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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM LUTON CROWN COURT
HIS HONOUR JUDGE EVANS
T20217241

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/02/2025

Before :

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE SOOLE
and
HIS HONOUR JUDGE THACKRAY KC

- -

Between :

REX	**Respondent**
- and –	
JASON RUSSO	**First Appellant**
JAMIL AHMED	**Second Appellant**
MOHAMMMED MIAH	**Third Appellant**

- -
- -

Francis FitzGibbon KC and Lisa Goddard (instructed by **CCU CPS Thames & Chiltern**) for the **Respondent**
Tim Clark KC (instructed by **Berkeley Square Solicitors**) for the **First Appellant**
Richard Furlong (instructed by **Sperrin Law**) for the **Second Appellant**
Tom Edwards (instructed by **Woolfe & Co**) for the **Third Appellant**

Hearing dates: 14 February 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 27th February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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LORD JUSTICE WILLIAM DAVIS:

Introduction and factual background

1. From about 2015 Jason Russo, Jamil Ahmed and Mohammed Miah worked together at a branch of Kwikfit in Luton. Russo was the manager of the branch. Ahmed and Miah were employees who had worked at the branch. The three of them were friends as well as work colleagues.

2. Russo had a friend to whom we shall refer as Staunch. That is how he was referred to in the course of the criminal proceedings with which we are concerned. He was not party to those proceedings because he could not be traced. His name was not given in case he later was the subject of proceedings. Russo had known Staunch since his schooldays. In around 2018 he asked Russo if he wanted to go into business. The idea was that they would trade under the name Securetech. The company was to supply encrypted mobile telephones. Nothing came of that joint venture. In late 2019 Russo, at Staunch's instigation, became involved in the supply of Encrochat enabled handsets. As is now well-known these handsets were widely used by individuals engaged in serious criminal activity. The messaging service used by the handsets was highly encrypted. Each handset could only communicate with another handset.

3. Those to whom the handsets were supplied were introduced to Russo by Staunch. The stock of handsets was kept at Staunch's mother's home. Customers always paid in cash for the handset, the cost being around £1,500. The handset came with a 6 months' subscription to the encryption service. Customers could extend the subscription. Any extended subscription also would be paid for in cash. Ahmed's role was to deliver handsets and collect the cash payments. Miah's role was similar. He also was involved in technical aspects of the handsets. When cash had accumulated, it would be taken to the home of Staunch's mother or to a shop in London called Mr Mobile. On occasion tens of thousands of pounds in cash was delivered to Mr Mobile.

4. Over the period up to June 2020, the point at which the Encrochat server was compromised, over 50 handsets were supplied to customers introduced by Staunch. Russo, Ahmed and Miah each had an Encrochat handset. Any communications between them about the supply of handsets were via their own Encrochat devices. Although there were no explicit messages between the three of them about the use to which Encrochat handsets supplied by them were put, Russo had an exchange with one customer (Bashir) in which there was reference to drugs. A photo of a substantial quantity of cocaine was sent by Bashir to Russo.

5. As a matter of fact, a significant number of those to whom handsets were supplied was involved in supplying drugs. Staunch regularly exchanged messages with customers which indicated that they were involved in the supply of drugs as was Staunch himself. At least 10 men supplied with an Encrochat handset by Russo and the others in due course were convicted of conspiracy to supply Class A drugs. In one of those cases there was also a conviction for possession of Class A drugs with intent to supply.

6. As we have said, the Encrochat server was compromised in June 2020. The French authorities provided UK police and other law enforcement agencies with data relating to over 7,400 Encrochat accounts. There is no evidence of any use of an Encrochat device other than for criminal purposes.

7. Against this factual background Russo, Ahmed and Miah were tried in the Crown Court at Luton on a single count indictment charging a statutory conspiracy to encourage or assist in the commission of one or more offences knowing one or more would be committed. The particulars of the offence were that they conspired together and with Staunch and others unknown to do an act, namely to supply Encrochat telephones to others, thereby encouraging or assisting those others in the commission of offences, namely the supply of Class A or Class B drugs, the supply of firearms and the evasion of the prohibition on importation of Class A or Class B drugs, knowing that the offences would be committed and that the act of supplying Encrochat telephones would encourage or assist the commission of the offences.

8. Although the indictment identified offences relating to firearms and to importation of drugs, the case was put by the prosecution on the basis that the defendants agreed to assist others in the supply of drugs. In due course the judge directed the jury that they had to be sure that the defendants "knew that the customers, the purchasers of the phones, were or would supply drugs, no other offence." On 14 December 2023 Russo, Ahmed and Miah were convicted on the single count. Another employee at Kwikfit also was tried. He was acquitted. As we have said, Staunch was not tried because he could not be found.

9. Russo, Ahmed and Miah appeal with the leave of the single judge against their convictions. All three argue that the offence with which they were charged was not known to law. Ahmed and Miah also say that, irrespective of whether the indictment was sustainable in law, the judge should have withdrawn their cases from the jury at the conclusion of the prosecution case. They submit that there was no or no sufficient evidence to show that they knew of the use to which the Encrochat devices would be put. Finally, Russo argues that the verdict in his case was unsafe because the judge asked him many questions at the conclusion of his evidence. The nature and effect of the questions was that the judge entered the arena to such an extent as to render the trial unfair in Russo's case.

