

Neutral Citation Number: [2021] EWCA Crim 66

Case No: 202001031/B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Crown Court at Teesside
His Honour Judge Armstrong
T20187108

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/01/2021

Before :

LORD JUSTICE GREEN
MR JUSTICE GARNHAM
and
MR JUSTICE FORDHAM

Between :

REGINA
- and -
Darren Paul GATES

(Transcript of the Handed Down Judgment.
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Mr Eric Lamb (instructed by **Paul Crowley & Co Solicitors**) for the **Appellant**
Mr Matthew Bean (instructed by **Crown Prosecution Service**) for the **Crown**

Hearing date: Thursday 14th January 2021

Judgment
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Lord Justice Green :

Introduction: The Issue – “Open” and “Closed” Conspiracies

1. There is before the Court, an appeal against conviction.
2. On 4th February 2020 in the Crown Court at Teesside, the appellant was convicted of conspiracy to supply drugs of Class A (cocaine). This was Count 1 on the indictment. He was sentenced to 6 years and 6 months imprisonment. The particulars of the offence in relation to Count 1 stated that the appellant, and other named defendants conspired “*together with others unknown*” to supply the Class A drugs.
3. The appellant was jointly charged with 10 other males with an offence of conspiracy to supply between 18th August 2015 and 25th July 2016. These were Mitchell, Hickson, Horner, Gilling, Brett, Baines, Bate, Wilding, Dodsworth and Pringle.
4. Three conspirators pleaded guilty to substantive offences before trial: Gilling, Bate and Dodsworth. Five defendants: Mitchell, Hickson, Pringle, Wilding and Baines, were found not guilty by the jury and were acquitted. In relation to Horner, the jury were unable to reach a verdict. The Prosecution did not seek a retrial and no evidence was ultimately offered. In relation to Brett, the jury were unable to reach a verdict. He also faced a separate indictment alleging a separate drugs conspiracy. As of the date of this appeal, the retrial had not taken place.
5. There is one issue before the Court. It is argued that all persons with whom it was said by the Prosecution that the appellant actually conspired, were found not guilty so that the verdict of the jury, to the effect that the appellant was guilty of conspiracy, was illogical and inconsistent, and should be set aside. The Crown say that the indictment was that the appellant conspired with the other defendants, or some of them, or with other persons unknown. This was an “open” conspiracy. The Crown argue that the jury must have concluded that the appellant conspired with persons unknown, which was a verdict open to them.

The Case against the Appellant

6. The Crown’s case was a mixture of general evidence about the alleged conspiracy and particular evidence linking the appellant to it. The conspiracy was an open conspiracy, in other words, the appellant conspired with named co-defendants and/or with others unknown. It concerned supply of cocaine within a relatively small geographical area of the North-East of England, centring upon the villages of South Hetton, Haswell and Haswell Plough, where other members of the alleged conspiracy lived, in County Durham.
7. The appellant lived in South Shields. He was alleged to be in contact with Mitchell during the early party of the conspiracy. Hickson and Horner were said to have helped him in organising the conspiracy and were in regular phone contact with Mitchell and each other. Wilding, Baines and Bate lived in Hartlepool. They were alleged to have transported large quantities of cash and cocaine and were said to be in regular contact with Mitchell and allegedly threw drugs from car windows prior to being stopped by police. Ten mobile numbers were used sequentially over the course of the conspiracy. Based upon usage and cell-site evidence, only Mitchell used those numbers.

8. The conspiracy comprised an organisation of individuals in the East County Durham area, who obtained cocaine in wholesale amounts from outside sources, for it to be sold on to others in the chain for distribution. In its opening to the jury, the Prosecution expressly described the case as involving a conspiracy of an open type. This is how the case was opened:

“Overview of the offences”

The buying and selling of drugs is a business, albeit an illegal one. Like any other business, an organisation set up to buy and sell drugs has a structure. There will be people in the organisation who provide leadership and direction; planning what to buy and sell and who to do business with. Below those providing direction, there are those that are involved in managing the business on a day to day basis, and those who then deliver it to the buyer or receive it from the supplier.

Ultimately, however, a drug business is an illegal business. It takes place out of sight of the general public. It is also a cash business. Banks can't be used, as questions may be asked as to where all this cash is coming from and going to. There are therefore no bank accounts and no written records.

During the course of 2015 and 2016, Durham police conducted an investigation into drugs supply in the North East of England. The Investigation became known as Operation Ebony.

