

R v Saunders [2012] EWCA 1380

Legal Advice

Saunders lived next door to Z. Someone had used Z's name to apply for credit card accounts, using Saunders personal computer to set up the accounts and obtain credit cards. Saunders blamed her cousin who she said was staying with her at the time of those transactions and who had to have obtained access to a computer which she no longer used. Four other counts related to occasions when the credit cards were used for the benefit of the Saunders such as paying for her rent. There was also evidence of other fraudulent transactions involving the misuse of three cards belonging to F, who sat next to Saunders at work for which Saunders offered no explanation. She had previous convictions for theft in 2007. Furthermore, in March 2008, she had pleaded guilty to 19 counts of fraud by misusing her employer's credit card for her own personal use.

In February 2011, Saunders was interviewed by the police. The record of interview noted that she was told that she was entitled to free and independent legal advice and that she was reminded of her right to ask for a solicitor at any time. She declined. The prosecution subsequently sought to rely on the interview because at no time did she mention that her cousin was living with her and had to have been responsible for the false applications in Z's name and the use of the cards.

At her trial for fraud by false representation, Saunders submitted that she had not validly waived her right to a solicitor. The foundation of that submission was that the relevant police officer had the practice of giving pre-interview disclosure in all cases where a defendant **was** legally represented, but of never giving such disclosure where a defendant **was not** represented. It was submitted by Saunders, that she had not been fully informed as to the consequences of a decision not to be legally represented and thus had not made an informed and voluntary waiver.

The judge rejected an application to exclude the interview under section 78 of PACE 1984 on the basis that disclosure was for the purpose of a solicitor and not for the purpose of a defendant. Where a defendant opted to forego legal representation, the necessity for disclosure 'did not arise' (the judge's reasoning). Saunders was subsequently convicted of nine counts of fraud by false representation. She appealed against conviction.

The principal issue that fell to be determined was the degree to which a detainee had to be informed and foresee the consequences of waiver to the right to legal advice before it could be said that the waiver was effective.

Held

The appeal would be dismissed.

It was settled law that, to be valid, a waiver to the right to legal advice had to be voluntary, informed and unequivocal. However, a waiver could be effective even though the suspect could not be shown to have appreciated all the consequences of his decision.

On the facts of the instant case, the waiver had been effective. In assessing the validity of Saunders's waiver, the court had had to consider two factors:

(i) the extent of her knowledge; and

(ii) the extent to which her decision, in ignorance of the police officer's practice, had caused her disadvantage.

As to the first factor, Saunders had previous experience and understanding of the interview procedure, having been subject to the interview process on at least two previous occasions. She had been neither unintelligent, nor vulnerable; apart from the question of pre-interview disclosure, she could have been expected to have been well-aware of the benefit she would have gained from legal advice.

As to the second factor, the course of the interview had shown that Saunders had not, in fact, been placed at any real disadvantage by her ignorance of the police officer's practice. Even if it had been assumed that she had been worse off without a legal representative and that she would have received greater disclosure, her background had been a sufficient source of information and knowledge. Her decision had been informed by that source.

The judge's reasoning however, ***had been too rigid and inflexible a proposition.***

There might well have been cases where fairness demanded that a detainee was afforded pre-interview disclosure so that he knew sufficiently the nature of the police enquiry and was placed in a position to know whether legal advice would assist or not. The inflexible practice adopted by the police officer and endorsed by the judge ran a serious risk of depriving a detainee of information he needed before deciding whether to waive or not.

In this case, the risk had not arisen, but in other cases it might do. The approach adopted by the police needed to be flexible in order that they could be sensitive to the different needs of different detainees.

*The interpretation and comments made within this document are not to be considered as legal advice.
Reference should always be made to the original case.*