Neutral Citation Number: [2022] EWCA Crim 209

Case No: 201903666 C3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SNARESBROOK
His Honour Judge Shanks

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/02/2022

Before :

LORD JUSTICE EDIS
MR JUSTICE TURNER
and
HER HONOUR JUDGE KARU
(sitting as a Judge of the Court of Appeal Criminal Division)

- -

Between :

JOREL EDGECOMBE	**Appellant**
- and -	
THE CROWN	**Respondent**

- -
- -

Oliver Weetch (instructed by **Macauley-Smith Solicitors**) for the **Appellant**
Toby Fitzgerald (instructed by the **Crown Prosecution Service**) for the **Prosecution**

Hearing date : 19 October 2021

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 10:30am on Tuesday 22 February 2022.

Lord Justice Edis :

Introduction

1. On 9 September 2019, in the Crown Court at Snaresbrook, before His Honour Judge Shanks, the applicant was convicted at a re-trial ("Trial 2") of conspiracy to possess prohibited firearms with intent to endanger life (count 1). He had already been convicted (by a majority of 11 to 1) on 3 May 2019, at the earlier trial ("Trial 1"), of a lesser alternative count of conspiracy to possess firearms (count 2). Both counts arose out of the same facts. The jury had been unable to reach a verdict on count 1 at Trial 1, which is why there was a re-rial. The applicant stood trial in Trial 1 alongside Robert Odum Toland ("Toland"), who was convicted of count 1 at that trial.

2. He now applies for leave to appeal against conviction, the single judge having referred the application to the Full Court on grounds 1, 2 and 3, which relate to Trial 1, and ground 9, which relates to Trial 2, and refused leave on the other grounds. The single judge also granted a Representation Order for Mr. Oliver Weetch who represented him at Trial 2. Counsel does not seek leave to pursue any of the grounds of appeal that were refused by the single Judge.

3. He also seeks leave, pursuant to section 23 of the Criminal Appeal Act 1968, to introduce fresh evidence from himself, and from Jane Flanagan and Tomasz Machjer about the instructions given to his representatives before Trial 1. We heard this evidence without having decided whether or not to receive it, in order better to inform that decision.

The facts

4. The prosecution case was that the applicant and Toland were involved together in the importation of firearms from a contact of Toland in the United States of America for sale to criminals in this country and that the parties to the agreement intended that they would be used by those criminals to endanger life.

5. They became the subjects of a police surveillance operation. On 6 December 2017, the applicant was seen going into 25 Pinnell Road London SE9, which is in Eltham not very far from Kidbrooke Station. On 8 and 11 December 2017, police intercepted two FedEx parcels containing firearms and ammunition, concealed inside soft toys, which had been addressed to 25 Pinnell Road. The parcels had been scheduled for delivery on each of those two days. Police also conducted observations at the address on both 8 and 11 December 2017 and saw the applicant and Toland together in the vicinity. Call data from their phones confirmed that they were in the area for significant periods of time.

6. On 19 December 2017, a package was delivered to 22 Landmann House, which is on the Rennie Estate in Bermondsey. About 30 minutes later Toland was seen coming out of the address carrying a large bag. He was stopped while driving a car soon afterwards and in the boot of the car was the same bag. It contained firearms and ammunition. The vehicle was registered in the applicant's name and contained documents addressed to him. The applicant later told police that Toland had been on his way to see him when he was stopped. A telephone was also recovered from the car, which contained a series of WhatsApp messages exchanged between the two men, which included pictures of firearms and discussions about them. The WhatsApp messages also showed that the

applicant had provided the Landmann House address to Toland in late August 2017. He had also sent a screenshot tracking a parcel to the address on 1 December 2017. Toland had provided this address to his contact in the USA on 3 October and 12 December 2017.

7. Investigators established that the person in the United States who was responsible for dispatching the FedEx parcels was a Maurice ('Mo') Taylor, who would later plead guilty to the illegal export of firearms. Toland had been in contact with Mo by WhatsApp, and these messages included photographs of firearms and a number of addresses including the Landmann House address, the applicant's home address, and two other addresses linked to him.

8. The applicant said in his police interview that he had known Toland in the United States and had lent him his car for a couple of weeks. He was familiar with the Pinnell Road address, and had keys for the address, because this was his friend Andy's address and he had stayed there occasionally. He denied that he had known anything about deliveries of firearms to any address and said that he was not involved in any arrangements to import items of that kind. He denied that he had provided the Landmann House address to Toland. He denied that he was interested in firearms or had been conspiring with Toland to import them.

