

ADVICE ON THEFT & FALSE ACCOUNTING

1. I have been asked to advise POL on my view of the “equality” of the offences of theft and false accounting under the Theft Act 1968, and to consider the terms of the letter sent by POL to SS on 24th February 2015.
2. SS is, I am told, beginning to advance arguments that POL is abusing its prosecutorial role by charging subpostmasters with theft, when there is no evidence of it, in order only to pressure subpostmasters into pleading guilty to false accounting.
3. I have read M103 (the case of Timothy Burgess) where at §4.19 to §4.22, SS assert the following: -
 - 1) In the POIR, POL had said Burgess had initially been charged with theft “but this was subsequently withdrawn”.
 - 2) The Magistrates declined jurisdiction based on their sentencing powers and sent the case for trial when theft was the only live matter.
 - 3) POL representations at court had been that Burgess had taken the money and altered the accounts to cover his tracks.
 - 4) At the Crown Court, POL responded favourably to a letter offering a plea to false accounting in the alternative to theft and so POL did not proceed on the theft count.
 - 5) Burgess pleaded not guilty to theft but guilty to false accounting
 - 6) POL offered no evidence on the theft count.
 - 7) SS opine that they “consider that it is not correct to say that the theft matter was withdrawn”.
 - 8) Neither the “Summary of facts” provided on disclosure to Burgess nor anything served subsequently revealed in SS’s view any evidence of

theft.¹

- 9) Thus, SS concludes “this was possibly an abuse of Post Office’s authority ...” and prior review say by the CPS might have led to the theft charge being discontinued before the case arrived at the Magistrates’ Court.
 - 10) SS have seen several such cases where the “practice has been frequently employed by Post Office to encourage defendants, in the absence of evidence of theft, to plead guilty to the “lesser” charge of false accounting in the hope of avoiding a custodial sentence”.
4. I have read CK’s response to these allegations upon which Jane McLeod’s letter to SS of 24th February 2015 appears to be based.
 5. I have also been made aware that Sir Tony Hooper has seen the letter, and the gist of what he has said, among other things, is that false accounting *is* a lesser charge than theft, so SS was not incorrect to characterise it as such. He added however that if someone steals, then that is more serious than if someone falsely accounts to cover up an accidental loss of £10,000. But if someone falsely accounted for say £500,000 then that offence is of greater seriousness.
 6. In its advice, CK had said that SS’s views were inexpert and wrong. On this particular topic, they said:
 - *The suggestion that the offence of false accounting is a less serious offence to that of theft. This suggestion has appeared in a number of contexts, most commonly where an Applicant has pleaded guilty to the former offence so as to avoid “the more serious” charge of theft, or has pleaded guilty to “the lesser offence” of false accounting.*

¹ If SS is right, then Burgess was sent to the Crown Court on the theft charge only and, as a result of his solicitor’s letter, and POL’s favourable response to it, the false accounting charge was added to the indictment as an alternative to theft. This does not mean there was no evidence underlying the allegation of theft

- *In fact, both offences are equal in law: both are offences of dishonesty and both carry the same maximum sentence (7 years imprisonment).*

7. This was used as the basis for a letter that was sent to SS, which included the statement:

- *The suggestion that the offence of false accounting is a less serious offence to that of theft is incorrect. Both offences are equal in law: both are offences of dishonesty and both carry the same maximum sentence (7 years imprisonment).*

8. I understand that POL wishes to ensure that the statement made in its letter of 24th February 2015 is defensible. Thus, my specific advice is required on the following:

- As a basic legal point, whether both offences do carry the same maximum sentence and whether they are both offences of dishonesty (we presume that this is correct and is not the source of Tony's comment)?
- What arguments could be advanced to defend this statement?
- What arguments could be advanced to attack this statement?
- Whether in your view it is fair to characterise these offences as being equal (against whatever yardstick you think is most appropriate to apply)?

9. First, there is no legal concept of the "equality" of offences in law. All I think CK meant by it was that both are offences of dishonesty carrying identical maximum sentences. This was a generalisation but in reality means little or nothing.

10. Tony Hooper's examples are trite examples of where an allegation of theft may be of more seriousness than an allegation of false accounting and where an allegation of false accounting may in certain circumstances be of greater

seriousness than theft. But the examples he gives are of course also generalisations, and are not case-specific examples.

11. There will indeed be cases where a theft causing actual loss, if the default is say in the 10s of £1000s, will be of far greater seriousness than the false accounting that was undertaken to cover it up. Conversely, there will be cases where the false accounting was of far greater sophistication than the theft it was designed to cover up as to characterise that conduct as of greater seriousness.
12. To illustrate the point a little differently, the Sentencing Guidelines Council issued a definitive sentencing guideline effective from 5th January 2009 to cover theft including (at Section E) the situation where there had been theft in breach of trust for which the Council set custody starting points and ranges of sentence for certain financial levels of offending. Subject to additional aggravating or mitigating factors, under this guideline, the theft of £125,000 or more, or theft of £20,000 or more in breach of a high degree of trust attracts a starting point of 3 years' custody in the range of 2 to 6 years custody. The theft of £20,000 or more but less than £125,000, or the theft of £2,000 or more but less than £20,000 in breach of a high degree of trust attracts a starting point of 2 years' custody in the range of 12 months to 3 years' custody. The theft of £2,000 or more but less than £20,000, or the theft of less than £2,000 in breach of a high degree of trust attracts a starting point of 18 weeks' custody in the range of a high community order to 12 months custody, and the theft of less than £2,000 attracts a starting point of a medium community order in the range of a fine to 26 weeks' custody.
13. More recently, the Sentencing Council (the successor to the Sentencing Guidelines Council) published a definitive sentencing guideline on Fraud, Bribery and Money Laundering offences effective from 1st October 2014, in which false accounting is included under heads of 'Fraud', 'Revenue Fraud' and 'Benefit Fraud'. Just using the 'Fraud' heading for these purposes:

