IN THE COURT OF APPEAL

CRIMINAL DIVISION

NCN [2020] EWCA Crim 1229

CASE NO 201900402/B4

Royal Courts of Justice

Strand

London

WC2A 2LL

Tuesday 8 September 2020

LADY JUSTICE CARR DBE

MRS JUSTICE MCGOWAN DBE

MR JUSTICE MARTIN SPENCER

REGINA

V

DEJAN BOGDANOVIC

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MR M LAVERS appeared on behalf of the Appellant.

MR M HOOPER appeared on behalf of the Crown.

J U D G M E N T

LADY JUSTICE CARR:

Introduction

1. This is an appeal against conviction brought with limited leave. The appellant (now aged 55 years) was convicted on 19 December 2018 following trial in the Crown Court at Kingston-upon-Thames before HHJ Lodder QC ("the Judge") on two counts: count 1, being concerned in supplying a Class A controlled drug to another, contrary to section 4(3)(b) of the Misuse of Drugs Act 1971; count 2, possessing criminal property contrary to section 329(1)(c) of the Proceeds of Crime Act 2002. He had earlier pleaded guilty to the offence of, being a person in police detention, failing without good cause to provide a non-intimate sample for the purpose of ascertaining whether he had a specified Class A drug in his body contrary to section 63B(8) of the Police and Criminal Evidence Act 1984. Two days later he received an overall sentence of 12 years' imprisonment in respect of which leave to appeal was refused on a renewed application earlier this year.

2. The appellant's co-accused, Billy Davis ("Davis"), had earlier pleaded guilty to the same first two offences. Davis received an overall sentence of 4 years and 8 months' imprisonment.

3. Leave has been granted to advance three grounds of appeal. The first and principal ground turns on whether the Judge was wrong to refuse to admit bad character evidence relating to Davis. The second (related) ground arises out of a comment made by the Judge in the route to verdict document provided to the jury. The third ground arises out of an answer given by the Judge to a question from the jury relating to the correct standard of proof. The overarching question is whether or not any matters relied on, either individually or cumulatively, render the appellant's convictions unsafe.

4. To assist our determination of the issues raised we have had the benefit of written and oral submissions from Mr Lavers for the appellant and Mr Hooper for the respondent, neither of whom appeared below.

The Facts

5. At about 2.35 pm on Tuesday 27 March 2018 police officers in Wandsworth observed a white Transit van (“the van”) turning onto Shuttleworth Road. It was being driven by Davis who had come up from Portsmouth and who was the focus of police observation. No other person was noted to be in the van at this stage. The police then lost sight of the van, albeit for a very short time, observing it again on Trott Street, a residential road running off Shuttleworth Road. The van then turned into Battersea High Street where it pulled up in a parking bay. By now there was the appellant in the front passenger seat of the van.

6. The police carried out a stop and search exercise under section 23 of the Misuse of Drugs Act 1971. In the centre console area was found a white paper bag with a distinctive red "Aroma" logo written on it, inside of which was another identical paper bag with the same “Aroma” logo, doubled up and sealed with sellotape. On breaking the seal, an act which required some force, PC Abbott found inside a plastic bag with perfume logos on it

containing £30,060 in cash ("the perfume bag") and a white envelope containing £500 cash ("the envelope"). Under the driver's seat police also found a rectangular package covered in wrapping tape and in a heat-sealed bag, containing 999 grams of cocaine of 90% purity. £30,060 was the equivalent market price for a kilogram of cocaine at the time.

7. Both the appellant and Davis were arrested on suspicion of money laundering and possession of Class A drugs with intent to supply. The police found two mobile telephones and a motorcycle key on the appellant. He refused to say where the motorcycle was but a search of the area located it. Nothing further was revealed. The appellant gave an address of 27 Battersea Square. Police found there a small quantity of cocaine apparently for personal use.

8. The appellant refused a drugs test whilst in custody. When interviewed the following morning he gave a prepared statement, stating that the items found in the van did not belong to him. Thereafter he answered no comment to all questions.