9. To prove the case at Trial 2, the Prosecution relied on:

   i) The conviction of Toland on count 1 at Trial 1;

   ii) WhatsApp messages between the applicant and Toland, demonstrating that the applicant was part of the conspiracy and that the conspiracy involved selling firearms to criminals;

   iii) WhatsApp messages containing two addresses linked to the applicant to which the firearms were to be supplied;

   iv) Evidence of police surveillance, particularly on 8 and 11 December 2017;

   v) The fact that firearms and ammunition were intercepted before being delivered to the Pinnell Road address which was associated with the applicant;

   vi) The fact that firearms and ammunition were found on Toland after being delivered to the Landmann House address (the applicant's home) on 19 December 2017; and

   vii) The fact that the applicant did not mention his involvement with cannabis rather than firearms to the police or in his defence statement, mentioning it first in his evidence during Trial 1.

10. The Defence case was that whilst it was accepted that the applicant had been involved in a conspiracy, with Toland, to try to import cannabis from the United States, it was denied that he was involved in a conspiracy to import firearms.

11. In support of the defence case, the applicant relied upon:

i) His own evidence, in which he said that he was tracking the packages because they were meant to contain cannabis. He did not think that Toland was serious when he talked about firearms as he thought it would be impossible to import them. In cross-examination, the applicant explained that he had talked to his solicitor about putting the cannabis conspiracy into the defence statement but had been told that the trial was about firearms only and that should be what the defence statement should address.

ii) Evidence of Paul Salafia, to support his defence that he was involved in a conspiracy to import cannabis and not firearms; and

iii) Evidence that Mo, his co-accused's contact in the United States, did not know him.

12. Since the applicant's co-accused had already been convicted at the previous trial, the central issue for the jury (in Trial 2) was whether the applicant was involved, with Toland, in the conspiracy to import prohibited firearms with the intention that they would be used to endanger life.

The Grounds of Appeal

13. The grounds of appeal which were referred to the full court by the single judge are as follows:-

i) **Ground 1 (Trial 1)** It is submitted that the applicant's representatives in the first trial failed to ensure that there was sufficient time in conference to properly understand, explore and prepare the defence.

ii) **Ground 2 (Trial 1)** It is submitted that the applicant's representatives further erred in the preparation of the Defence Case Statement (dated 9 December 2018). It did not accurately reflect the applicant's instructions, namely that he accepted that his involvement with his co-accused was in respect of a cannabis conspiracy, whilst maintaining he was not guilty of a conspiracy to import firearms. Further, this deficiency led to him facing criticism on the issue during the trial.

iii) **Ground 3 (Trial 1)** It is submitted that the applicant's representatives further erred in failing to call a significant defence witness and failed to adduce evidence, which would have supported the defence that the applicant's only involvement with his co-accused was in the context of cannabis and not firearms.

14. The applicant contends that he told his former representatives about his connection with cannabis before the defence statement was completed but was told it would not be included. He complains that given the complexity of the case and the evidence he was not seen by his trial representatives often enough for them to properly prepare him for trial or explain and analyse the evidence. He says that they further failed to call any evidence that would have supported his defence. In particular, Paul Salafia, who could have given direct evidence of the applicant's involvement with cannabis and produce WhatsApp messaging between him and Toland which showed pictures of growing cannabis plants. It is submitted that the appellant's case was ill-prepared, did not accord

with the appellant's instructions, and failed to introduce evidence which would have materially assisted his defence. One of the Grounds for which leave was refused in relation to Trial 2 informs us that Paul Salafia did give evidence at that trial, and complains that the judge did not deal with it in summing up.

15. **Ground 9 (Trial 2):** The appellant was prevented by the Judge from giving evidence about why cannabis was not mentioned in the defence statement prepared for the first trial.

16. It is submitted that when the applicant was asked, in cross-examination, to explain the failure to mention anything about cannabis in his defence statement, the judge intervened to warn him about the impact of waiving his legal privilege. It is submitted that the judge erred in stopping the applicant from giving evidence on this subject, and observed that by the time the judge intervened he had already given evidence which breached privilege. It is submitted that the interventions meant that the applicant was unable to give full and detailed explanation on this issue, and on which he was productively cross-examined during both trials. It is further submitted that the jury may have been left with a false impression about what the 'papers' over which he claimed privilege might include and therefore unfairly formed an adverse view of his evidence and credibility.

17. At the suggestion of the single judge, on 23 October 2020, the Registrar wrote to the representatives from Trial 1 directing as follows:

    i) All attendance notes of conversations or meetings with the applicant are to be provided to his new legal representatives forthwith or an explanation provided to the Registrar why that has not been done.

    ii) Your attendance may be required at the appeal hearing and this will be confirmed nearer the time.

    iii) You are directed to respond to this letter within 14 days confirming that all material required by the applicant's representatives has been provided or explaining why this has not been complied with (6 November 2020).

18. The Registrar received a reply on 6 November 2020, confirming that all available notes had been sent to the applicant's solicitors and there was no further material to be disclosed.