The Prosecution say that between August 2015 and July 2016 each of the Defendants conspired, that is, **formed an agreement, together with persons unknown,** to supply cocaine in the North East of England.” (emphasis added)

9. The Prosecution relied upon a variety of different strands of circumstantial and actual evidence. These included (i) the location of the places where the defendants lived; (ii) the association or connections between them; (iii) telephone contact between them and the timing and frequency of it; (iv) cell-site evidence; (v) the nature of the unregistered phones used and the volume used; (vi) observations of the defendants by the police including covert surveillance operations; (vii) automatic number plate recognition evidence (ANPR); (viii) evidence of drug dealing in the form of text messages; (ix) dealer lists; (x) the guilty pleas of Bate, Gilling and Dodsworth; and (xi), actual evidence relating to the seizure of cocaine and large amounts of cash.
10. The Prosecution's case against the appellant was that the only co-conspirator he had contact with was Mitchell. The appellant travelled to Haswell Plough on 10 occasions between 19th August and 30th September 2015, each time to move quantities of either cash or cocaine.
11. On 9th October 2015, the appellant was observed in his vehicle meeting another vehicle, a blue Ford Focus, said to have been driven by Mitchell. When stopped by the police shortly after, the appellant was found in possession of £110,000 in cash. The Crown case was that this was the proceeds of drug dealing. The Crown

established that HMRC had no record of the appellant declaring income attributable to any source which, it was said, supported the Crown's case that this was illegal, drugs money. There was also evidence that bank notes in the possession of the appellant, including from the £110,000, contained twice the level of cocaine contamination normally found on bank notes in general circulation. Cocaine was found at the appellant's home. Latex gloves said be typical of those which would be used by those handling drugs, were found in the appellant's car.

12. He was also in possession of an encrypted phone. Mobile phone evidence showed the appellant had been in contact with one of the 10 mobile numbers attributed to Mitchell, before and after the meeting. The evidence against the appellant also consisted of telephone evidence. The appellant accepted attribution of three phones, ending 5424, 8876 and 8732. He disputed attribution of two phones ending 9547 and 5585.
13. The Prosecution also relied upon an adverse inference drawn from the appellant's no comment answers posed in interview.

The Defence Case

14. The Defence case was that he was not a party to any conspiracy. There were no photographs of him attending meetings with any other defendant, despite the Prosecution alleging meetings in August, September and October 2015. Whilst there was evidence of him in the area by way of ANPR, it was not unusual for him to travel to see family. He was not having meetings about drugs.
15. He did know some of the other defendants. He had seen Mitchell around a dozen times over a period of a couple of years before the conspiracy period. He had met Gilling once. He had never met any of the other defendants in the case. He had seen Brett once or twice before and knew of him.
16. As to the fact that HMRC had no declared income recorded for him in 2015, this was because he was wheeling and dealing, buying boats, fishing licences, cars and other items. He was not dealing in drugs. The cocaine in his house was for personal use. The latex gloves found in his car were because he was running his car on red diesel. In relation to the encrypted phone found on his possession, he had found this on a boat and had not been able to get into it.
17. In relation to phone attribution, the appellant could not remember all the numbers he had used but they were probably his; he used to buy and sell things and therefore had a different phone for business which he would change. The number 5121 which had been attributed to Mitchell was not in fact Mitchell, but a person called "Concrete Roadman" who he purchased drugs from.
18. In relation to the 9th October incident, his car was seen at the Mill Pub in South Shields and then travelled down to the Murton area. He agreed he was with the Ford Focus car, but he had followed the Ford Focus car as it went around the back of the streets into Cookson Terrace and was therefore behind, not in front. He would not say who the driver of the Focus was, but it was not Mitchell. The driver gave him a bin liner containing £42,000 in cash which had been buried.

19. The £42,000 was his money that he had won from gypsies betting on fights at Appleby Fair. After he won the money, he had received a phone call from a friend telling him that the gypsies wanted their money back. He took the threat seriously. He asked a friend to take the money for safekeeping. In October he wanted to buy a boat that was on sale for £160,000. He made arrangements to get the hidden money back. He already had £70,000 at home with him and wanted the other £42,000 so that he would have £112,000. The fact that there was not £112,000 in cash meant that someone had dipped into it. He was going to make a cash offer for the boat in the hope that the sellers would accept a lower purchase price.
20. He answered no comment in his first interview because he was high on drugs at the time. In December he gave an account to the police, but he lied when he said all the money found came from a friend.

Grounds of Appeal

21. We turn to the grounds of appeal.
22. In directing the jury, the four elements needed for a conspiracy were set out. These included that the jury needed to be sure that a defendant did, at some stage, agree with a named co-conspirator that the crime in question should be committed and at the time intended, that it should be carried out. It is argued that the verdict of the jury on conspiracy with the co-accused and others was inconsistent with their acquittal, particularly of Mitchell who was the only person at trial said to have direct links to the appellant.
23. The acquittals of Hickson, Baines, Wilding and Pringle, excluded those people from any agreement with the appellant. The jury were unable to reach verdicts on Horner and Brett, but the Prosecution adduced no evidence of direct contact between the appellant and either of these two. Brett's evidence had been he did not know the appellant at all.
24. With regard to Gilling, the evidence did not disclose anything further than Gilling's connection by DNA to the money found on the appellant on 9th October 2015, and his conviction for a substantive offence for supplying cocaine between 19th August and 9th October 2015. There was therefore no evidence to permit the jury to conclude Gilling had agreed anything with the appellant.
25. The Crown make the following points. First, the Crown's case at trial was that this was an "open" conspiracy, in other words, it was between each defendant and other defendants and/or persons unknown. The Prosecution made plain that others were involved in the conspiracy who had not been identified and the evidence against the appellant and his co-accused, and in particular Mitchell, was different. The Judge directed the jury that the facts against each defendant were different and that it was open to the jury to convict some but not others.
26. The direction to the jury included the following language: "...are you sure that the defendant whose case you are considering agreed with at least one person named in the indictment or unknown to supply cocaine". The direction thus made explicitly clear that the jury could find a defendant guilty upon the basis of a conspiracy with a third person who was not before the Court.