9. The prosecution case was that the appellant was carrying the full amount of £30,560 with him when he got into the van, which he did with the view of purchasing the cocaine from Davis. The prosecution relied, amongst other things, on: first, Davis' guilty pleas to confirm i) that the cocaine was being supplied to another and that Davis was concerned in that supply and ii) that the £30,560 in whole or in part was the proceeds of crime; secondly, CCTV footage showing the appellant holding a bag before he got into the van being driven by Davis (which he was seen to flag down) which was identical to the outside “Aroma” bag subsequently found in the van; thirdly, the fact that £30,060 was equivalent to the market price for 1 kilogram of cocaine at the time; fourthly, text messages (both historic and received after his arrest) on the appellant's phone indicative of involvement in the supply of drugs; fifthly, body worn-video footage from the camera worn by PC Abbott (which we have also viewed), showing the discovery and contents of the items in the van. This included the fact that the envelope containing the £500, which the appellant admitted taking into the van, was inside the inner sealed “Aroma” bag on top of the perfume bag; sixthly, the appellant's silence in interview (albeit that he made a prepared statement to the effect that the items found in the van did not belong to him); seventhly, the finding of a line cocaine on a mirror at 27 Battersea Square; eighthly, communications between the appellant and Davis, as evidenced by mobile telephones found on each of them.

10. The appellant gave evidence at trial. His defence was that he was not involved in the supply of the cocaine nor in possession of criminal property on 27 March 2018 or at all. On that day he had been expecting to purchase 5 grams of cocaine for personal use to celebrate his wife giving birth to their sixth child and to help him with the exhaustion that he was suffering. It had been a complicated pregnancy for her and, together with attending to their other children, he had managed little sleep. He had arranged to meet Davis around the corner from his home address as he wanted to get back to his wife as quickly as possible. The appellant accepted that he had been a habitual user of cocaine for several years and that the person from whom he obtained drugs sometimes used runners, one of whom was Davis, whom the appellant had met on a few occasions in the

past.

11. The appellant said that he took with him two sturdy paper “Aroma” take-away bags as he intended to buy eight cans of Guinness in the store outside of which he was due to meet Davis. He knew from personal experience that the thin plastic bags provided by the store were not strong enough. When going to pay for the cans of Guinness he realised that he did not have his wallet with him and so had to return the cans to the shelf before exiting the store. One of the paper bags was inside the other; the only thing otherwise inside was a bottle of water. The only cash of which he was in possession was £500 to pay for the 5 grams of cocaine, that cash being in an envelope he had marked. He said that he gave the envelope to Davis as soon as he got into Davis' van. He did not get into the van with a larger sum of £30,060 subsequently found in the perfume bag inside the inner “Aroma” bag. The appellant said that when he got into the van Davis seemed agitated and in a rush. He told the appellant that he needed to do something before he could give the appellant his order. Davis asked where the appellant's home was and the appellant, unwilling to take him to his family home, directed him to 27 Battersea Square which he knew to be unoccupied since he was managing the premises for somebody else. The appellant said that before moving off Davis noticed the appellant's paper bag and asked him if he needed it or whether he could use it. The appellant said that he did not need it as there was only a bottle of water in it. He took the bottle of water out and handed Davis the “Aroma” bags. Davis put something in it, although the appellant said he could not see precisely what. The appellant said that he did not know of the existence of the £30,060 or of the near kilogram of cocaine under the driver's seat. He said that Davis must have sealed the inner “Aroma” bag.

12. The appellant was cross-examined. He said that he did not know when Davis rolled over and sellotaped the inner “Aroma” bag. He said that he (the appellant) took the water bottle out and Davis put his bag in the “Aroma” bag. The appellant kept the bottle. He did not see Davis putting sellotape on the inner “Aroma” bag. The appellant said that he did not put the envelope with the £500 inside the inner “Aroma” bag with the perfume bag.

13. The issue for the jury was whether it could be sure that the appellant was in possession of the £30,060 at the point he entered the van. There was no issue in the case that <u>if</u> that money belonged to the appellant, then he must have been aware of the nearby kilogram of cocaine and intended to purchase it.

14. Against this background, we outline the grounds of appeal for which leave has been granted and the parties' respective positions.