19. The applicant seeks to rely on the evidence of two witnesses as fresh evidence, on the basis that they provide relevant and credible evidence to support his account of the meetings with his previous legal representatives before Trial 1, at which he says that he spoke of his involvement with his co-accused in a conspiracy to import cannabis rather than the firearms conspiracy.

20. In view of the criticisms made of trial counsel and solicitors (from Trial 1), the applicant was invited to and did waive his privilege in respect of Mr Piers Kiss-Wilson and Stephen Fidler & Co Solicitors. The responses from trial solicitors and counsel were before the court.

The Respondent's Case

21. **Grounds of Appeal 1 and 2 (Trial 1):** (1) The inadequate taking of instructions and (2) the issue of cannabis importation not being mentioned in the defence case statement dated 9 December 2018.

22. It is submitted that:-

    i) the nature and extent of the contact between the applicant and his first representatives is only relevant to when the appellant first mentioned that he had conspired with his co-accused to import cannabis (not firearms) into the United Kingdom from the United States;

    ii) there is a dispute between the applicant and the lawyers as to when cannabis was first mentioned;

    iii) the evidence from Mr. Kiss-Wilson and Mr. Fidler is relied on and the court is invited to prefer it to the applicant's fresh evidence;

    iv) even if the applicant mentioned cannabis at the pre-trial conference, the principal point able to be made by the Crown, namely that he failed to mention it both at his police interview, and for nearly a year after that interview, would strongly rebut the applicant's argument in relation to this issue.

23. **Ground of Appeal 3 (Trial 1):** Failure to call the witness Paul Salafia and introduce WhatsApp messages to his co-accused, which included images of cannabis plants.

24. It is submitted that:-

    i) Paul Salafia gave evidence (in Trial 2) and said that the applicant had told him he was planning, with his co-accused, to import 'weed' from California;

    ii) even if this evidence had been believed, it did not undermine the allegation that there was a conspiracy between the two men to import firearms; because

    iii) an interest in cannabis and a desire to import firearms are not mutually exclusive. There was evidence in the case of the applicant encouraging his co-accused to obtain firearms and it is observed that there were no such comments regarding the cannabis images.

25. **Ground of Appeal 9 (Trial 2):** The appellant was prevented by the judge from giving evidence about why cannabis was not mentioned in the Defence Case Statement.

26. The Respondent invites the court to consider the transcript of the cross-examination of the applicant on the issue, and submits that:

    i) it was explained that the Crown could potentially call the solicitor and that it was his choice whether or not to give evidence as to what he had said to his first representatives;

    ii) the judge did not prevent the applicant from giving further evidence concerning the defence case statement but that instead the Judge properly told him that it was his choice and warned him of the potential consequences;

iii) the applicant's choice not to answer further questions may reflect the apparent conflict between himself and his first representatives on this issue.

The evidence concerning the Defence Case Statement at Trial 2

27. The passage of evidence relied on is as follows:-

> Q: ………'The Defendant is aware that this [Defence Case] Statement can be used to cross-examine him at trial if he chooses to give evidence and deviates from it. He understands the importance of it and gives consent for it to be uploaded to the digital system'. That means provided to the Prosecution. Why, when your solicitors drafted that and presented it to you for your signature, did you not say, 'Hang on, no mention on cannabis here and that's the defence that I'll be putting before the Jury'?
>
> A. I did.
>
> Q. You did?
>
> A. Yes. We had a conversation about that –
>
> Q. Pause there. I'm going to interrupt you and there's a reason for it. Okay? We have rules –
>
> JUDGE SHANKS: Perhaps I should. You do not have to tell us what passed between you and your solicitor but if you do you open it all up and the Prosecutor might be able to get the papers and so on and then ask further questions. Do you understand? It's up to you.
>
> A. What papers would...?
>
> JUDGE SHANKS: I do not know. I do not know what papers might exist but solicitors usually make a note of things and so on.
>
> MR CASEY: Before you say anything may I just summarise what might happen. Okay? Let me speak first. It is probably better that I explain it and if I get it wrong the Judge will correct me. Okay?
>
> A. Fair enough.
>
> Q. The rules say that clients and their solicitor are protected by a veil of confidentiality. It's called legal privilege. Yes?
>
> A. Yes.
>
> Q. So I'm not allowed to ask you about any conversation that went on between you and your solicitor. What I can ask you and what I am asking you is that this document submitted in your

