the VEC on the basis that the cost would be re-imbursed. Furthermore, the delivery of the service in question was not completed until the expiry of the booking period. It was the provision of a service which was capable of being retrieved or cancelled immediately following delivery by removal of the bouncy castle, had the provider so decided. Again, the preponderance of the evidence would suggest that the decision to leave the bouncy castle in situ for the duration of the booking, in circumstances where there was not to be a cash payment, was undoubtedly prompted by the fact that an invoice was to be sent to the VEC, a public body likely to honour payment in due course.

29. In the context of this case the prosecution was required to establish that the appellant *dishonestly and with the intention of making a gain for herself or causing loss to another by deception* obtained a service from *another*.

30. The intention of making a gain relates to the allegation that the appellant intended that the VEC would pay for the services provided. The evidence from the CEO of the VEC, and other staff members was to the effect that the appellant had not been authorised to charge the services to the VEC, and had not sought authorisation. The jury was told that the appellant only reimbursed the VEC after the matter had been raised with her. The appellant provided explanations to the VEC for her actions, and these were canvassed in the cross examination of witnesses undertaken by the appellant's counsel. The jury was advised of other rare occasions when VEC staff were permitted to make personal purchases through the VEC and then reimburse that organisation. This happened very occasionally and examples given included the fixing of a tow bar to a staff member's vehicle, and the purchase of an I-pad.

31. Section 7(1) uses the term "*another*" three times. That term is not necessarily a reference to the same party. In his commentary on "Offences of Deception" in his handbook "Criminal Justice (Theft and Fraud Offences) Act 2001", Cathal McGreal states (at p. 14):-

*"..The person referred to as "another" need not necessarily be the victim...Again, the dishonesty need not be with reference to the person induced..."*

32. The submission that an offence is not committed unless the deception operates in the mind of the service provider and that the service provider must have been aware of the deceit is accepted, but subject to the clarification, if such is required, that the service

provider need not necessarily be aware that the information provided to him and which prompts the provision of the service is based on deception or dishonesty.

33. The definition of *deception* in s. 2(2) refers to the creation or reinforcement of a false impression, the prevention of another person acquiring truthful information relating to a transaction and the creation of a false impression to deceive another. It does not require that the service provider must be aware of the deceit as being such before or at the time of the provision of the service.

34. Prior to the enactment of the 2001 Act, in *DPP v. Ryan* (3 Frewen 107, [1986]), the Court of Criminal Appeal adopted the following English definition of deception:-

*"To deceive is ...to believe that a thing is true which is false, and which the person practicing the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely, it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action" per Buckley J. in Re London and Globe Finance Corporation Limited [1903] 1 CH 723 at 732."*

35. The core issue is, essentially, what information was conveyed expressly or by implication to the service providers in both instances and the intent behind it. It is irrelevant that one or both service providers may have provided the services if given accurate information at the outset. Furthermore ordering the bouncy castle in the name of the VEC to ensure availability but then, upon delivery, paying or agreeing to pay in cash for its hire would not have afforded the appellant any pecuniary gain nor would it have been intended to cause any loss to the VEC, nor could it have caused any loss to that organisation. In that event, no offence could have been committed under s. 7(1).

36. *McGreal*, in his commentary on his definition of deception in s. 2 (at p. 57) stated:-

*"Deception is defined in s. 2 must contemplate the giving of a false impression, or failing to correct such an impression, (which is at least partly attributable to the defendant) on matters ranging from law, value or state of mind. Alternatively, it might deny the full facts or fail to warn the victim so that he or she makes an uninformed decision. Finally, deception will be operative when the defendant is bound by fiduciary or confidential relationship to correct a false impression acting on the victim's mind and fails to do so."*

37. By way of illustration, *McGreal* refers to the case of *R v. Bernard* [1837] 7 CP 784 which held that the mere clothing worn by the defendant was enough to create a deception that he was entitled to a discount. In that case, the defendant entered a shop in Oxford wearing a fellow commoners cap and gown. He induced the shopkeeper to sell him goods on credit by an expressed representation that he was a fellow commoner. It was held that the defendant would have been guilty even if he had said nothing. The act of deception can therefore be implied.

38. In relation to the bouncy castle count, the evidence was to the effect that the service was ordered in the name of the VEC, and the service provider was instructed to submit an invoice to the VEC for payment which he agreed to do and did in fact do. Whether or not this was deception such as to constitute an offence under s. 7(1) entirely depends upon the appellant's intent. Did she intend to deceive? Did she intend that the VEC would pay for the hire of the bouncy castle without reimbursement by her? This question was a matter for resolution by the jury, and the learned trial judge properly left it to the jury for its decision.

39. In relation to the mini bus hire count, the relevant question is again; did the appellant intend, in arranging for the service of providing the mini bus to bring her son and his friends to and from Kart World, that it be paid for by the VEC without reimbursement from her. The fact that the appellant may not have expressly sought the service from the mini bus driver on the basis that it would be paid for by the VEC in advance of a provision of the service is not the deciding factor. There was evidence that such a request was initially made by implication and later confirmed in response to Mr. Hayes' question prior to the return trip 'What group do I put them down to'!

40. The question as to whether or not the appellant had left the mini bus driver with the false impression or belief at the time she engaged his services that the return trip to Kart World was sanctioned by the VEC and would be paid by the VEC was an issue properly left for decision by the jury. Equally, the issue whether or not the cost of providing the service would be paid for by the VEC on the basis that it be reimbursed to that organisation by her was also a matter properly for decision by the jury. The learned trial judge was therefore correct in permitting this count go to the jury.

41. Accordingly, the appeal, in respect of both counts, is dismissed.