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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 26 March 2019

B e f o r e:

LORD JUSTICE HAMBLEN

MR JUSTICE EDIS

HIS HONOUR JUDGE LEONARD QC
(Sitting as a Judge of the CACD)

R E G I N A
v
ROY JOHN PHILLIPS

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Mr B Douglas-Jones QC appeared on behalf of the **Appellant**
Mr M Jewell appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

LORD JUSTICE HAMBLEN:

Introduction

1. On 26 April 2018, in the Crown Court at Winchester before His Honour Judge Cutler, the appellant was convicted of being concerned in the production of a Class B controlled drug (cannabis), contrary to section 4(2(b) of the Misuse of Drugs Act (count 1) and of transferring criminal property, contrary to section 327(1)(d) of the Proceeds of Crime Act 2002 (count 2).
2. He was sentenced to 5 years' imprisonment on count 1 and to 18 months' imprisonment concurrent on count 2.
3. His co-accused, Slawomir Saklak, pleaded guilty to being concerned in the production of cannabis and was sentenced to 24 months' imprisonment suspended for 24 months. John Pout pleaded guilty to the same offence and to transferring criminal property and was sentenced to 6 years' imprisonment.
4. The appellant appeals against conviction and sentence by leave of the single judge.

The case against the appellant

5. The case against the appellant was that he was knowingly concerned in the production of a Class B drug (cannabis) with his two co-accused, Pout and Saklak, at three separate locations between 1 June 2013 and 28 October 2016 and that he was also involved in the associated offence of transferring criminal property. The three locations and the relevant dates were as follows:

    (i) Yelf's Yard, an industrial estate in Bishop's Waltham (“Yelf's Yard”), between 1 June 2013 and 23 October 2015;

(ii) a stable at Crawley Lodge, West Wellow, a private dwelling with outbuildings ("Crawley Lodge") between 1 January 2014 and 28 October 2016 and

(iii) the farmhouse and outbuildings at Bradley Wood Farm, Whitchurch ("Bradley Wood"), between 1 September 2015 and 28 October 2016.

6. The alleged transfer of criminal property related to monies in payment for deposit and rent of premises.
7. The indictment reflected the conduct alleged. Count 1 charged the appellant with being concerned in the production of a Class B drug (cannabis), with Pout and Saklak between 1 June 2013 and 28 October 2016. Count 2 charged the appellant with transferring criminal property, namely monies and payment for deposit and rent of premises between 1 June 2013 and 28 October 2016.

The facts and evidence in outline

8. We shall summarise the facts and evidence chronologically.
9. The prosecution case was that the appellant had set up two companies with Pout in June 2013. They would be beneficially owned by Pout. Through them Pout would enter and entered into a lease to occupy Yelf's Yard, an industrial premises.
10. The evidence of the owner of the yard, Mr Parsons, was that in 2013 he had been contacted by "John Phillis" about renting the yard. He said that he was acting as an agent for another company called Vorster Investments. They reached an agreement that the property would be let from June 2013 for £28,000. He later understood that Vorster Investments was controlled by Pout, however the appellant conducted the negotiations and set up the payments. The lease was an exhibit at trial and the appellant's signature appeared on this document.

11. The appellant's case was that he thought, having effected legitimate business with Pout, such as drafting Powers of Attorney, that Pout wanted to use Yelf's Yard for a document storage business for city-based companies which needed to safeguard and preserve data.
12. In January 2014 the appellant and his wife entered into an assured shorthand tendency in the appellant's name, to occupy Crawley Lodge, a house in the countryside with outbuildings.
13. It was agreed that the appellant had let some outbuildings to Pout. The prosecution case was that he had done so knowing that Pout was to grow cannabis there. The appellant's case was that he had been told by Pout that he needed the storage as swing space for the document storage business that the appellant thought Pout was running from Yelf's Yard.
14. In September 2015, the appellant took out a lease on a property at Bradley Wood, another house with outbuildings. At that time he was already living at Crawley Lodge. The combined monthly rent on these properties was almost £8,000 - the appellant's declared annual income was less than £10,000.
15. The prosecution case was that the appellant had entered into this lease to facilitate Pout's cultivation of cannabis at this further site.
16. The appellant's case was that he had acquired the property as a new family home but his wife had been suffering from mental ill-health and changed her mind, deciding she did not want to move from Crawley Lodge. He had thus ended up servicing two tenancy agreements. He had licenced the outbuildings at Bradley Wood to Saklak. Saklak had a secondhand plant, a machinery business, which involved buying equipment from eBay and reselling it. The equipment would be stored at the premises.
17. On 22 October 2015, Mark Parsons needed access to Yelf's Yard. He attended with his father and they were met by Saklak. They were given access to the office buildings but

Saklak said he did not have keys to the workshop and left. Mr Parsons immediately noticed a strong smell of cannabis and forced entry to the workshop. He found a substantial cannabis factory. The police were called.