> name doesn't mention cannabis and I can ask you why that is and I understand from your answer is you're saying, 'I did tell my solicitor and it didn't go in there'. Okay? The question I ask next, and this is the question I'm going to ask and you can pause before you answer it, is why did you not insist to your solicitors that they submit the full picture on your behalf before you signed it? And if the answer to that, if the answer to that is, 'Well, I did tell this to my solicitors', the Prosecution may potentially seek to call that solicitor as a witness or seek to look at the papers in your case. Okay? So that's the territory. Okay? The question I ask of you is why did you not make sure that the document submitted on your behalf was full and accurate and [inaudible]?
>
> A. I had the conversation about my defence statement. I was instructed, if that's the right word, I was instructed that I was – well, he said – I don't really know how I'm supposed to answer this but I'm confused.
>
> JUDGE SHANKS: I wonder if we should – yes. Just hold on. Should we in the absence of the Jury just – sorry, members of the Jury, I think it is important. Obviously you understand that.
>
> **(12:12:41 - Jury out)**

28. There then followed a period of about 10 minutes when the jury was out, and the judge explained to the applicant that he could rely on privilege and refuse to answer questions about what passed between him and his lawyers in connection with Trial 1. Alternatively, he could answer those questions, but that might expose him to risk because he would then lose privilege and the prosecution could investigate the solicitors' file and perhaps call Mr. Kiss-Wilson. The judge told the applicant that because he was in the process of giving evidence he could not receive advice about this from his counsel. During this exchange, counsel who then appeared for the prosecution reminded the judge that evidence had been given at Trial 1 about this issue, and the applicant had not said that he had told Mr. Kiss-Wilson (who was, of course, there at that time) that the conspiracy was about cannabis and not guns. It was agreed that he could tell the court what his answer was to the question he had been asked in the absence of the jury and the prosecution would not seek to rely on it in the trial. He said:-

> WITNESS: Right. So when we had the conversation about the cannabis, because it was part of the interview I had with Mr Kiss-Wilson and I asked, 'Why aren't we bringing this up?' because, obviously, this is – he said, 'At the moment', and this is not verbatim but the gist of the conversation was, 'You are being charged with the importation of firearms. Anything to do with cannabis it doesn't...' He said the burden of proof lies with the Prosecution or something like that and at this stage there's no need to bring in another element. And I said, 'Okay'. But, like I said, the conversation did transpire between me and Mr Kiss-Wilson and he was aware of the cannabis before any defence statement was made and before the trial because, as Your

Honour remembers, the cannabis came out from the other end not from my own.

29. The discussion continued in that absence of the jury:-

> JUDGE SHANKS: All right. Well, okay, you have told us what it is. If you want to tell the Jury that it seems to me clear that you run the risk that the Prosecution will explore matters with Mr Kiss-Wilson at least, call for his files and so on and if what you are saying to the Jury about that proves not to be so or is inconsistent it goes down a path, as you see. So it is up to you and it may be up to – well, I suppose the question has been asked. That is the trouble. You cannot very well backtrack if the witness now wants to give that evidence.
>
> MR CASEY: If he wants to give that evidence he can. If, alternatively, he says, 'I would prefer not to answer that question', we'll just drop it.
>
> JUDGE SHANKS: We will just drop it. All right. But there you are.
>
> WITNESS: The conversation did happen and by backtracking it makes me – I don't know what that would be implied. Obviously nothing's been said to the Jury. I don't know what the implications or the adverse effects of what will happen in the Jury's minds about not answering –
>
> JUDGE SHANKS: If we do not say anything more about it no one will refer to it again. The Prosecutor will not be able to say, 'Oh look, he dodged that question'. The Jury may well forget about it. But, again, unfortunately I cannot advise you, your barrister cannot advise you so you will have to make a judgment about that.
>
> WITNESS: The conversation happened and that's the fact.
>
> MR CASEY: Another option, of course, would be to waive privilege and call Mr Kiss-Wilson as part of his own case but –
>
> JUDGE SHANKS: Yes, well that will be a matter for him and his lawyers once he has finished his evidence.
>
> MR CASEY: We'll press on.
>
> JUDGE SHANKS: Well, we will press on. Anyway, you are aware of the risks. You cannot say later, 'Well, I didn't realise that would happen'. All right? You understand.
>
> WITNESS: Sorry, ask me the question again.

JUDGE SHANKS: I think it is now for you to give the answer that you want to give. It is for you to tell the Jury about this conversation. You have more or less started telling them. I mean any bright Juror will have already seen where this is going.

WITNESS: But if I were to continue the conversation –

JUDGE SHANKS: Look, if you want to put an end to all this we will pass to the next topic. If you want to tell the Jury what you have just told me –

WITNESS: I'm generally confused.

JUDGE SHANKS: You run a risk that Mr Kiss-Wilson will be asked about it and say, 'No, I would never advise anyone in those terms'.

WITNESS: I don't care if he's asked.

JUDGE SHANKS: Okay.

WITNESS: Because that conversation happened.