<u>Ground 1: the defence application and the Judge's ruling on Davis' bad character</u>

15. During the first two days of trial the defence applied to adduce evidence of police observations carried out on Davis on 8 January 2018, 19 January 2018 and 6 February 2018 as set out in a statement from DC Neil Stanley dated 15 May 2018 (but only disclosed on the first day of trial). In his statement DC Stanley stated that on each of these three occasions a different man had been seen to get "empty handed" or "with an

empty looking bag" into the passenger seat of a black Mercedes van for which Davis was the only insured driver. On each occasion when the man left he was found to be in possession of a substantial amount of cash. There was evidence of telephone communications between each man and Davis on the day in question, and Davis' mobile telephone cell was cited at the locations where the monies were said to be handed over.

16. Each of the three men had been prosecuted subsequently on the basis that the sums of cash had been collected variously from Davis and were the proceeds of crime. By the time of the application before the Judge one of the men had been acquitted after two trials, one had been convicted and the third was awaiting a retrial after the jury had failed to reach verdicts at the conclusion of his first trial. Davis himself, however, had never been charged or convicted in relation to these three incidents.

17. It was said that from this evidence it could safely and properly be inferred by the jury that Davis was the target of an operation into his activity in respect of drugs and money laundering and that over the preceding 2 months he had been seen on three separate occasions transferring some £160,000 of criminal property in total to three different men. The defence sought permission to cross-examine DC Stanley on these matters. We will call this "the bad character evidence".

18. The defence submitted that Davis' possession of criminal property on these previous occasions was relevant having regard to the issues raised by way of defence. The evidence would support the appellant's account that the money found in the van upon his arrest did belong to the appellant but rather was already in the van and placed in the bags by Davis. The prosecution objected to the defence application, relying namely on the fact that Davis had never been charged.

19. The Judge refused the defence application. In a short ruling he stated that it was neither important explanatory evidence nor did it have substantial probative value because of what the jury was already aware and because it would involve consideration of entirely separate allegations against different factual backgrounds. The Judge had been told that Davis was not in fact seen handing over the money in the manner alleged and had never been charged. The jury was aware that Davis had pleaded guilty to counts drawn in exactly the same fashion and the matter had been opened on the basis that it was Davis who was the focus of the police attention and interest at the outset.

20. For the appellant Mr Lavers submits that the Judge erred in refusing the defence application to admit the bad character evidence. The question of whether the money was delivered to Davis by the appellant or whether Davis was already in possession of the money was at the heart of the case for both parties and the central issue. The defence would have invited the jury to find that the three previous events were part of a clear course of conduct involving Davis being in possession of large quantities of cash on repeated occasions. This, submits Mr Lavers, supported the appellant's case, in the sense that it made it more plausible that he was just an incidental customer of Davis and that the larger sum of £30,060 and the kilogram of cocaine related to a wholly separate transaction or transactions. The £30,060 could relate to different transactions past,

continuing or future.

21. Mr Lavers submits that consideration of the factors identified in section 100(3) of the Criminal Justice Act 2003 all points in favour of allowing the bad character evidence into evidence. There were three previous incidents in a short period preceding the index event, each occasion involving Davis being in possession of large cash sums with circumstantial similarities. The evidence showed Davis to be "deeply engrained" in criminal conduct. The jury was thus, submits Mr Lavers, deprived of important evidence. It was left with the impression that Davis was simply an errand boy whose services were worth no more than £500.

22. Mr Lavers submits that although there was no evidence of Davis handing over the money, it was untenable for the respondent to dispute the meetings leading to the transfer of cash on the earlier occasions and the evidence from which it could be inferred that Davis was involved as the driver of the vehicle. The fact that there was no evidence of drug involvement did not alter the fact that the evidence showed that Davis had the means to possess substantial quantities of cash. Further, the fact that Davis had not been convicted did not prohibit the admission of the bad character evidence. Mere allegations can be seen as having substantial probative value.