different custody starting points were indicated within certain sentencing ranges depending on the harm caused and the culpability of the offender (high, medium or lesser) starting at Category 1 (£500,000 or more; high culpability) providing a starting point of 5 years 6 months in the range 4 years to 6 years 6 months' custody to Category 5 (less than £5,000; low culpability) providing a starting point of a fine in the range of a discharge to a low level community order.

14. My point is that merely because the charges involve dishonesty and maximum sentences of 7 years is not to tell the whole story of how in individual cases a judge is likely to sentence one from the other. Each involves a careful process of assessment of the culpability of the offender, the harm caused, the aggravating and mitigating factors and the individual guideline into which the offence fits.
15. If I may say so, the so-called "equality" of the offences is an unnecessary and unprofitable focal point of attention. The other issues raised by the letter have greater force and are defensible.
16. I also have in mind the case of *R v Eden* (1971) 55 Cr.App.R. 193. This was a Post Office prosecution case, the outcome of which turned on its own facts. However, the importance of the case lies in what it had to say about parallel theft and false accounting charges in such prosecutions.
17. The Court held that on a prosecution for parallel offences of theft and false accounting, it does not follow that because the defendant is not guilty of theft, he must also be not guilty of false accounting. A defendant who has deliberately made false entries for gain within the meaning of section 34(2)(a)(i) to cover up a muddle is guilty of false accounting, contrary to section 17 of the Theft Act 1968, whether or not he has at that time committed a theft. Such a gain may be constituted by putting off the evil day of having to sort out the muddle and pay up, as well as by other forms of

temporary gain. In future in Post Office prosecutions relating to parallel charges of theft and false accounting, the prosecution should make up its mind whether it intends to submit that there should be a conviction for false accounting only if theft is proved; if so, reliance should be placed on a count for theft only. On the other hand, there may be cases where it is wise to include in the indictment counts for false accounting also, as, for instance, where the prosecution intends to submit that temporary gain may have been the object of the defendant's dishonest act.

18. The distinction that was being made between theft on the one hand and false accounting on the other is that theft requires proof of the dishonest appropriation of property belonging to another with the intention of *permanently* depriving the other of it. False accounting is committed where a person *dishonestly* with a view to gain for himself or another or with intent to cause loss to another destroys, defaces, conceals or falsifies any account or record or document made or required for any accounting purpose. But "gain" or "loss" for the purposes of false accounting extends to any gain or loss whether *temporary* or *permanent*.
19. Thus the Court's view that it would be wise to have on the indictment a count of false accounting where for example a *temporary* gain could be the object of the dishonest act. A *temporary* gain could not be the subject of a theft charge where the deprivation has to be *permanent*. Otherwise the Court could not see the point in having two charges in parallel if the prosecution's purpose was to prove the theft only by proof of the false accounting etc.
20. In the time I have I have been unable to discover whether CK routinely charges false accounting in all cases of theft or not or indeed vice-versa. But I do have in mind that CK's early iteration of a POL draft policy document (stated as effective from 1st November 2013 but not in fact implemented) did say at §5.2:

In addition to those matters set out in the Code for Crown Prosecutors, Post Office Ltd. will apply the following considerations:

- i. Alternative charges. Where a suspect is charged with offences of theft and false accounting arising out of the same basic facts, those charges will always be alternative charges.¹² This approach is not to be regarded as an invitation to plead guilty to any particular charge(s).

21. Footnote 12 stated, "This is consistent with the decision of Sachs LJ in *R v Eden* 55 Cr.App.R. 193 CA". I am not sure this is entirely consistent with the decision. However, where the evidence supports the addition of alternative charges, for instance, where POL cannot say on the evidence if there has been any actual financial loss or whether the false accounting was simply to cover up for accident or muddle where there has been no actual loss, alternative counts are entirely permissible, as they are where some distinction is to be made between permanent deprivation and a temporary gain or loss.

22. In conclusion advise:

- 1) Both offences of theft and false accounting do indeed involve dishonesty and do carry a maximum sentence of 7 years' imprisonment.
- 2) I think the only argument that may be advanced to defend the statement is that it is accurate *within the narrow context* in which it was stated.
- 3) The point is that false accounting *may* be a lesser offence, and may often be a lesser offence in the context in which it is charged, so to argue it is not a lesser offence is not accurate; it all depends on the circumstances of the individual case as Tony Hooper's illustrations show.
- 4) The statement is undermined by the fact that the seriousness or otherwise of any offence of theft or false accounting must always

depend on its own facts, as is demonstrated by the many ways in which such offences may be committed, and how offenders may be sentenced for them.

Brian Altman QC

2 Bedford Row

London WC1R 4BU

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