18. Pout sent a text to the appellant, after the police had attended Yelf's Yard, which said: "What's this about? They fucked up my grow at Bish... You do the legals. Sort it out or else".

19. It was the appellant's evidence that this text was followed up by threats made by Pout to the appellant and the appellant's wife, including an incident when Pout held a knife to his throat.

20. In November 2015, the appellant contacted police and volunteered his details, giving his address as one in Bournemouth. He said that he was a retired IT specialist and had set up a company called Vorster Investments. He said that Pout had contacted him in a panic as he acted as a consultant for Pout and had Power of Attorney for him in Poland.

21. DC Bugden met with the appellant on numerous occasions between 3 November 2015 and 24 March 2016. He was to be a prosecution witness and was assisted by police when he required protection. He was given practical advice about moving house and was told that Pout had a history of drug offences and witness threats.

22. Pout was arrested on 9 December 2015. Photographs and video footage were recovered from his camera which appeared to show the cannabis factory at Yelf's Yard was in existence in October 2013.

23. Shortly before Pout's arrest on 7 December 2015, there was a meeting between him and the appellant at which Saklak was present. Unbeknown to the others, Saklak recorded the meeting. On the Saklak recording the appellant appeared to admit to having a "crop" at Crawley Lodge. He did not admit to knowing about cannabis production at Yelf's Yard

or Bradley Wood. On the other hand, the recording disclosed that the appellant appeared to have working knowledge as to how money received from Pout's businesses was to be and was split between various people.

24. The appellant's case was that he had been threatened by Pout at knife point (before the phone was set to record) into agreeing with Pout that he had knowledge of and was involved in Pout's cannabis production enterprise so that when the recording began he would implicate himself. From the recording it was clear that the appellant was threatened during the meeting, but the prosecution contended that the appellant had stood up to Pout.

25. In September 2016, the appellant was engaged in negotiations regarding the rent of another property, Ryedown Lodge, the monthly rent of which was £5,500. This was a five-bedroomed property with four bathrooms, annex a swimming pool and 6.5 acres of land. In the event, this rental did not go ahead.

26. On 25 October 2016, the appellant was attacked at Bradley Wood by Pout and two other men. They punched him and hit him with a hammer, they threatened him with a sabre, they bound him by the wrists and dragged him round the farm. He sustained lacerations, bruising, abrasions, a mild head injury and loss of consciousness. They caused him to be photographed whilst potting cannabis plants in the farmhouse at Bradley Wood. They robbed him of his mobile phone and watch and made him drive while filming him with a car full of cannabis from the premises. They then made him drive to a public house near Portsmouth to hand over SD cards bearing CCTV recordings from Crawley Lodge, his computer, iPad and the certificate of authenticity for his watch. After 25 October 2016 the appellant and his wife were afforded police protection and later witness protection.

27. After the attack the police were called and the ensuing investigation led to a search of the

properties at Bradley Wood and Crawley Lodge. Cannabis plants and other evidence of cannabis production was evident at Bradley Wood. There was no such evidence apparent at Crawley Lodge, although expert evidence was relied upon which showed findings consistent with the stable area of the property having previously been used to produce cannabis. A small amount of cannabis leaf was found on the stable floor and it was said by a prosecution expert that photographic evidence of the stable was consistent with having been used to grow cannabis.

28. The appellant's case however, which was accepted by the Crown, was that on 20 October 2016 Pout and two associates had placed cannabis at Crawley Lodge to implicate the appellant in the cultivation of cannabis. It was agreed by the prosecution and defence that on 20 October 2016, Pout and his associates had fixed hooks into the stable ceiling and laid white sheeting over ecotherm insulation, had hung lines from the hooks from which they had in turn hung cannabis and that the cannabis placed there on that day had nothing to do with any cannabis cultivation by the appellant.

