Neutral Citation Number [2019] EWCA Crim 1352
No: 201704392/B3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday 16 July 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE SWIFT

R E G I N A
v
MOHAMMED AZIM ASLAM

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22 Furnival Street, London EC4A 1JS Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr T Schofield appeared on behalf of the **Applicant**

Mr M Duck QC appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: On 2 October 2013, after a trial in the Crown Court at Birmingham before His Honour Judge Rafferty QC and a jury, this applicant was convicted of conspiracy to fraudulently evade the prohibition on the importation of a class A controlled drug, namely diamorphine (count 1) and conspiracy to supply that controlled drug (count 2). On 18 December 2013 he was sentenced to concurrent terms of 12 years' imprisonment on each count. No appeal was brought at the time, his trial lawyers having advised that there were no arguable grounds. The applicant subsequently engaged fresh legal representatives and now applies for an extension of time of about three years eleven months to apply for leave to appeal against his convictions. His applications were refused by the learned single judge. They are now renewed to the full court. Application is also made for an order for disclosure.

2. Each of the charges alleged a conspiracy between 1 June 2010 and 16 June 2012. On count 1 the applicant was jointly charged with Zaheer Hussain and Haroon Ali. On count 2 he was jointly charged with those two defendants and with four others, one of them the applicant's brother.

3. There was no doubt that during the relevant period there were conspiracies to import heroin into this country from Afghanistan via Pakistan and to supply it to drug dealers. Sophisticated measures were taken to conceal the imported heroin amongst what appeared to be legitimate goods.

4. The conspiracy operated on a large scale. A dealer's list found at one of the premises which was searched by the police contained details which appeared to show that more than £1 million had been received in one week from drug dealers.

5. The prosecution alleged that Zaheer Hussain was at the head of the conspiracies and that the applicant was a trusted lieutenant, responsible for arranging transport and accommodation for Zaheer Hussain and directly involved in at least one importation. Zaheer Hussain was also convicted of both counts and his application for leave to appeal was refused by the full court.

6. The applicant denied that he was involved in any way in either of the conspiracies.

7. At trial the prosecution relied on circumstantial evidence which they contended pointed plainly to the applicant's involvement. Key features of the evidence included, in summary, the following. First, a mobile phone with a number ending 595 was shown to be associated with Zaheer Hussain. 595 had only ever been in contact with three phone numbers, all with Pakistani prefixes. One of those three numbers ending 717 was shown to be a number used by Babar Qayyum.

8. Secondly, a flat at The Hive in Birmingham City Centre was used by the conspirators as what was referred to as a "money house". When the police raided that flat they found £146,000 in cash, together with the dealer's list to which we have referred. The applicant went to the flat on 28 March 2012 at a time when it could safely be inferred from the

evidence that a large sum of money must have been present in the flat, and he spent some three-and-a-half hours there with Haroon Ali. On two other occasions the applicant was alone at the flat for periods in excess of one hour. The prosecution relied on the fact and duration of those visits, including a long visit when the proceeds of drug trafficking were present, as indicating that the applicant was a trusted co-conspirator.

9. Thirdly, on dates in May 2012 the applicant attended The Belfry Hotel. He drove Zaheer Hussain to and from that hotel. He used his credit card to pay for hotel rooms which the evidence (including fingerprint evidence) showed were used by Zaheer Hussain. CCTV footage obtained from the hotel's system showed the applicant arriving at and leaving from the hotel in an Audi car and a Toyota car, and also showed him at the reception desk making bookings.

10. Fourthly, on 16 May 2012, two crates, within which was concealed 2.82 kilograms of heroin, arrived in the United Kingdom. They were addressed to 122 The Broadway, Southall and the contact number for the delivery was shown as a mobile phone number ending 596. The crates and their contents were intercepted by the police. The phone 596 was only active during the period 22 April to 16 May 2012. It was an important part of the prosecution case to attribute that phone to the applicant. Cell site evidence showed that the movement of 596 on 10, 11, 12 and 13 May was consistent with the applicant's movements by car, as tracked via ANPR cameras, to and from The Belfry Hotel. A similar combination of cell site evidence and CCTV footage in relation to a shop called Simply Fresh was relied upon as consistent with the applicant's visits to that shop and possession or use of the 596 phone.