27. It followed that even if, as turned out to be the case, the jury was not satisfied that Mitchell was a conspirator with the appellant, it was still open to the jury to find that the appellant was part of a conspiracy to supply Class A drugs. It was not possible to know what led the jury to find the appellant guilty but, in principle, there was no basis for saying that simply because other, named, defendants were acquitted this meant that the verdict for the appellant was inconsistent. On the facts, there were many different evidential bases upon which he could be convicted.

Conclusion

28. We dismiss this appeal.
29. At base, this appeal turns upon a point of logic about closed and open conspiracies. The Crown is correct to say that where an open conspiracy is alleged, and the Prosecution case includes the possibility that a defendant conspired with persons unknown, the mere fact that there is no clear evidence that a defendant conspired with another indicted but acquitted defendant, does not render the conviction of a defendant inconsistent. Provided the possibility is put to the jury that the defendant in issue conspired with another defendant or with a person unknown, it remains proper for a jury to be sure that the conspiracy was with that person or persons unknown.
30. In this case, the Crown opened the case explicitly upon the basis that each defendant might have conspired with some other person(s) unknown.
31. The judge in his legal directions to the jury also made this clear on three different occasions. When he explained what was meant by a conspiracy he said as follows:

“In the count on the indictment, the Statement of Offence sets out the name of the offence and the statute which creates the offence, and the Particulars of Offence sets out the way in which the prosecution alleges the offence has been committed. The offence charged is one of conspiracy to supply a Class A drug, contrary to Section 1(1) of the Criminal Law Act 1977.

...

It is an offence to supply a controlled drug to another. Controlled drugs are divided into Class A, B or C, (Class A being the most serious). Class A drugs include, e.g., cocaine, crack cocaine, heroin (diamorphine), LSD and MDMA (Ecstasy).

Just as it is a criminal offence to supply a controlled drug of Class A, namely cocaine, to another, so it is a criminal offence for two or more persons to agree with one another to commit that offence. An agreement to commit an offence is called a conspiracy and that is the offence which is charged in the indictment.

For an arrangement to constitute an agreement, the parties to it must share the same unlawful design or purpose, that is, the

parties must have a common unlawful design or purpose in mind.

The prosecution must prove in the case of each defendant (1) what the particular agreement was, (2) that the defendant was a party to that agreement, (3) that the defendant knew what he was agreeing to, and (4) that when he joined the agreement the defendant intended that he or some other party to it should carry the agreement out.

Before you could convict the defendant whose case you are considering, of the offence of conspiracy, you must therefore be sure of all of the following 4 elements:

That there was in fact an agreement between two or more of the persons named in the indictment or persons unknown to supply the controlled drug cocaine to another person or persons; and

That the defendant whose case you are considering was a party to that agreement, in the sense that he agreed with one or more of the other persons named in the indictment **or persons unknown** that the crime should be committed; and

either:

he knew it was cocaine which was to be supplied; or

he knew it was a Class A drug which was to be supplied even though he did not have any knowledge or belief as to the particular drug involved; or

he believed it was another particular drug of the same (but not lower) Class; or

he did not care at all what particular drug was to be supplied; and

at the time of agreeing to this, he intended that the agreement should be carried out by him or some other party.

The prosecution case is that there was a single conspiracy to supply cocaine and each of the defendants was a party to it by agreeing **with at least one other defendant or person unknown** that the offence or offences of supplying cocaine be carried out and each shared that same or common unlawful design. The prosecution does not have to prove precisely when, or on how many occasions or how much cocaine was to be supplied.”

(emphasis added)

32. Question two in the route to verdict was in the following terms:

“2. Are you sure that the defendant whose case you are considering agreed **with at least one other person named in the indictment or unknown** to supply cocaine? Well, if you are sure you proceed to question three. If you are not sure, then your verdict must be not guilty.”

(emphasis added)

33. This short point is sufficient to dispose of the appeal.
34. This is not a case where it is said that the judge wrongly directed the jury, or that the case should have been stopped at half-time by the judge, or that the case was so exceptional that the verdict was utterly perverse. The only point is essentially one of logic based upon inconsistency.
35. We would add (but only as a form of postscript) that the facts that we have recited above (which included evidence of the appellant being found in possession of large amounts of cash contaminated with abnormal traces of cocaine immediately after meeting with a person in a vehicle whom he refused to identify, and which evidence also included his possession of actual cocaine, latex gloves and an encrypted phone), all amount to inculpatory evidence upon which a jury could be sure that the appellant conspired with “*someone*”.
36. For these reasons, we dismiss the appeal.