29. A defence expert gave evidence that the power supply and electrical set up were inadequate to support cannabis cultivation. Ecotherm lining was in a virgin state, without any indicators of the wear and tear one would expect to see, had the stable been used for cultivation. The only fan at the premises, in a separate stable, was a freestanding domestic fan unlike the wall-mounted fans that could be seen at Yelf's Yard and Bradley Wood.

30. In an initial interview the appellant denied knowledge of cannabis production and said that he had rented both Bradley Wood and Crawley Lodge because he and his wife had planned to move from Crawley Lodge but his wife had changed her mind and wished to remain there. In two subsequent interviews the appellant made no comment.

31. The appellant gave evidence at trial. He was 63. He had IT skills and had worked in a city for over 30 years. He had been approached by Pout and they had a business meeting. Pout appeared to be wealthy and was concerned in dry lining construction works. However, at some point in 2013 he approached the appellant and said that he needed a property for another business which involved the storage of bank documents. He had seen a property that he liked and asked the appellant to negotiate the lease of Yelf's Yard on behalf of his company, Vorster Investments. The appellant's signature was on the lease. However, whilst he collected post for Vorster Investments and ensured that bills were recorded in a spreadsheet, he had little or nothing to do with payment of the bills after he set up standing orders and direct debits in this regard. He had received a fee of £5,000 and expenses. He had given the keys to Pout at the start of the lease and had no access to the premises. However, there had been a dispute between Pout and Parsons, the lessor at one stage, and the appellant and his wife had been paid a sum of £2,500 in cash.
32. On another occasion Pout had asked him to "sort out" a further property but the appellant had refused. This had been a private property with an assured shorthand tenancy and there were no accounts for Vorster Investments.
33. In 2013 he and wife were living in a two-bedroom flat in Bournemouth. His wife had not been happy living there due to its size and problems with rats. They had entered into a lease for Crawley Lodge. The rent was £3,000 per month and was paid using savings and income the appellant had from various businesses.
34. In February 2014 Pout visited him at his new home. He had asked whether he could rent the garage and the stables for his storage business. They entered into an agreement that from January 2014 he would rent the garage and the two stables for spring space for his storage business.

35. In October 2014 he had asked Pout about the annual accounts for Vorster Investments. Pout had told him to mind his own business and suggested that if he continued to ask questions that this would not be good for his health. The appellant's wife was unhappy about Pout's visits to their home and the appellant decided to terminate the relationship. He explained this person and wrote to him. Pout had reacted badly and asked the appellant to change his mind but the appellant had declined. He told him to leave and threatened to call the police. He explained that he and his wife were going away and on their return wanted him gone.
36. In relation to Bradley Wood, after he had been threatened by Pout the appellant wanted to move so that Pout did not know where they were. He had signed the agreement regarding Bradley Wood on 1 September 2015 and intended to cease living at Crawley Lodge. However, his wife became ill and refused to move. She did not care that the appellant had to pay for both houses.
37. In October 2015 Saklak had asked if he could rent some space for his business which involved buying and selling equipment on eBay. Around this time Yelf's Yard had been raided. The appellant had not been present as he had been with his wife. Pout had been angry that the appellant had not been present and the appellant took this to be an indication that Pout had intended to "set him up". He had been unaware of any cannabis operation and any messages he had sent to Saklak had not been referring to any such operation. He would not have been involved in negotiating the lease had he been aware of any cannabis operation.
38. On 23 October 2015 Pout had telephoned. He had been paranoid about the appellant going to the police and made further threats. Pout continued to threaten him. The appellant was worried and afraid. On 26 November 2015 he was told by Saklak to

telephone Pout. Pout claimed to be at Crawley Lodge and said he could see the appellant's wife. He told the appellant to go to Otterbourne. Both the appellant and Saklak drove to Otterbourne in separate vehicles. On arrival Pout held a knife to the appellant's throat. He said that he had a man outside the appellant's home who could kill the appellant's wife if Pout asked him to. He threatened the appellant and said he should do whatever Pout wanted. At one stage the appellant shouted at Pout. The appellant said he did not believe the recording started until about one-and-a-half hours after his arrival. He accepted that the conversation suggested he was aware of the growing of cannabis but denied that this was the case.

39. On 9 December 2015, he discovered that Pout had been arrested. Pout continued to threaten him and his family. He told police of these threats and said that the reference to immunity from prosecution was his seeking reassurance that anything he had done had been lawful. Pout maintained contact and told the appellant to pay the rent on Bradley Wood but to stay away from the property. Pout's threats continued and included an incident on 18 October 2016 where the appellant was threatened with a knife.