23. Mr Lavers submits that the Judge's reasons for refusing the defence application were inadequate. The fact that the jury knew that Davis was the police target was only to invite speculation. The fact that the jury would have to consider entirely separate allegations was not a bar. The Judge failed to consider section 100(3) of the Criminal Justice Act 2003 and the prospect of satellite litigation was not a real concern here; there would simply have been submissions on both sides. It is said that the facts of this case are very different to those in *R v Braithwaite* [2010] 2 Cr App R 18. The observations of the police officers could have been padded out with detail. As to probative value, this was the defence seeking to cast doubt on the prosecution hypothesis.

24. For the respondent Mr Hooper submits that the Judge's ruling was correct and that the evidence was neither important explanatory evidence nor of substantial probative value in the context of the case. The jury was already aware that Davis had pleaded guilty to involvement in the present case and that it was he, and not the appellant, who was the target of police attention.

25. Further, Davis' three alleged transfers in the past were based on entirely different factual matters. There was no evidence of drug involvement. Davis was not charged. Even if it could be said that it was Davis who handed out the money on the three earlier occasions, that would not inform the jury as to how the money (the £30,060) came to be in the vehicle he was driving in the first place. It would do no more than invite speculation. To allow cross-examination on it would have involved satellite litigation on matters which could not assist the jury. Mr Hooper also points to the fact that of the three other men involved in the earlier transactions, one, as indicated, was acquitted, another convicted but only after the trial of the appellant, and another convicted. These matters are important, he submits, to our assessment of the probative value of the bad character

evidence. Mr Hooper's submission was that the bad character evidence was ambiguous at best.

26. Moreover, Mr Hooper submits that there was compelling evidence considered carefully by the jury leading to the conclusion that the appellant already had the money with him when he entered the van. Knowledge of Davis' previous conduct would not have made a difference to the verdict.

Ground 2: the written route to verdict ("the Route to Verdict")

27. In paragraph 3 of the Route to Verdict provided to the jury the Judge wrote as follows:

> i. "... the prosecution say that [Davis] was carrying £30,560. £30,060 was wrapped in a perfume bag and that was payment for ... almost one kilogram ... of cocaine, and £500 in the envelope payment for [Davis] for delivering the cocaine [emphasis added]."

28. The defence had objected to the underlined passage on the basis that it had never been part of the prosecution case, nor had it ever been put to the appellant, that the £500 was payment for Davis to deliver the cocaine. The Judge overruled that objection.

29. For the appellant Mr Lavers concedes that the Judge would have been entitled to make a comment to the effect that the jury could conclude that the £500 was payment for delivery by Davis but submits that the Judge was wrong to introduce it into the Route to Verdict and so late in the day. The suggestion that the £500 was a separate payment for courier services was not a distinction ever drawn by the prosecution, he says, nor was it a proposition put to the appellant. The separation of the £500 was an important point for the defence. The appellant had no opportunity to answer the suggestion now being made. It was a new case which substantially undermined the appellant's defence since a jury would be less likely to conclude that Davis could have been in possession of over £30,000 in cash if he was a mere courier. It is said by way of example that police officers could have been cross-examined as to the likelihood of the purchaser of drugs paying the courier as opposed to the vendor.

30. Further, had the suggestion that Davis was a mere courier been made earlier, the earlier events of January and February 2018 would have taken on an even greater significance. The error, submits Mr Lavers, compounds the unfairness arising under ground 1.

31. For the respondent Mr Hooper submits that it was the prosecution case from the outset that the appellant had handed over all of the £30,560 in the bags which he had brought into the van, wherever it was within the bags, to Davis and made no differentiation between the payment for the drugs and a payment for Davis for delivering them. Whilst it would have been preferable for the hypothesis not to have been mentioned, the Judge's suggestion that the £500 was payment for Davis cannot realistically have affected the jury's overall deliberations.

32. As to the limited point now relied upon for the appellant based on the inclusion of the comment in the Route to Verdict, the actual route to verdict was limited to the questions

posed at the end of that document. Further, Mr Hooper points to paragraph 5 of the Route to Verdict where the Judge made it clear that, to the extent that the defence case involved an attempt by the appellant to purchase 5 grams of cocaine and being in possession of £500, that would not render the appellant guilty on count 1. The £500 was not the basis of the prosecution case.