11. Fifthly, Babar Qayyum was arrested and interviewed by the police in July 2012, having been stopped at an airport as he was about to leave the country. His 717 phone contained text messages connecting him to the importation of heroin which arrived on 16 May 2012. One message which had been texted to him contained the address "M Aslam, Middlesex Knitwear, 122 The Broadway, Southall" and the relevant postcode. Qayyum told the interviewing police officers that he was an informant cooperating with law enforcement authorities in Pakistan. He was released on bail following his interview. He promptly left the country and so far as is known has not subsequently returned to the United Kingdom.

12. Sixthly, when the police went to arrest the applicant's brother, they found the applicant in possession of the keys for the Audi which had been used to transport Zaheer Hussain to The Belfry. In the boot of the Audi were empty sports bags of a kind similar to bags recovered by the police from a car which was being driven by Haroon Ali at the time of his arrest. The bags found in Ali's possession contained £160,000 in cash. Ali later pleaded guilty to money laundering.

13. Seventhly, at one of the premises searched there was found by the police an identity document relating to the applicant, together with a substantial sum in excess of £1,000 in cash.

14. Lastly, in interview the applicant gave what the prosecution alleged was a lying account about his booking of rooms at The Belfry, which he said he had done on behalf of a friend who he did not wish to name.

15. The applicant did not give evidence at trial. One of the points which was emphasised on his behalf by his then counsel related to the evidence concerning a visit which the applicant made to The Belfry Hotel on the afternoon of 10 May 2016. According to the timing displayed on the footage from the hotel's CCTV system, the applicant entered the hotel at 14.49 and was at the reception desk for five minutes. At 14.55 the CCTV footage showed him holding a phone to his ear. The call data records for 596 did not however show any incoming or outgoing call at that time. The applicant could then be seen to return to the reception desk at 14.58 no longer holding a phone. At 14.58.40 the call data records showed that 596 either made or received a call lasting for 58 seconds. Counsel therefore made the point that the applicant on that evidence could not have been using the 596 phone at that time.

16. In summing-up, the judge pointed out that although the prosecution had called as a witness Mr Matthew Davies, the senior security supervisor at The Belfry Hotel, no one had asked him whether the timings on the CCTV system were accurate. At page 122B, the judge, having referred to the point made by counsel, said:

> "However, with respect to her, there is no evidence that The Belfry CCTV timings were accurate, either with one another or otherwise. If they were accurate, or might have been accurate, then the point which she makes is powerful. If they were not, then the point has little value. How you approach that issue is a matter entirely for you."

17. We should say at once that we reject the submission of Mr Schofield on behalf of the applicant that by those words the judge was expressly adopting and confirming counsel's submission. He was not; he was merely relating the submission and assisting the jury with the relevant evidence.

18. With that brief summary of relevant facts, we turn to the ground of appeal. It is that the convictions of the applicant are unsafe because evidence obtained since conviction amounts to fresh evidence which casts doubt on the safety of the convictions. Application is made to rely upon fresh evidence of three witnesses. An explanation has been put forward for the long delay in lodging the notice of appeal. We shall postpone consideration of that application until after we have considered the merits of the ground of appeal.

19. We begin by reminding ourselves that section 23 of the Criminal Appeal Act 1968 provides in material part as follows:

> "(1) For the purposes of an appeal, or an application for leave to appeal, under this Part of this Act [appeals against conviction and/or sentence and References to the Court of Appeal by the Home Secretary] the Court of

Appeal may, if they think it necessary or expedient in the interests of justice—

(a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case;

(b) order any witness to attend for examination and be examined before the Court (whether or not he was called in the proceedings from which the appeal lies); and

(c) receive any evidence which was not adduced in the proceedings from which the appeal lies.