40. By 25 October 2016 the appellant had become aware that there was cannabis at Bradley Wood. He told Pout to move it or it would be destroyed. On that day he attended Bradley Wood to ensure that the cannabis had been removed. Pout had been angry. The appellant had been attacked by two men on Pout's instructions. He had been hit with a hammer, threatened with a sword and punched. His watch had been taken. After the attack he was filmed walking around the premises and made to comment on the cannabis yield - he believed in order to be blackmailed. Eventually he was told they were going to kill him but had changed their minds and asked him to go to a public house and to bring various items or they would kill his wife. After this incident the appellant had been in

police protection for about 2 weeks.

41. The appellant had given information to the police from October 2015 to June 2016. He had settled draft witness statements. The prosecution case was that this was part of an artifice to make it look as if he had no criminal involvement in Yelf's Yard, when he had.
42. The defence case was that he was genuinely seeking to assist the police. From the first interaction he had with the police the appellant had reported being the victim of violent threats from Pout.

The application to amend the indictment

43. It was and is said on behalf of the appellant that the prosecution evidence against him concerning the three sites was different.
44. With Yelf's Yard, there was no apparent confession and the documents concerning the setting up of the companies and the lease provided some support for the appellant's case.
45. With Crawley Lodge, there was an apparent confession but this was in the context of a recording given to the police with no admissible explanation from Saklak as to how the recording came about and evidence of threats being made to the appellant by Pout from the recording itself.
46. With Bradley Wood, the prosecution relied on the fact that the appellant did not have the disposable income or capital to afford a second country home when his first home would have been a significant financial burden on him and his wife.
47. It also was and is said that there were differences between the appellant's explanation of his involvement at each of the three sites.
48. In respect of Yelf's Yard, the appellant's case was that he merely acted as an agent for Pout and set up offshore and onshore companies through which Pout would run a storage

business. Similarly he acted as agent for Pout in negotiating the terms of the commercial lease for Yelf's Yard so that Pout could run his storage business from that property.

49. In respect of Crawley Lodge, the appellant's case was that he and his wife had rented the property as a private dwelling. He had hoped to service the rent through the encashment of pensions, other capital sums he had and through consultancy work and the opportunity arose, when Pout sought to licence the outbuildings from the appellant as swing space, for Pout's document storage business at Yelf's Yard.

50. When the appellant and his son thought that Pout's activities at the premises may have been suspicious, the appellant had terminated his relationship with Pout and terminated the licence to use the outbuildings. The Saklak recording contained evidence of threats which supported the appellant's explanation that he had made to confess to involvement in cultivating cannabis at Crawley Lodge because he understood that Pout sought some sort of untrue confession from him to act as security for Pout against the appellant's reporting him to the police.

51. In respect of Bradley Wood, the appellant's case was that he and his wife had rented the property as a private dwelling. He had hoped to determine the assured short-hold tenancy at Crawley Lodge and rent Bradley Wood as their private dwelling. As with Crawley Lodge, the appellant had hoped to service the rent through the encashment of pensions, other capital sums and consultancy work. The appellant had availed himself of the opportunity of licensing the outbuildings when Saklak sought to licence them from him to enable him to run a business which involved the buying and selling of secondhand industrial plant.

52. In the light of differences between the strength of the prosecution evidence in relation to each of the properties, and between the nature of what was said to be the appellant's

involvement in relation to each of them, before the close of the prosecution case the defence invited the Crown to separate count 1 into three separate counts. It was said that this would be appropriate so as to reflect the fact that the appellant had separate defences to the allegation that he was knowingly concerned in cultivating cannabis at each of the three sites. This would enable the jury to consider the evidence against the appellant in the context of the three separate factual allegations, and also enable the judge to see what the jury's verdict was in relation to each of the three enterprise.

53. Although the prosecution did not concede that there was anything wrong in law with the indictment, it agreed that it should settle a draft amended indictment. At the close of the defence case, with the agreement of the defence, the prosecution made an application to amend the indictment accordingly and the defence supported the application.

The judge's ruling.

54. The judge declined to amend the indictment, stating that it was not necessary in law and that he was well placed to make findings of fact for sentence.