Ground 3: jury direction on standard of proof

33. During retirement, on the third day of their deliberations, members of the jury informed the judge that none of them were in possession of a copy of the indictment. That position which was rectified immediately. But in the light of that discovery the Judge referred again to the Route to Verdict. At this stage a jury note was handed up to the Judge. It read:

    i. "'Are we sure that"
    ii. Does this mean absolutely, 100% certain? May there be any doubt at all in my mind?"

34. The Judge proceeded to answer the note immediately and without consulting counsel as follows:

    i. "... well you have answered the question, are we sure that it is what it is, it does not say we must be 100% certain. You use sure as you would use it in your ordinary lives, an ordinary English word."

35. For the appellant, Mr Lavers submits that the Judge erred in this further direction. First, he should have consulted counsel before answering the question. Secondly, he was wrong to engage in a statistical evaluation. What he said was "unhelpful, inadequate and wrong". He failed to answer the jury's second question in particular. Reference is made to *R v Stephens* [2002] EWCA Crim 1529; *R v Majid* [2009] EWCA Crim 2563 and *R v JL* [2017] EWCA Crim 621.

36. It was incumbent on the Judge, submits Mr Lavers, to provide an answer to the jury's second question and to make it clear that if the "doubt in my mind" was a reasonable doubt, as opposed to a fanciful or unreasonable doubt, a juror was obliged to acquit.

37. For the respondent Mr Hooper concedes that the Judge should first have consulted counsel but submits that the Judge's answer was nevertheless accurate and adequate when combined with his written directions and repetition throughout the summing-up that the jury had to be sure in order to convict. He points to the Crown Court Compendium Part 1 at section 5 in particular. No particular form of words needs to be used in relation to the direction on standard of proof. It is unwise to elaborate. Questions from the jury should be answered as shortly as possible: see *R v Yap Chan Chin* (1976) 63 Cr App R 67).

38. Overall, Mr Lavers submits that individually and cumulatively the errors and irregularities which he identifies render the convictions unsafe. There was real potential, he submits, for the jury to conclude that the £30,060 may have been for a deal that did not involve the appellant at all, such as to result in his acquittal. The bad character evidence,

if admitted, could have made a difference.

39. Analysis
40. We turn first to ground 1. Section 100 of the Criminal Justice Act 2003 provides materially as follows:

> i. "100 Non-defendant's bad character
> (2) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—
>
> (a) it is important explanatory evidence,
>
> (b) it has substantial probative value in relation to a matter which—
>
> (i) is a matter in issue in the proceedings, and
>
> ii. (ii) is of substantial importance in the context of the case as a whole..."

41. Section 100(2) of the Criminal Justice Act 2003 provides that evidence is important explanatory evidence for the purpose of section 101(1)(a) if:

> i. "(a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
> ii. (b) its value for understanding the case as a whole is substantial."

42. Section 100(3) of the Criminal Justice Act 2003 identifies the factors to which the court must have regard in assessing the probative value of evidence for the purpose of subsection 100 (1)(b), including where the evidence is evidence of a person's misconduct and it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct, the nature and extent of similarities and the dissimilarities between each of the alleged instances of misconduct.

43. The assessment is by definition highly fact sensitive in each case and falls to be carried out in the context of the case as a whole (see *R v Braithwaite* (supra) at [12]).

44. Section 109 of the Criminal Justice Act 2003 also provides:

> i. "(1) Subject to subsection (2), a reference in this Chapter to the relevance or probative value of evidence is a reference to its relevance or probative value on the assumption that it is true.

(2) In assessing the relevance or probative value of an item of evidence for any purpose of this Chapter, a court need not assume that the evidence is true if it appears, on the basis of any material before the court (including any evidence it decides to hear on the matter), that no court or jury could reasonably find it to be true."

45. By section 100(4) of the Criminal Justice Act 2003 evidence of the bad character of a non-defendant to be adduced under section 100(1)(b) must not be given without leave of the court.