(1A) The power conferred by subsection (1)(a) may be exercised so as to require the production of any document, exhibit or other thing mentioned in that subsection to—

(a)the Court;

(b)the appellant;

(c)the respondent.

(2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to—

(a) whether the evidence appears to the Court to be capable of belief;

(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;

(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings."

20. The applicant seeks first to rely on further evidence from Mr Davies, who has made a statement dated 27 October 2016 indicating that he does not recall being asked about the accuracy of the timing shown on footage from The Belfry's CCTV system at the time when he made his original witness statement or at the time when he was giving evidence at trial. He says that there was no regular check made of the accuracy of the times shown on the

footage. In this regard he says in paragraph 10 of his statement that there were six separate hard drives involved in the system. He says:

> "When any particular incident that required subsequent investigation occurred, an enquiry would be made of the CCTV system at the time of viewing the incident as to whether timings on the cameras compared accurately with real time. This would include a comparison of the CCTV system against GMT and camera against camera. I do not recall being asked, at any time, whether the CCTV times were accurate when compared against GMT. Had there been any issues, I would have expected this to be raised. To the best of my recollection, no such issue ever arose."

21. In his cogently made submissions on behalf of the applicant, Mr Schofield relies on this evidence as showing, to put it at the lowest, a very high degree of probability that the times shown on the CCTV footage were reliable, from which he argues it must follow that the point made by trial counsel, to which we have referred earlier in this judgment, was indeed a powerful one.

22. Secondly, the applicant seeks to adduce in evidence a report dated 3 June 2016 by a forensic investigator Mr Ross Colwell. This is relied upon for the proposition that cell siting survey measurements and call data record analysis are inconsistent with the prosecution evidence that the use of the 596 phone was consistent with the user of it being connected to a particular address in Birmingham, 60 Selston Road, which is linked to the applicant. Mr Colwell bases his report on a network survey of the relevant area which he carried out on 9 May 2016. He indicates that in preparing his report he made a number of assumptions. First, he assumed that the mobile telephone networks were functioning correctly at the time of the survey; secondly, he assumed that the configuration of the networks was the same at the time of the survey as it was at the time of the relevant events in 2012; thirdly, he assumed that the majority of the call data record entries were located at the home location and that there is a typical quiet period when the user of a phone is at his home and asleep. Mr Colwell states that the call data records show seven cell identifications in entries either side of the presumed quiet periods. In his survey, none of those cell sites provided service at the Selston Road address. Noting that his results therefore differ from those given in unchallenged evidence by the prosecution's expert witness at trial, Mr Colwell suggests that the relevant network provider, namely Vodafone, be asked whether any network configuration changes have been made during the intervening years which might explain the differing results. We are told by Mr Schofield, and of course accept, that Vodafone would be willing to provide the information sought but only if required to do so by a court order. Accordingly, one of the applications made to this court is for such an order against Vodafone.

23. Lastly, the applicant seeks to adduce in evidence a statement recorded in Pakistan from Babar Qayyum. The statement was apparently taken on 2 December 2016 by an investigator who was instructed by the lawyers now representing the applicant to go to Pakistan for the purpose of making enquiries of Mr Qayyum. Mr Qayyum's statement says at paragraph 4:

> "I have not spoken to or met Mohammed Azim Aslam. It is not a name that is familiar to me. I do not believe I have had any contact with him whatsoever."

24. Then at paragraphs 6 and 7 the statement says:

> "6. I do not recall the police officers asking me about Mohammed Azim Aslam or the 596 number in the context of the importation of drugs into the UK or in any other context.
>
> 7. I do not believe that I have spoken to him or been in contact with him regarding any other number."

25. It is apparent that before making his statement to the investigator, Mr Qayyum had been provided with and given time to read a transcript of his police interview.