55. In his ruling the judge observed it was the eighth day of the trial. The case had been opened and presented to the jury on the basis of a two count indictment: count 1 being a charge of being concerned in the production of a controlled drug, which reflected the involvement of the appellant and the two co-accused. The jury would know, by way of admission, that the co-accused had pleaded guilty and the question was whether the appellant was a part of that enterprise. The evidence had been concluded and the parties had decided that they wished to proceed on the basis of three counts to reflect the three properties at which it was contended the production of cannabis took place.

56. Initially it had appeared that the appellant's defence was different in relation to three

different premises and that there was an element of duress in relation to Crawley Lodge and Bradley Wood. However, in evidence the appellant's defence was that he had not participated or been concerned in the production of cannabis at all.

57. The judge's view was that it would be wrong to divide up count 1 at such a late stage of the proceedings. The prosecution counsel had said that he did not concede there was anything wrong in law in the original count 1, nor was it suggested by the defence.

58. The basis for the amendment appeared to be that it would assist the judge in sentencing the appellant, however the judge had not sought such assistance and could do so in the event of a guilty verdict. The judge's view was that the application had been made too late and it was therefore rejected.

The appeal against conviction

59. The sole ground of appeal is that the judge's refusal to amend the indictment or, if it was not to be amended, to give a Brown direction, renders the conviction unsafe.

60. It is submitted that the unamended count contained three separate enterprises, but the jury were not directed that they all had to be sure that the appellant knowingly participated in the same enterprise in order for them to find him guilty. This rendered the conviction on count 1 unsafe.

61. In the case of R v Brown (K) 79 Cr App R 115, which involved multiple instances of fraud in a single count, it was held that it was necessary that the jury be directed that they must all be sure that the defendant is guilty of any one - but the same - instance of fraud alleged. Similarly, in a case such as the present, involving the production of cannabis at three separate sites, where the prosecution evidence and defences concerning each site were materially different in nature, strength and date parameters, it is submitted that it

was wrong in principle for a single count to have been left to the jury and that without a Brown direction the conviction on count 1 was unsafe.

62. As count 1 was the predicate defence for count 2, the fact that the conviction on count 1 was unsafe rendered that in respect of count 2 unsafe also.

63. The appellant, in oral submissions developed before us by Mr Douglas-Jones QC, relies on the summary of the relevant law set out in Archbold 2019 at paragraph 4-452:

> "It is a fundamental principle that in arriving at their verdict the jury must be agreed that every ingredient necessary to constitute the offence has been established: R v Brown (K), 79 Cr App R 115 CA. B was charged with contravening s 13(1(a) of the Prevention of Fraud (Investments) Act 1958. Each count in the indictment contained particulars of a number of different statements relied upon by the prosecution as constituting fraudulent inducements. It was held that in such a case the following principles apply:
> (a) each ingredient of the offence must be proved to the satisfaction of each and every member of the jury (subject to the majority direction);
> (b) however, where a number of matters (the different statements) are specified in the charge as together constituting on ingredient in the offence, and any one of them is capable of doing so, then it is enough to establish the ingredient that any one of them is proved; but
> (c) (because of principle (a), above) any such matter must be proved to the satisfaction of the whole jury.
> The principle does not require each juror to follow the same evidential route in order to arrive at a unanimous decision as to the existence of the same false statement. For example, some jurors may base their conclusion on the accuracy of an alleged confession, while others may prefer to rely on evidence from the person to whom the false statement was made.
> A direction as to (c), above, will be necessary only in comparatively rare cases, in which there is a realistic danger that the jury might not appreciate that they must all be agreed on the particular matter (constituting the particular ingredient) on which they rely to find their verdict of guilty, and might return a verdict of guilty on the basis that some of them found one matter proved and others found another proved (R v Mitchell [1994] Crim LR 66, CA; R v Keeton [1995] 2 Cr App R 241, CA); or where there is a risk that, notwithstanding that all are agreed on the defendant's guilt, some members of the jury might, on the findings of other members of the jury, have concluded that the defendant was innocent (R v K (Robert) [2008] EWCA Crim 1923; [2009] 1 Cr App R 24). Such a direction may also be required where two distinct incidents are alleged, either of which might constitute the offence charged, particularly where they give rise to different

> defences (see R v Carr [2000] 2 Cr App R 149, CA, where death was caused either by injuries or by fire; and R v Hobson [2013] EWCA Crim 819; [2013] 2 Cr App R 27 (one count of indecent assault, but complainant describing course of similar conduct, plus a number of particularised incidents))."