JUDGE SHANKS: All right. Well it is your choice.

WITNESS: I'd rather just move on to the next topic.

JUDGE SHANKS: Would you?

30. The jury returned, and this followed:-...

(12:21:54 - Jury in)

Cross-examined by MR CASEY (continued)

JUDGE SHANKS: Yes. All right. Well, Mr Edgecombe, is there anything you want to add or expand on what you've already said or shall we pass to the next topic?

A. There's nothing I'd like to add.

Q. Okay. Let's move on.

31. It is relevant to observe that at Trial 1 Toland gave evidence that he, the applicant and Mo were all involved in a conspiracy to import firearms and ammunition into the United Kingdom from the United States of America. His case was that he had not intended to endanger life by doing so. He said that the discussions were originally about importing cannabis, but that a conspiracy to import firearms and ammunition had taken place, and had pleaded guilty to count 2. The applicant's evidence was that Toland was lying about that. The jury convicted the applicant of the offence in count 2. The judge in Trial 1 directed the jury that the applicant had failed to mention the cannabis conspiracy both in interview and again in the Defence Case Statement. He gave a section 34

adverse inference direction in relation to the interview. The applicant had said that he did not take the interview seriously and that he did not want to admit to a criminal offence, namely the importation of cannabis. In dealing with the Defence Statement, the judge said this in summing up:-

> "Now, again, he mentioned various reasons why he did not mention it in the defence statement: first of all, again he said he did not really take it seriously because he believed that as an innocent he should not really have to face proceedings; and again he did not want to confess on paper particularly to cannabis dealing of any sort, so why would he tell the prosecution that through the means of this defence statement. Again, members of the jury, if you think he may have had a good reason for not mentioning that then you must not hold his omission against him, but if you think really it is no good reason bearing in mind all the circumstances, what he is charged with, what stage it has reached and all those points, if you are sure there is no good reason you can draw an inference against him if you think that is fair and proper."

32. It would be improper for counsel to allow such a direction to be given if he knew that, in fact, the applicant had told him prior to the drafting of a Defence Case Statement that the conspiracy concerned cannabis not guns. In those circumstances he would have to explain to the court that the omission was his fault and not that of the applicant. That might be rather a difficult thing to explain, but it would be his duty to ensure that the facts were properly before the court to avoid prejudice to his client. Mr. Kiss-Wilson did not say anything during Trial 1 to deflect the judge from giving this direction.

33. No such direction was given in Trial 2, and the cross-examination set out above from Trial 2 was not referred to in the Summing Up, and neither was the interview of the applicant under caution and the Defence Case Statement. We do not know how this came about, but no complaint is made about it on behalf of the applicant.

34. At Trial 2, the conviction on count 1 of Toland was put in evidence to prove the fact of the conspiracy to import firearms with intent to endanger life. Since there was at least one other conspirator, namely Mo, this did not imply the guilt of the applicant. Although it may have been unhelpful, it was probably not as damaging as the evidence of Toland about the applicant's guilt which was before the jury in Trial 1, but not Trial 2. The applicant's conviction from Trial 1 on count 2 was not adduced in Trial 2 to rebut the "cannabis defence".

The evidence concerning the preparation of the Defence Statement

35. We considered the documents which had been disclosed from the file of Stephen Fidler & Co, who had acted for the applicant in Trial 1, and heard oral evidence about the conferences held with the applicant before that trial from four witnesses.

36. The applicant gave evidence before us on this issue. He said that there were two meetings before Trial 1. One with the barrister and one with the solicitor. He met counsel, Mr. Kiss-Wilson on 4 December 2018 at his office. He met the solicitor, Mr. Fidler February in Brent Cross shopping centre. He said that he gave instructions on