26. Mr Qayyum's statement goes on to refer to the fact that heroin was to be delivered to the address in Southall which is mentioned in a text message stored in his own mobile phone and which message includes the name M Aslam. As to this, he says that he was asked by someone in Pakistan, whom he does not wish to name, to check up on a parcel that was being delivered to that address. He went to the address, looked around and could find no suggestion that there was any police activity. He adds at paragraph 13:

> "I had no involvement in this package and I simply reported back that I could not see what had happened to it."

27. It is submitted on behalf of the applicant that this statement could be admissible pursuant to section 116 of the Criminal Justice Act 2003 and it is said that the statement provides support for the applicant's case that he was not involved in either of the conspiracies of which he has been convicted.

28. In connection with Mr Qayyum, application is made for disclosure relating to Qayyum's police interview. As we have noted, Qayyum told the police who interviewed him that he was an informant assisting the authorities in Pakistan. A transcript of his interview was prepared and was available to all parties as part of the evidence at trial. In that transcript certain passages have been visibly redacted to delete particular names referred to by Qayyum as being his contacts. As we understand it, some use was made of this interview transcript at trial. The prosecution called a detective constable who had been involved in the arrest of Qayyum simply to give evidence about the text messages found on the 717 phone when it was seized from Qayyum. Counsel for the co-accused Zaheer Hussain then cross-examined Qayyum, effectively to put before the jury the substance of the account given by Qayyum, and subsequently sought to rely on that account. There was understandably no cross-examination on behalf of this applicant. In re-examination by Mr Duck QC, then (as now) acting for the prosecution, reference was made to the fact that Qayyum had told the police that in his role as informant he had been making contact with persons involved in the importation and supply of class A controlled drugs.

29. It is now submitted that there are deeply suspicious features of the transcript. The point is made by Mr Schofield that the duration of the interview is recorded as being one hour 30 minutes, and indeed the start and finish times of the interview were stated by the interviewing officer for the record as being 12.30 and 14.00 respectively. However, the tape counter times which appear within the record only go up to 67:05. Mr Schofield argues that there is on the face of it a 23-minute discrepancy between the stated duration of the interview and the tape counter times shown on the transcript. In addition, when enquiries have been made at the urgings of those now representing the applicant, it has emerged that the master recording of this interview was in a package on which the seal had been broken, and Mr Duck has not been able to assist us with when or in what circumstances the seal was broken.

30. From this position, Mr Schofield argues that there is reason to believe that the transcript has been improperly edited so as to exclude important content. He submits that it is the applicant's case, "supported by Qayyum's account and the real possibility that his interview under caution has been improperly edited", that both the 595 and 596 phones were being used by members of the Zeb Khan family and were nothing to do with either the applicant or Zaheer Hussain. Mr Schofield submits that he is not able properly to present his application for leave to appeal against conviction until the prosecution have been required, by an order of this court, to cause an analysis to be made on a bit for bit basis of the original master recording to see whether the transcript is accurate and to see whether anything has been omitted. Mr Duck tells us, and of course we accept, that the master recording has recently been listened to by the officer in charge of the case and by a representative of the CPS and found to tally accurately with the transcript. But, says Mr Schofield, that does not answer the point that there may have been interference with the disk so as to make it match the improperly circumscribed transcript.

31. All these matters are relied on, as we have said, by way of fresh evidence. In the alternative, although no criticism at all is made of trial counsel, it is submitted that if all or any of the evidence could reasonably have been obtained at trial, it should have been obtained and the failure to obtain it casts doubt on the safety of the convictions.

32. We are concerned at this stage with whether there are arguable grounds of appeal against conviction, the test of course being whether there are arguable grounds for doubting the safety of the convictions. We are also concerned with the applications made for disclosure.