64. We have been taken to most of the cases referred to in this passage.

65. Having declined to amend the indictment, it is submitted that the judge erred in failing to give the jury a Brown direction. The unamended count left open the possibility that some of the jury may have been sure of the appellant's involvement at Yelf's Yard, some of his involvement at Crawley Lodge and some of his involvement at Bradley Wood, but no unanimity as to his involvement at any one of these three premises.

66. The prosecution submits that the single count 1 was neither wrong in law nor in principle. The prosecution case, in summary, was that this group of three men, Pout, Saklak and the appellant, were all engaged together in an ongoing enterprise to produce cannabis and that the enterprise made use, or intended to make use, of a number of different premises to achieve that purpose. There was no doubt that Pout and Saklak's engagement in this ongoing enterprise involving all three premises and the issue for the jury was whether the appellant knowingly joined in that ongoing criminal enterprise. Although the evidence said to prove the appellant's involvement in the enterprise was different in relation to the various premises, the appellant's defence was in fact a simple one, which was that he was not involved in the enterprise at any stage from start to finish.

67. We agree that in such circumstances no error of law was made in leaving a single count to the jury. The prosecution case was of a single ongoing enterprise, not two or three distinct enterprises. Equally, the appellant's defence was lack of involvement in any part of that enterprise.

68. We also note that there was no submission made to the trial judge that the single count

was wrong in law. The application to amend the indictment made no such concession. In our judgment, there was nothing wrong either in law or in principle with the drafting of the indictment.

69. As to whether a Brown direction should have been given, as is clear from the above citations in Archbold, the situation dealt with in Brown was one where each count in the indictment contained particulars of a number of different statements relied upon by the prosecution as constituting fraudulent inducements.

70. We agree with the prosecution that that is very different from the situation in this case. In this case there were no such multiple particulars, any one of which could form the basis of a conviction.

71. The first paragraph of 4-453 of Archbold reads as follows:

> "However, unanimity is only required in respect of ingredients of the offence; thus where the different available factual findings do not amount to different ingredients no Brown direction is required, eg in respect of an intent to supply controlled drugs (R v Ibrahima [2005] EWCA Crim 1436; [2005] Crim LR 887, where the jury could convict on the basis of either social supply to a named friend, or commercial supply in a nightclub, without having to agree on which it was); intent to pervert the course of justice (R v Sinha [1995] Crim LR 68, CA,where the defendant's intention might have been to pervert criminal or civil proceedings, or an inquest); dangerous driving (R v Budniak [2009] 9 Archbold News 3, CA, where the prosecution case was that both the manner of the offender's driving and the condition of his vehicle were dangerous); and an agreement to act dishonestly to the prejudice of a defined group of which the particulars specified the nature of the prosecution case and the principal overt acts relied on rather than alternative ingredients of the offence, and which was followed in R v K [2004] EWCA Crim 2685; [2005] 1 Cr App R 25)."

72. As there stressed.

> "... unanimity is only required in respect of the ingredients of the offence; thus where the different available factual findings do not amount to different

ingredients no Brown direction is required."

73. In this case, unanimity was only required in respect of the ingredients of the offence, of which the only contested ingredient was whether the applicant was concerned in the production of cannabis.

74. Equally, this is not a case in which two distinct incidents were being alleged, either of which might constitute the offence charged or where there were different defences.

75. As stated by this court in R v Mitchell 26 HLR 394, a Brown direction:

> "... would will be necessary only in comparatively rare cases. In the great majority of cases, particularly cases alleging dishonesty and cases where the allegations stand or falling together, such a direction will not be necessary. It is of first importance that the directions for juries should not be overburdened with unnecessary warnings and directions which serve only to confuse them."

76. In all the circumstances, we agree with the prosecution that no Brown direction was required.

77. In conclusion, in our judgment, the judge was justified in refusing to amend the indictment and the unamended indictment did not require a Brown direction to be given. It follows that the conviction on count 1 is not arguably unsafe. The appeal on count 2 must accordingly also fail, as it is accepted by all parties that for these purposes count 2 stands or falls with count 1.