46. The court has no power as such to rule evidence inadmissible on the ground that it will give rise to satellite litigation which might risk the derailment of the trial: see *R v Dizaei* [2013] EWCA Crim 88; [2013] 1 Cr App R 31; [2013] 1 WLR 2257 at [35], approved in *R v King* [2015] EWCA Crim 1631, at [43]. However, such risk is something that the court can properly take into account in deciding whether the conditions for admissibility in section 100 have been met: see in particular *R v Dizaei* (supra) at [36] to [38] endorsed most recently in *R v Umo & Ors* [2020] EWCA Crim 284 at [37] and *R v DG* [2020] EWCA Crim 939 at [31] and [32]. Whether the evidential dispute is capable of resolution by the jury is an "important factor" when considering an application under section 100(1)(b).

47. We ask first whether the bad character evidence was "important explanatory evidence". In our judgment it was neither impossible nor difficult to understand other evidence in the case without it. Indeed, although section 100(1)(a) of the Criminal Justice Act 2003 was relied upon below it has rightly not be pressed upon us on appeal. We do not consider that the Judge was wrong to conclude that the requirements of section 100(1)(a) were not met.

48. We then consider whether the bad character evidence had substantive probative value in relation to a matter which was in issue and was of substantial importance in the context of the case as a whole. The matter in issue is whether it was the appellant and not Davis who brought the £30,060 into the van. More specifically, how did the £30,060 get into the two bags that the appellant had taken into the van alongside the £500 which he had accepted he had brought with him in the envelope?

49. We state at the outset that we understand the submission that the bad character evidence could lend some weight to the defence case. However, in our judgment, the Judge was entitled to rule that the bad character evidence was not of substantive probative value in relation to the central issue in question. The jury already knew that Davis had pleaded guilty to being concerned in the supply of drugs. It was established that he was supplying drugs on this occasion. The case was opened on the basis that it was Davis not the appellant who was the police target. To the extent that the bad character evidence might support the defence case that it was Davis who was driving around with a large amount of drugs money on this occasion, we can understand why in these circumstances the Judge might consider that it would not be of substantive probative value.

50. Consideration of the factors identified in section 100(3) does not assist the appellant. At

its highest the material in DC Stanley's statement gave rise to an inference against Davis. Perhaps for good tactical reasons no application for further disclosure beyond DC Stanley's statement was made at trial. But the fact remained that there was precious little evidence as to the precise facts and circumstances of the three transfers of cash in question and, more importantly, Davis's involvement in it. To the extent that there was material available, the Judge was told that there was a dispute as to whether or not it was true that Davis had transferred the sums in question as alleged. He was not seen to be handing over the money at any stage. He had, as already indicated, never been charged.

51. We find force in the respondent's submission that the circumstances of the previous transactions, to the extent identified, were not inconsistent with the case against the appellant, telling the jury very little, if anything, as to how the money came to be in the vehicle being driven by Davis at the time. The earlier transactions were factually different but not inconsistent. As already indicated, the bad character evidence could be said to lend weight to the defence case; but equally it could be said to be supportive of the prosecution case, demonstrating that Davis was a trusted delivery driver in the context of criminal activity. Thus, even if the jury had inferred that Davis was the one to deliver the proceeds of crime on three previous occasions, that did not undermine significantly the prosecution case that Davis was not the one delivering cash on this occasion.

52. Admission of the bad character evidence would have required the jury to consider potentially contentious allegations as to the nature and extent of Davis' involvement in the earlier transactions. As the Judge put it, its admission would involve the jury having to consider entirely separate allegations against different factual backgrounds, a notable difference being the absence of any evidence of drug involvement in the earlier transactions. To have introduced the material ran the clear risk of a substantial and complex diversion from the central issues arising on the particular facts of the incident on 27 March 2018.

53. Indeed, the submissions before us this morning have demonstrated the extent of potential debate as to, for example, whether or not it was a coincidence that sums of £60,000 were found to have been transferred in the earlier transactions. There would have been substantial debate on either side as to what the bad character evidence could reasonably be said to prove. At the very least there were submissions to be made both ways.

54. In this context there is to be considered the effect that the introduction of the evidence at trial would have had and the question of satellite litigation in its broadest sense. The potential for such satellite litigation is borne out by the earlier unsuccessful application made on behalf of the appellant for disclosure in relation to ground 1. (Disclosure was sought of the case summaries in respect of three recipients of cash on the earlier transactions and of telephone exhibits and schedules referred to in DC Stanley's statement.) It is significant that the defence applied to cross-examine DC Stanley; DC Stanley's statement was very far from the end of it.