these two occasions. He said that he discussed the background with Mr. Kiss-Wilson and said that he was trying to import cannabis from America and not firearms. He said that he explained how Toland had proposed to him that a friend could ship cannabis to the UK for a reduced price. He said that he would then sell it onwards to people that I knew. He said that Mr. Kiss-Wilson told him that his only job was to defend him against the charge of conspiracy to import firearms, and he had not beenthe hired to defend against an alleged conspiracy relating to drugs. He said "it is up to prosecution to prove you are guilty" and he did not want to put forth anything that could confuse the jury. I felt I had no choice but to accept that advice. He went into a lot of detail about my history and that was about it. He said that he did not remember seeing the draft proof of evidence created by Mr. Kiss-Wilson dated 7 December 2018. He did remember seeing the Defence Statement in draft, and neither document mentions cannabis. He said he was given an opportunity to correct the Defence Statement. He said that he had questioned counsel about it on the phone and he said he was sure this was the right way to go. He said it was his job to defend me against firearms not cannabis. He met Mr. Fidler in February 2019 after Trial 1 had concluded in December. He had tried reaching Mr. Kiss-Wilson to arrange another meeting to discuss the case and strategy, but he couldn't get hold of him and he wanted to talk about his concerns about not mentioning cannabis in the Defence Statement. Mr. Machjer arranged this meeting. He said that he, Mr. Machjer and Mr. Fidler were present. Jane Flannagan was there only for part of it. He said that he expressed his concerns about Mr. Kiss-Wilson not being available, and his phone going to voicemail. His main concern was that the evidence about the cannabis had not been put forward, and he wanted him to speak to Toland's associate in America which he said he would do. He discussed briefly what he had told Mr. Kiss-Wilson, but he said he had faith in Mr. Kiss-Wilson and he said he would not get involved in the way the case was being run. There was no conversation after that. He said that they discussed the cannabis at court during the trial, in presence of the witness Paul Salafia. We had further discussion after that. He pointed out Mr. Kiss-Wilson's annotations on a copy of the jury bundle which refer to cannabis. It was common ground that there had been conversations about cannabis at Trial 1, which is when the jury bundle would have been available and these notes therefore related to that.

37. When cross-examined, Mr. Edgecombe said the WhatsApp messages between him and Toland were about their agreement to import cannabis. He appeared now to accept that he had seen his proof of evidence soon after his meeting with Mr. Kiss-Wilson and said that he agreed with his assessment that it was not necessary to mention it because the prosecution had to prove he was guilty, and this was the only thing he had to defend him on. He was, though, concerned about the Defence Case Statement when he saw that. He was not sure about his strategy which is why he asked for a meeting with Mr. Fidler. When he was asked why he did not put this in an email or text (he did communicate by these means to some extent) he said he does not use emails or texts, he has his conversations face to face. He said that he did tell Mr. Fidler that the conspiracy was about drugs not firearms. He said that he did not think the prosecution evidence pointed to firearms. He said that he did not have a say in how his defence was going to be presented. They said there was not enough evidence to support my guilt, to prove it beyond doubt.

38. The Defence Case Statement is dated 8 December 2018. The applicant was asked about it and said that he was not happy with it. It does not mention cannabis and explains some of the messages about firearms with these words:-

> "In relation to specific messages the prosecution rely on to show my involvement in "the conspiracy" these were my way of appeasing him and almost dismissing him for example when I said, *"I really like the top one for myself "(*the picture of the firearm) I did like the gun but I had no belief that he would actually import them for me."

39. He said that he was in fact seen by Mr. Fidler at the conference in 2018, not in 2019. He had requested the meeting because Mr. Kiss-Wilson did not answer his phone. He had two witnesses who can confirm as they were at the alleged conference. This was an informal meeting held in a 'Starbucks' at Brent Cross Plaza. He was told that Mr. Fidler would go to America to gather a witness statement from Mr. Taylor ("Mo") to prove he had no connection to the importation, but that was never followed through. He phoned repeatedly to make appointments with Mr Kiss-Wilson, but he never answered those calls. His pre-trial conference with Mr. Kiss-Wilson was the point in which he made his first reference to the importation of cannabis. This was done and noted at the end of that conference. He refuted Mr. Kiss-Wilson's evidence that, "there were a number of times where he was asked to attend the office but due to work commitments he did not".

40. He was asked about Mr. Kiss-Wilson's handwritten notes taken throughout the conference. He said they are incomplete: there are missing pages. He did not think the last page is a document which relates to the conference he had at all.

41. He said that he did not tell the police he was committing a crime (cannabis importation) because he would get charged with it. He thought it best not to implicate himself in a crime.

42. Mr. Piers Kiss-Wilson told us that in 2018/19 he was employed as solicitor advocate for Stephen Fidler & Co, and represented the applicant at Trial 1. He first took instructions from him about 4/12/18 at Stephen Fidler &Co's offices. The meeting took at least 90 minutes. He took handwritten notes and produced them to new solicitors for the purposes of the appeal. There are 4 pages of handwritten notes. This is the whole note of conference. He then dictated the proof into his iPhone from handwritten notes. There was no mention of importation of cannabis into the United Kingdom. If there had been, he would have noted it and discussed it in detail and discussed it with colleagues and put it in the proof of evidence. He received minor amendments from the applicant for the proof. These did not suggest he had been involved in cannabis conspiracy. He later compiled the Defence Case Statement and the applicant signed it and returned it to him. Next saw him on the day when the trial was first listed at Snaresbrook Crown Court. He did not say anything about the proof or Defence Case Statement not mentioning a conspiracy to import cannabis. Mr. Kiss-Wilson said that he first heard about the cannabis conspiracy in Trial 1. It was mentioned in a number of conferences probably starting before the trial began. These conversations were probably about the WhatsApp messages. There was a specific message about "cally plates" which he said was about Californian cannabis, rather than Californian number plates as was suggested. They did discuss the Defence Case Statement and serving an

amended one mentioning cannabis. He advised this was not the best way of fighting the trial. He did not remember the response but the applicant accepted that advice. He did not think that Mr. Fidler had spoken to him separately, although he may have been aware because the applicant wanted enquiries made in America about the addresses where firearms had been shipped from. He was not instructed by him to call any witnesses and he did not do so.