33. We can express our conclusions comparatively briefly. So far as Mr Davies is concerned, it is self-evident that the evidence now sought to be adduced was available to the defence at trial. Mr Davies was called as a witness, he gave evidence and he could have been asked. There were perfectly understandable reasons why he was not asked and, rightly, no criticism is made of trial counsel. But if the defence wish to argue that it was important to explore the accuracy of the timings, then in our view no reasonable explanation has been put forward for the failure to adduce this evidence at trial. We regard this as a clear example of a perfectly proper decision being made as to how the case should be conducted at trial, but the applicant now hoping to conduct his case differently on appeal. In any

event, whilst there is no reason to doubt the veracity of Mr Davies's further statement, it is not, in our judgment, capable of affording any ground for allowing the appeal. In reality, the statement does not add anything to the evidence which was before the jury. It simply indicates that Mr Davies assumes the timings were accurate and would have expected to be asked about the matter if it was in issue. His assumptions do not however alter the simple fact that no contemporaneous check of the accuracy of the equipment or of its display was made at any relevant time and there was simply no evidence before the jury as to whether the timings were accurate or not. The jury had to decide the case on the evidence which was before them and this further statement by Mr Davies does not materially add to that evidence. The defence were able to make a good point about the combined effect of the available evidence as to usage of the 596 phone and the timings shown on the CCTV footage, and at two different stages of his summing-up the judge clearly reminded the jury of that point and of the importance attached to it. Nothing in Mr Davies's further statement adds to the point forcefully made by defence counsel at trial, which in any event has never been a winning point.

34. As to Mr Colwell's report, relied upon as we have said to undermine the prosecution case that the usage of 596 was consistent with the user living at an address associated with the applicant, there is again no reason to doubt that Mr Colwell is a truthful witness. Again, however, this is evidence which was reasonably obtainable at trial and again it is in our view evidence which is incapable of affording any ground of appeal. Trial counsel advised in favour of instructing an expert to comment on the prosecution evidence and advised against using the expert witness who had already been engaged by those representing Zaheer Hussain to undertake a similar investigation. It seems that difficulty was then encountered in finding an appropriate expert witness who was able to carry out the necessary work in time for the trial and as we understand it the applicant gave instructions that he did not wish to delay the trial by seeking an adjournment for this purpose. It is simply too late now for him to try to take a different course.

35. As we understand it, Zaheer Hussain's expert witness appears not to have found any basis for challenging the link between this applicant and the 596 phone, because it would have been in Zaheer Hussain's interest to contest that link if any evidence was available to assist him in doing so.

36. In any event, Mr Colwell's report does not in our view assist the applicant and is not capable of doing so. It is based, as we have indicated, on a number of assumptions for which there does not appear to be any particular basis. Moreover, Mr Colwell relies on his own survey conducted four years after the material time and he is not able to put forward any basis for suggesting that there has been no material change in network coverage during the intervening years. It is clear on the face of Mr Colwell's report that such a change could be capable of explaining the difference between his 2016 findings and the findings made during the contemporaneous cell site survey which was relied on by the prosecution at trial. Importantly, as it seems to us, there is nothing in Mr Colwell's report which provides any basis for saying that the evidence relied upon by the prosecution was unreliable. There is merely the assertion that a survey taken four years later gave rise to differing results.

37. The application for disclosure by Vodafone is in our view nothing to the point. It seeks information as to any changes which may have been made since the material time but it does not suggest any basis for challenging the contemporaneous findings which were relied upon by the prosecution.

38. We turn finally in this regard to the statement which was taken in 2016 from Babar Qayyum. Given that Qayyum was arrested, and given the terms in which he was interviewed and the information stored on his phone, an issue would no doubt arise as to his credibility if he were ever to give evidence. An issue would also arise in our view as to the submission that the statement taken in 2016 could successfully be the subject of an application to adduce hearsay evidence pursuant to section 116 of the Criminal Justice Act 2003. Most importantly, the statement taken from Mr Qayyum does not in our view actually support the applicant's case in the way which is suggested. A key feature of it is that Mr Qayyum does not say that he was asked about a relevant topic in interview but can find no record of that topic in the transcript which is now said to be unreliable. On the contrary, he specifically says that he does not recall the police officers asking him either about the applicant or about the 596 number in the context of the importation of drugs into the United Kingdom. He was asked about a phone number ending 595. The reason for that is that 595 was a number stored in his phone as one of his contacts, but 596 was not stored in his phone.