55. The jury would have had to make findings in relation to the other transactions before applying any conclusions they were to reach to the facts of this case and as to the nature

and extent of Davis' involvement. This is of course not a bar to admission of the bad character evidence but it seems to us to be highly material to an assessment of the strength of the probative value of that evidence.

56. Against this background the Judge cannot, in our judgment, be criticised for having taken the view that the bad character evidence should not be admitted as being of substantive probative value. Thus we do not consider that the Judge erred in ruling that the requirements of section 100(1)(b) of the Criminal Justice Act 2003 were not made out.

57. Further and fundamentally, any error in this regard would not render the appellant's convictions unsafe. The appellant entered the van which pulled away almost immediately only some four minutes before it was searched and found to contain the two “Aroma” bags, one within the other. The £30,060 was found inside the perfume bag, itself inside one of the “Aroma” bags brought by the appellant and which had been taped and sealed with sellotape inside the other “Aroma” bag, also brought by the appellant. There was no evidence of sellotape found or seized in the van or on Davis. Inside the sealed “Aroma” bag which contained the perfume bag was the envelope which the appellant admitted bringing into the van. Davis had no meaningful opportunity to place the money and the envelope in the inner “Aroma” bag, double it up and seal it. Proof of earlier involvement by Davis in moving the proceeds of crime could not defeat the overwhelming inference that the appellant must have brought both sums of money into the van on this occasion.
58. Further, the appellant went silent in interview. There were text messages indicating his involvement in dealing drugs albeit only cannabis. There was no separate amount of 5 grams of cocaine found in the van or scales to separate out such an amount, nor were there text messages consistent with the purchase of such an amount by the appellant.

59. As for the second ground, we do not accept the submission that by summing-up as he did the Judge effectually rewrote the prosecution case. It was always the prosecution case that the money in total was payment for the cocaine (substance and delivery). It was the appellant's own evidence that he had brought the £500 to pay for cocaine for his personal use and that Davis was the courier for his dealer.

60. The proposition advanced by the Judge was, as he put it in the course of discussion with counsel, "an available position", even though it was not put expressly to the appellant. The defence had the opportunity to challenge the evidence of the searching officer who found the bags containing the money and to provide an explanation in evidence as to how the envelope came to be inside the inner “Aroma” bag.

61. In any event, the error, if made, would not render the convictions unsafe. The Judge made the comment that he did, not as a legal direction but as "very, brief summary" before the actual route to verdict questions and in advance of closing speeches. It would have been preferable for the Judge to separate out any written summary of the parties' respective cases from the actual questions posed in the Route to Verdict. But it is accepted that the Judge could have made the comment in principle. Its inclusion in the written document does not tip the balance in favour of a finding of lack of safety so far as the conviction is concerned. The jury had heard the evidence and the prosecution case

for itself. The defence had the opportunity to make a closing speech after the comment was made. The summing-up made it clear that the central issue for the jury was whether it was sure that the appellant had the £30,060 in his possession when he got into the van. In any event, we refer again to the strength of the case facing the appellant.

62. As to the third and final ground, the Judge should have discussed how to answer the jury question with counsel first. However, the direction that he gave was substantively unobjectionable. The jury was not directed to decide whether or not it was sure by reference to a percentage. It was told positively to avoid a mathematical approach but rather to ask itself whether it was sure by reference to the ordinary use of that word. This was consistent with the original direction to the jury which was as follows: "sure is an ordinary English word, but you apply it just as you would do in your ordinary lives." Any attempt to draw any further distinction between or provide a definition of the words "certain" and "sure" would not have been helpful: see *R v Stephens* (supra) at 16]; *R v Majid* (supra) at [16] and *R v JL* (supra) at [11] to [18]. The Judge's direction was consistent with the suggested guidance in the Crown Court Compendium. In our judgment, the Judge answered both the jury's questions in a composite and adequate manner.

Conclusion

63. For all these reasons, and despite the able submissions advanced by Mr Lavers for the appellant, we would dismiss the appeal.

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