43. In cross-examination, Mr. Kiss-Wilson said that there was a paper file which had largely got email correspondence on it. As far as he was aware everything has been disclosed. He did not recollect having many calls, although there may have been the odd message. He communicated with the applicant by emails. If there had been a call there would have been a note. He said that he only met him on 4 December 2018 to take instructions. He was sure these are the only notes he made at the conference. On that day he did not say anything about a cannabis conspiracy. He said "I may have said you are only on trial for firearms" but this could have been at any stage. I was dissuading him during Trial 1 from serving an amended Defence Case Statement because the defence was unattractive. That decision was tactical. I would have said that the Crown has to prove the case against him, because this is standard generic advice. He said he had never met Tomas Majcher. He did speak to Paul Salafia during Trial 1 on a day to day basis, but he was not called as a witness. There may have been occasions when the applicant could not get in touch with him because he was working. He said that there was no need for any further pre-trial conferences because they knew the issues. Most of the evidence in the prosecution case was agreed, and there was a small number of messages which the applicant had to explain. He described the cut-throat nature of the defence of Toland at Trial 1. He accepted that it would have been better to have further conferences but said that it was hard to get the applicant into the office.

44. Mr. Fidler said that he had met the applicant once and he was not sure if he met him again. He met him at Brent Cross at Starbucks. His notes say this was on 15 December 2018, but this is wrong. He could not say what the right date was. He did not take notes at the meeting. The applicant was there with an existing client with a Polish sounding name, and a female who was there but not part of the discussion. He discussed travelling to America because he had made online enquiries about the address from which packages had been sent. The applicant wanted to know what sort of sentence he would get. His practice would be to speak to Mr. Kiss-Wilson after the meeting, but he did not remember doing so. He said that he did not remember him saying anything about intending to import cannabis not guns. If he had he would have asked him for detail. He would also have asked the Polish man what he knew about it.

45. In cross-examination Mr. Fidler said that he was first asked about this meeting in 2020. He then produced a note with the wrong date, and did not know why. This was an informal meeting, so no note was taken. Nothing arose which required action, there was no need for a note. After speaking to the applicant there was no need to go to America: it was a bogus address. He spoke to the applicant about sentence, but did not remember discussing the evidence. The main problem was a message about guns. He asked him for explanation and the applicant said it was a joke for fun.

46. Tomas Majcher said he has known the applicant for over 10 years, having met him in the United Kingdom. He recommended Stephen Fidler to the applicant. He remembered the meeting at Brent Cross which he said took place on 21 December

2019. He has text messages and a receipt to show date and time. He said that applicant, was at the meeting with him and his partner (Jane Flanagan). The applicant wanted to meet Stephen Fidler about the court case, because he wanted to speak about a cannabis package and generally about the case. He had heard everything which was said. He had made a statement for the appeal dated 15 March 2021. At the meeting the applicant said that he did not expect what was delivered he had expected a cannabis package. Mr. Fidler said he had to investigate more deeply how the package could come from the States and discussed flying there to investigate how it was sent, and who sent it. He also said the applicant had a very good lawyer for the trial. Mr. Machjer said that he never met the lawyer then, but he had called him 20 -30 times afterwards. He said that Mr. Fidler had made a note. There was discussion about witnesses. The meeting may have lasted 40 minutes, at most 1 hour. He did not want to meet JE in his office and I do not understand why. In cross-examination he said that he was not in the country at the time of Trial 2. He heard what had happened from the applicant's girlfriend. He said that the applicant had first told me about cannabis when he was released from the police station.

Discussion

47. One striking feature of this application is that it predominantly relates to Trial 1 at which the applicant was convicted only of count 2 which was later ordered to lie on the file because of his conviction at Trial 2 for the more serious offence in count 1. Count 2 would have been important if it had been adduced as part of the prosecution case in Trial 2, but it was not.