39. In those circumstances, there seems to us to be no foundation at all for the submission that the court should accept, as a possibility worthy of further investigation, that there has been an interference with the course of justice so as to eliminate from the transcript a record of questioning about the 596 phone.

40. The apparent discrepancy between the stated duration of the interview and the tape counter times is a matter to which we have given careful thought. We note, as we have said, that the start and finish times of the recorded interview were clearly stated by one of the officers and faithfully transcribed. The proposition therefore seems to be that someone has edited the recording in such a way as to remove 23 minutes from it, but to leave the record in terms which make it perfectly plain that the total duration of the interview was 90 minutes. If that were thought to be a point of importance, it was there to be explored at trial. The discrepancy to which Mr Schofield draws attention is there to be seen on the face of the papers. As to why it was not explored in trial, it is submitted on behalf of the applicant that the explanation lies in the fact that Qayyum had not at that stage provided his statement later taken in 2016. But that, with all respect to the submission, does not seem to us to explain the matter at all, because as we have noted Qayyum says nothing to suggest that he was in fact questioned about the 596 phone or about this applicant. More generally, it seems to us that there is no satisfactory explanation for the very late emergence of this point now said to lie at the very heart of the applicant's case.

41. It seems to us that the submissions suggesting an interference with the transcript are entirely speculative and amount again to an attempt now to present a case very different from that which was advanced at trial.

42. In our judgment, the statement of Qayyum raises far more questions than it answers. It is impossible to argue that it could provide a basis for a successful appeal.

43. The application for disclosure is in our view equally without merit. As we have indicated, no satisfactory explanation has been given for this point arising at such a late stage years after the trial. It is said, as we have indicated, that the applicant now suspects that a family called the Zeb Khans were involved in the drug conspiracies and that the transcript may have been interfered with in some way so as to obscure that reference. But if the Zeb Khans are said to have been implicated, two points immediately arise. First, the involvement in a relevant event of at least one member of Zeb Khan family formed part of the evidence at trial; and secondly, no explanation has been given as to why the point was not raised either at trial or immediately afterwards.

44. Mr Schofield submits that all speculation could be ended by the court causing the enquiry to be made which he seeks. We however accept Mr Duck's submission that before any such order could be contemplated there would have to be some basis sufficient to cause the court to act. In our judgment there is no such basis.

45. The reality of the case, as it seems to us, is that the prosecution were able to present a strong circumstantial case, not only against this applicant but also against his co-accused Zaheer Hussain. A defence case now sought to be advanced, based on the proposition that neither the applicant nor Zaheer Hussain had anything to do with the importations and that it was the Zeb Khan family who were using the 595 and 596 phones, would have to rely on coincidence upon coincidence. We are not persuaded that any basis has been put forward for asserting that the prosecution have failed to comply with their duty of disclosure or that there is ground for suspecting improper interference with the recording of Qayyum's interview.

46. It is, as we have said, a striking feature that Qayyum's statement to the investigator does not say anything which positively supports the speculative case now sought to be advised on behalf of the applicant. There is no satisfactory explanation for the omission.

47. In those circumstances, we are satisfied that none of the proposed further evidence can even arguably be received as fresh evidence pursuant to section 23 of the 1968 Act and we are satisfied that there is no arguable ground for saying that the applicant's convictions are unsafe. The reasons which we have given in this judgment are substantially those which were more succinctly given in writing by the single judge when she refused leave to appeal on the papers. It follows that no purpose would be served by granting any extension of time and that no ground has been shown for the court to make any of the orders in relation to disclosure which have been sought by the applicant.

48. Mr Schofield has presented the applicant's case with considerable skill, but notwithstanding his efforts these applications all fail and are refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk