IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202300486/B5

[2023] EWCA Crim 1560

Sitting at Swansea Crown Court
The Law Courts
St Helen's Road
Swansea
SA1 4PF

Thursday, 26 October 2023

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE
MR JUSTICE GRIFFITHS
MRS JUSTICE COLLINS RICE DBE

REX
v
OSMAN OMAR OSMAN

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

MR J RADCLIFFE appeared on behalf of the Appellant
MISS A WALTON appeared on behalf of the Crown

J U D G M E N T
(Approved)

1. THE VICE-PRESIDENT: The appellant was convicted of three offences of being concerned in supplying a controlled drug to another, contrary to section 4(3)(b) of the Misuse of Drugs Act 1971. With the leave of the single judge he now appeals against his convictions.
2. In October 2022 the appellant was the driver of a car which was stopped by police in Swansea. A man called Lafferty was his front seat passenger. A mobile phone was found in the front passenger footwell. Stored within it were messages which plainly related to the supply of controlled drugs in June 2022, at a time when the Glastonbury Festival was taking place. The appellant worked as a steward at that festival.
3. We quote the terms of two exchanges of messages stored on the phone, interpolating the names of the controlled drugs to which the messages refer. First, an exchange on 26 June 2022 between the user of the phone and someone with the name "Orla":

> "Orla - Also how much for K [ketamine]?
>
> Response – 40 for 1g
>
> Orla – How much you got? What about 2CB [a psychedelic drug]?
>
> Response – Nah, just got K and flake [cocaine]."

4. Secondly, an exchange on 27 June 2022 between the user of the phone and someone identified as "Not Abdul Kadir":

> "Not Abdul Kadir – How much is the key ket [ketamine]?
>
> Response – 1g for 40
>
> Not Abdul Kadir – 1g, MD [MDMA/Ecstasy]
>
> Response – No MD, just ket and flake and loud [cannabis]

Not Abdul Kadir – How for flake much? For half?

Response - £50

Not Abdul Kadir – Bring the flake."

5. Other messages and photographs stored on the phone led the police to believe that the appellant was, or had at the material time been, the user of it. He was charged on an indictment containing three counts, all of which were in identical terms save for the nature and classification of the relevant drug. The particulars of count 1, for example, alleged that between 25 and 28 June 2022 the appellant was concerned in the supply of a quantity of cocaine, a controlled drug of class A, to another in contravention of section 4(1) of the Misuse of Drugs Act 1971. Counts 2 and 3 related to class B drugs, namely ketamine and cannabis.
6. The only witness called for the prosecution at trial was a police officer who gave evidence as to the nature and usual prices of the drugs referred to in the messages. The appellant, who had made no comment when interviewed under caution, did not give evidence.
7. For almost the whole of the trial, the sole issue was whether the jury were sure that it was the appellant, and not some other person, who had been using the phone in the relevant exchanges of messages. It was not disputed that the messages related to the supply of drugs. Thus there was, for example, a formal admission pursuant to section 10 of the Criminal Law Act 1967 that messages pertaining to the supply of class A drugs were found on the phone.
8. Furthermore, the judge in summing-up more than once made statements such as the following:

> "... there is no issue between the prosecution and the defence that whoever sent those messages was offering to sell drugs and was concerned in the supply of drugs. And the question for you is, have the prosecution made you sure that the messages sent from the iPhone were sent by the defendant, Mr Osman?"

9. None of that was controversial until a very late stage in the proceedings.

10. Whilst in retirement, the jury sent a note seeking clarification of the judge's directions of law. The note was somewhat equivocal in its terms, but plainly showed that the jury were carefully applying their minds to the directions they had been given.

11. In discussing how the note should be answered, both counsel again emphasised that the only issue for the jury was whether they were sure that it was the appellant, and not some other person, who sent the messages.

12. The judge directed the jury to that effect, saying that if they were sure that the appellant sent the messages it was accepted that he thereby committed the offences of being concerned in the supply of drugs. That direction was entirely consistent with the way the trial had been conducted and with all the submissions of counsel up to that point.

13. The jury's question had, however, prompted Mr Radcliffe, then as now representing the appellant, to reflect on the terms of the indictment. He made for the first time a submission of law that the jury could not properly convict the appellant of the offences charged. He submitted that the prosecution had in each count charged the appellant with being concerned in the supply of controlled drugs, not with being concerned in the making of an offer to supply; that it was therefore necessary for the prosecution to prove that there was in fact a supply of each of the drugs concerned; that there was no evidence on which the prosecution could prove whether or not any supply had taken place, as the judge had made clear in the summing-up; and that accordingly the case should be

withdrawn from the jury, or they should be directed to the effect that the prosecution had failed to prove the necessary ingredient of the offences.

14. That very late submission was opposed by Miss Walton, then as now representing the respondent, who drew attention to the decision of this court in R v Martin and Brimecome [2014] EWCA Crim 1940, a case to which we shall return shortly and to which we shall for convenience refer as Martin.

15. Having considered the competing arguments, the judge declined to give any further or different direction to the jury. The jury subsequently returned guilty verdicts on each count.

16. Mr Radcliffe now puts forward two grounds of appeal: first, that the convictions are unsafe because the respondent failed to prove that the appellant had been concerned in the supply of controlled drugs; and secondly, that the judge wrongly directed the jury that they need only be sure that the appellant sent messages offering to supply controlled drugs, rather than being concerned in the supply of drugs.

17. As to the first ground, Mr Radcliffe accepts that the word "supply" was given a broad interpretation in Martin but submits that there nonetheless remains a distinction between the offences created by section 4(3)(a) and section 4(3)(b) of the 1971 Act. He points to R v McNaught [2018] EWCA Crim 1588 as support for his submission. He argues that the evidence adduced by the prosecution in this case was such that no jury could have found proved that the appellant was concerned in the supply of the drugs as opposed to the making of an offer to supply.

18. As to the second ground, it is submitted that the jury were directed only to consider whether the appellant was concerned in an offer to supply, not whether he was concerned in supplying controlled drugs.

19. Miss Walton opposes both grounds. Relying again on Martin, she submits that the evidence was sufficient to establish that the appellant was concerned in the supply of drugs. In her admirably focused submissions she draws attention in particular to the final message in the exchange with Not Abdul Kadir. She submits that the instruction "bring me flake" is a clear indication that the user of the phone was engaged in the supply of cocaine, the class A drug charged in count 1 in the indictment. Miss Walton goes on to argue that in the circumstances of this case the judge's direction to the jury was correct. There must, she submits, be a fact-specific assessment of the evidence in each case involving charges of this nature.

20. We are grateful to counsel for their submissions. We begin our consideration by setting out the terms of section 4 of the 1971 Act:

> "**4 Restriction of production and supply of controlled drugs**
>
> (1) Subject to any regulations under section 7 of this Act, or any provision made in a temporary class drug order by virtue of section 7A, for the time being in force, it shall not be lawful for a person—
>
> (a) to produce a controlled drug; or
>
> (b) to supply or offer to supply a controlled drug to another.
>
> (2) Subject to section 28 of this Act, it is an offence for a person—
>
> (a) to produce a controlled drug in contravention of subsection (1) above; or
>
> (b) to be concerned in the production of such a drug in contravention of that subsection by another.
>
> (3) Subject to section 28 of this Act, it is an offence for a person—
>
> (a) to supply or offer to supply a controlled drug to another in

> contravention of subsection (1) above; or
>
> (b) to be concerned in the supplying of such a drug to another in contravention of that subsection; or
>
> (c) to be concerned in the making to another in contravention of that subsection of an offer to supply such a drug."

21. We should note in passing that section 28 has no materiality in this case.

22. We turn to relevant case law. In R v Hughes [1980] 81 Cr.App.R 344, Goff LJ, giving the judgment of the court, noted that paragraphs (a) to (c) of section 4(3) contained three principal offences. He continued, at page 347:

> "So the difference between (b) and (c) is that in (b) there has to be an actual supply in which the accused was concerned, whereas under (c) it is enough that there was an offer to supply in which the accused was concerned."

23 In Martin the appellants were charged under section 4(3)(b). At paragraph 14, Lord Thomas CJ giving the judgment of the court identified the short point of statutory instruction which was raised by the case:

> "Was the evidence that was called before the jury sufficient to constitute evidence of 'supply to another'? Those are the words in the statute. It does not say 'actual supply to another'; nor does it say 'delivered to another'. It simply says 'supply to another'.