48. Nevertheless, we will consider the application in relation to Trial 1 on its merits. In our judgment it has none.

49. It is obvious that if the applicant told Mr. Kiss-Wilson or Mr. Fidler of the cannabis defence when they met him before Trial 1 the adverse inference direction concerning the Defence Statement should not have been given. It was not given in Trial 2, but the applicant was convicted anyway, so it is hard to attribute any decisive impact to it. However, we are in any event quite satisfied that he did not tell Mr. Kiss-Wilson or Mr. Fidler of it. This is for the following reasons:-

i) The applicant was given an opportunity to correct his proof of evidence and draft Defence Case Statement before they were finalised and did not insist that the cannabis defence was included.

ii) There is no reason why the lawyers would not have included the cannabis defence in the proof of evidence and Defence Case Statement if they had been told of it. It would involve their client admitting a serious criminal offence, albeit one which is much less serious than the allegations on the Indictment, but that is a fairly common feature of defence cases in this sort of case.

iii) When he was asked at Trial 1 why he had not mentioned the cannabis defence in his Defence Statement, he did not say to that jury that this was because of his lawyers' advice. He said instead that it had been his decision and tried to explain it. If he had said then what he says now, this would have caused a potential difficulty in the trial, but that was not his problem. His problem was to explain something which, on his present account, was easily explained. If he is now

telling the truth, he would have expected to get some support from his legal team in defusing what on his version is a bad prosecution point. His conduct in Trial 1 on this issue is quite inconsistent with his present account.

iv) We are unable to attach any weight to the evidence of the applicant or his witnesses on this issue where it is inconsistent with that of Mr. Kiss-Wilson and Mr. Fidler. Mr. Kiss-Wilson's evidence is entirely consistent with such documents as exist, including email traffic. Mr. Fidler's evidence is rather vague and undocumented, but we prefer it to that of the applicant and his friends. Mr. Machjer was present during Trial 1, and was not called either then or during Trial 2. Since the issue about when the applicant first claimed it was all to do with cannabis was prominent at Trial 1, this is very strange if he is telling the truth now. He says he was "out of the country" during Trial 2, but no details of that claim were given and no application appears to have been made to fix the trial for a date when this apparently important defence witness could attend. The witness statement which was placed before us is dated 15 March 2021, after Trial 2.

v) When the applicant told the court what he wanted to say about the omission of the cannabis defence from his Defence Case Statement in the absence of the jury at Trial 1, he mentioned the conversation with Mr. Kiss-Wilson, but not that with Mr. Fidler, see [28] above. Since the conversation with Mr. Fidler was allegedly witnessed, and since the applicant now says he has a very clear memory of it, this tends to undermine his own evidence of what was said, and that of Mr. Machjer.

50. That finding of fact disposes of the sole ground of appeal in relation to Trial 2. The reason he did not tell the jury about the conversations with Mr. Kiss-Wilson and Mr. Fidler about cannabis is that they never happened. The judge clearly told him that if he did give that evidence it could be checked with them and he knew what they would say. Wisely he chose not to do this, and he cannot now complain about how this was handled.

51. In any event, the convictions on count 2 in Trial 1, and count 1 in Trial 2 are plainly entirely safe.

52. In relation to Trial 1:-

i) The evidence was overwhelming, and the cannabis defence preposterous. Mr. Fidler's evidence about his meeting may have been vague and unclear, but there was nothing wrong with his assessment of the case. As he told us, "The main problem was a message about guns". He might have added that another very significant problem was that two different packages of guns and ammunition were sent to two different addresses, both connected with the applicant. It would be implausibly foolish of the conspirators to choose addresses belonging to someone who was not part of the conspiracy and who was expecting cannabis.

ii) It is impossible to suggest that the conviction on count 2 in Trial 1 is unsafe because of the failure to call a defence witness, Paul Salafia. He gave evidence in Trial 2, and that did not turn out well for the applicant. In any event, he was

present during Trial 1 and could easily have been called if that is what the applicant then wanted. The only sensible explanation of this is that it wasn't.

iii) The real point about the late disclosure of the cannabis defence arises out of the applicant's failure to mention it to the police in interview. Part of his explanation for that is implausible, but he does not seek to blame this on his lawyers. He claims instead that he did not mention the cannabis conspiracy because he was not taking the interview seriously. This is very implausible, given the subject matter of the interview. It may be more plausible that he was trying to hide his guilt for the cannabis conspiracy, but that also does not suggest that his conduct at the interview was influenced by his legal advice.

53. In relation to Trial 2:-

i) No adverse inference direction was given either in relation to the interview or the Defence Case Statement.

ii) The applicant knew from what happened at Trial 1 that he would be asked about why cannabis was not mentioned in his Defence Case Statement and had plenty of time to prepare for that with his new legal team. The question from the prosecution did not take him by surprise, and was dealt with very fairly by the judge.

iii) See[52(i)] above.

Conclusion

54. For these reasons we refuse to receive the fresh evidence because

i) It does not appear to be capable of belief;

It does not appear to afford any ground for allowing the appeal;

ii) There is no reasonable explanation for the failure to adduce the evidence in those proceedings.

55. We refuse these applications for leave to appeal.