The appeal against sentence

The judge's sentencing remarks

78. In his sentencing remarks the judge said that the appellant had previous convictions and a history of dishonesty. He had been the acceptable frontman representing others but renting properties in the country at locations which were not frequently visited. He had

been fully involved from the outset, setting up a company to launder cash from the cannabis production to pay the rent on Yelf's Yard.

79. When the offence was discovered after 2 years he had put himself forward as a victim of Pout and offered to give evidence against him. However, irrespective of whether there had been pressure from Pout, he had been involved in preparing further properties for use.

80. He had begun to live the life of a country gentleman, with large houses and acres of land although he had little or no money at all. It was clear that he did not have the money to live the life he felt he deserved and should only be continued by significant cash payments. There was little in the point advanced on his behalf that it only come into the operation at the end. The judge found that this was not the case and that he had been involved at an early stage. This was demonstrated by Pout's telephone call on 7 November, from which it was clear he could see his enterprise crumbling around him and that he felt that the appellant had let him down. The ending of a criminal relationship carried with it a risk that it would go wrong and lead to violence and intimidation.

81. His involvement had been motivated by money. He had not cared about the number of people affected by cannabis. People suffered psychotic affects from cannabis use, causing them to be a real danger which is why the production, sale and dealing of it was something about which the courts had to be particularly strict.

82. The judge had sentenced Pout on the basis that the operation was a category 1 Class B drugs operation, giving a starting point of 7 to 8 years. He had been given 6 years to reflect both his guilty plea and previous conviction.

83. The appellant's sentence would have been seven-and-a-half years before mitigation. It was clear that he had been the victim of a robbery by Pout. Credit would be given for the

fact that he had provided an interview which was used in a case against the co-accused. He was 63, was a father and a grandfather and had health difficulties. This mitigation resulted in the sentence being reduced to one of 5 years' imprisonment.

The grounds of appeal against sentence

84. The grounds relate to the application to amend the indictment. Amending the indictment would have meant obtaining the jury's view of the offending which was capable of various interpretations. In those circumstances, in declining to amend the indictment, the judge was bound to sentence the appellant on the most favourable view of the facts. The judge however, erred in refusing to allow amendment of the indictment and sentencing the appellant on the basis of his own findings of fact.

85. Given that we have concluded that the judge did not err in refusing to amend the indictment, the foundation for this ground of appeal must fall away. We shall nevertheless briefly address the arguments raised.

86. On behalf of the appellant it is pointed out that one of the reasons that the parties agreed that the indictment should be amended was because the particular facts of the case lent themselves to different interpretations and it would have been possible to amend the indictment so as to obtain the jury's view. The interplay between the facts and the indictment dictated that in the event of conviction on count 1, or counts 1 and 2, there would be numerous permutations as to the jury's possible view of the facts. In those circumstances, in declining to amend the indictment, it is submitted that the judge was bound to sentence the appellant on the most favourable view of the facts.

87. Reliance is placed on the case of R v Efionayi 16 Cr App R(S) 380, in which it was held that, if a verdict is consistent with two views of the facts and it would have been possible

to amend the indictment to obtain the jury's view, then the judge must adopt the more favourable view.

88. As the prosecution points out, Efionayi was decided in 1994 and the appellant in that case relied upon the earlier case of R v Stosiek 4 Cr App R(S) 2005 and in the particular circumstances of Efionayi the court was persuaded to adopt the Stosiek approach. The prosecution submits that Efionayi was decided on it own facts and much more recent authority supports the approach taken by the judge in this case.

89. As made clear by the decision of this court in R v King [2017] 2 Cr App R(S) 6, the Stosiek line of authority is not a freestanding principle and has been subsumed within the correct approach to the factual basis upon which to apply a sentence, as set out in King at paragraph 31 as follows:

> "If there is only one possible interpretation of the jury's verdict(s) then the judge must sentence on that basis. Where there is more than one possible interpretation, then the judge must make up his own mind, to the criminal standard, as to the factual basis upon which to pass sentence. If there is more than one possible interpretation, and [the judge] is not sure of any of them, then ... he is obliged to pass sentence on the basis of the interpretation (whether in whole or relevant part) most favourable to the defendant."

(see also Archbold at 5A-271)

90. The approach taken by the judge in this case followed this approach. He was able to make up his own mind, to the criminal standard, as to the factual basis upon which to pass sentence and he passed sentencing accordingly. On the facts, as the judge found them to be, the sentence is neither manifestly excessive nor wrong in principle.

91. The appeal against sentence must accordingly be dismissed.

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