24 Lord Thomas went on to say that the evidence in that case showed that a text message had been sent discussing the supply, there had been a journey to London to collect the drugs, and the quantity of drugs found by the police was clearly in excess of personal consumption. There was therefore clear evidence of supply to another. He continued at paragraph 16:

> "Did that, therefore, constitute supply to another? The word 'supply' is a broad term. It does not by any stretch of the imagination result in a confinement to the expressions 'actual delivery' or 'past supply'. It refers to the entire process of supply. In the present case there was clear evidence that the drugs were en route from London to Portsmouth. They were being transported so that they could be delivered to others in the Portsmouth area. It seems to us that that falls plainly within the word 'supply'."

25 The third case we must mention, although not initially cited by either counsel, is R v Coker [2019] EWCA Crim 420, [2019] 2 Cr.App.R 10. The appellant in that case had been charged with an offence contrary to section 4(3)(b). Analysis of messages stored in mobile phones in his possession provided evidence that the user of the phones was involved in drug dealing. The judge in summing-up had directed the jury that:

> "... the prosecution must prove, firstly, that there has been a supply of class A drugs to another, or the making of an offer to supply class A drugs to another. Secondly, that the defendant participated in such an enterprise involving such supply or such an offer to supply; and, thirdly, that he knew the nature of that enterprise, i.e., that it was the supply of class A drugs."

26 On appeal this court found that direction to have been wrong in law. Gross LJ, giving the judgment of the court, referred to Hughes and to Martin as establishing that section 4(3) gives rise to three separate and distinct offences. He noted at paragraph 25 of the judgment that paragraph (a) dealt with supply or an offer to supply; paragraphs (b) and (c) broadened the ambit of the section by applying it to those who were concerned in either the supply or an offer to supply controlled drugs. At paragraph 26, Gross LJ continued:

> "It follows that there is no room for an either/or direction. When the issue goes to whether a defendant was concerned with supply

> or an offer to supply controlled drugs, the count in question must either relate to subsection (b) or subsection (c)."

27 We note that in reaching that conclusion the court rejected a submission by the respondent in that case that a person can be concerned in the supply of drugs by making an offer to supply. That submission, it was said, was in danger of rendering section 4(3)(c) otiose. At paragraph 32 the court added:

> "... While, generally at least, 'being concerned in the supplying' of a controlled drug may well be preceded by 'being concerned in an offer to supply' such a drug, where the prosecution elects to proceed under s.4(3)(b), it is being concerned in the supplying which must be proved."

28 We would summarise the effect of those decisions as follows:

1. Paragraphs (b) and (c) under section 4(3) of the 1971 Act create two distinct offences.
2. Where an offence contrary to paragraph (b) is charged, the prosecution must prove that the enterprise in which the accused was concerned was the supplying of controlled drugs and not merely the making of an offer to supply.
3. On such a charge, the jury must not be directed in terms which suggest that it is sufficient for the prosecution to prove that the accused was concerned in either the supply or an offer to supply controlled drugs.
4. However, supply is a broad term: it is not confined to actual delivery or a past supply, but rather it refers to the entire process of supply.

29 We therefore accept Mr Radcliffe's submission that it was necessary for the prosecution to prove in this case that the appellant was concerned in an enterprise which could properly be described as the supply of controlled drugs. The question then becomes whether, on the evidence before the jury, it was properly open to the

jury to find that offence proved.

30 To that question there can, in our view, only be one answer. Once the jury were sure that it was the appellant, and not anyone else, who sent the relevant messages, then the concession made throughout almost the entire trial that the appellant was thereby guilty of the offences charged was entirely realistic. We agree with Miss Walton that a careful fact-specific assessment of the evidence in a particular case is required. Here the messages were not an abstract offer of a supply which might or might not take place, of a substance which might or might not be a controlled drug, and might or might not be a controlled drug of the kind offered. They were the clearest indication that the appellant was actively concerned in the supply of drugs, stating what stock he had available at a given time, stating the price for which he would supply it and also eliciting from Not Abdul Kadir a response requiring immediate delivery of one of the drugs available. In those circumstances, the jury were entitled to return the verdicts they did and the conviction is safe.

31 It follows from all we have said that the judge, with whom we sympathise in view of the collective misunderstanding underlying the conduct of the entire trial, fell into error in directing the jury in terms which suggested that it would be sufficient for them to be sure that the appellant was concerned in the making of offers to supply controlled drugs. The direction should have made clear that the prosecution must prove that he was concerned in the supply of controlled drugs. In so far as the judge misdirected the jury, however, the misdirection does not render the convictions unsafe; for if the correct question had been posed to the jury, there was, as we have said, only one answer to it.

32 This appeal accordingly fails and is dismissed.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400
Email: rcj@epiqglobal.co.uk