The statutory provisions

10. The substantive offence which the appellants were said to have agreed to commit is set out in section 46 of the Serious Crime Act 2007. It is as follows:

> "**Encouraging or assisting offences believing one or more will be committed**
>
> (1)A person commits an offence if—
>
> (a)he does an act capable of encouraging or assisting the commission of one or more of a number of offences; and
>
> (b)he believes—(i) that one or more of those offences will be committed (but has no belief as to which); and (ii) that his act will encourage or assist the commission of one or more of them.
>
> (2)It is immaterial for the purposes of subsection (1)(b)(ii) whether the person has any belief as to which offence will be encouraged or assisted.

> (3)If a person is charged with an offence under subsection (1)—
>
> (a)the indictment must specify the offences alleged to be the "number of offences" mentioned in paragraph (a) of that subsection; but
>
> (b)nothing in paragraph (a) requires all the offences potentially comprised in that number to be specified.
>
> (4)In relation to an offence under this section, reference in this Part to the offences specified in the indictment is to the offences specified by virtue of subsection (3)(a).
>
> Section 49 of the 2007 Act sets out supplementary provisions in relation to the offences created by the Act including the offence in section 46. The relevant provisions for our purposes are:
>
> (1)A person may commit an offence under this Part whether or not any offence capable of being encouraged or assisted by his act is committed……
>
> (4)In reckoning whether…..
>
> (b)for the purposes of section 46, an act is capable of encouraging or assisting the commission of one or more of a number of offences;
>
> …..listed offences are to be disregarded."

One of the listed offences is conspiracy contrary to section 1(1) of the Criminal Law Act 1977.

11. The offence of statutory conspiracy is set out in section 1 of the Criminal Law Act 1977 as follows:

> "(1)Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either—
>
> (a)will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or
>
> (b)would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,
>
> he is guilty of conspiracy to commit the offence or offences in question.
>
> (2)Where liability for any offence may be incurred without knowledge on the part of the person committing it of any

> particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place."

The submissions of the parties – was the offence charged known to law?

12. On behalf of the appellants it is argued that the conspiracy charged was equivalent to a conspiracy to aid and abet. There is no such offence known to law: Kenning [2008] EWCA Crim 1534. In Kenning the court accepted that it would be possible for persons to agree to aid and abet an offence that they intended or expected would be committed by a person not a party to that agreement. However, it could hardly fall within the definition of statutory conspiracy as set out in the 1977 Act.

13. The court explained that the course of conduct to which the would−be aiders and abettors agree would involve their performing acts no more than accessory to the offence intended to be committed by the primary offender. If they were to do all those acts, they would not amount to an offence were the primary offender not to commit the primary offence. There could be no certainty that he would do so. Thus, even if the aiders and abettors did all that they agreed to do, their course of conduct would not "necessarily amount to or involve the commission of (an) offence". The court in Kenning said that this was not a surprising outcome. The terms of section 1(1) of the 1977 Act made it clear that there could not be a criminal conspiracy to attempt to commit an offence. The same applied to aiding and abetting.

14. The appellants' submission is that the reasoning in Kenning must apply mutatis mutandis to the offence under section 46 of the 2007 Act. As is made clear by section 49(1) a person may commit the offence of encouraging or assisting offences whether or not any offence is committed. For a person to be guilty of aiding and abetting an offence, the offence must be committed. Yet there is no offence of conspiracy to aid and abet. The appellants argue that there hardly can be an offence of conspiracy to commit an offence when the anticipated result may not eventuate.

15. The appellants further argue that an Encrochat device could not be used to commit the offence of supplying drugs. The reality was that supplying Encrochat devices could assist persons to agree to supply drugs. It could not assist in respect of the substantive offence. A means of communication used by drugs suppliers was to be distinguished from items of direct assistance in drugs offences such as adulterants or hydroponic equipment. Thus, the evidence demonstrated that the appellants' acts were capable only of assisting the commission of a conspiracy to supply drugs. Section 49(4) of the 2007 Act requires any offence of conspiracy to be disregarded for the purpose of section 46.

16. The prosecution response to these arguments is that section 46 of the 2007 Act created a new offence, the actus reus of which was doing an act capable of encouraging or assisting the commission of one or more offences. It was not dependent on the actual commission of an offence. In this case the criminal agreement was to commit the offence as defined in section 46. The agreement was carried out in accordance with the

intentions of those who were party to the agreement. It amounted to the offence in section 46. Thus, there was no parallel to be drawn with the line of authority relating to aiders and abettors and/or to attempts. Here, the requirements in section 1(1) of the 1977 Act were satisfied. The prosecution rely on the view expressed by the editors of Smith, Hogan and Ormerod's Criminal Law (17th Edition 2024) at 11.4.4.5.

17. In relation to the submission based on section 49(4) of the 2007 Act, the prosecution say that it is based on a misconception of what is meant by assisting the commission of an offence in the context of supplying drugs. The offence of supplying a controlled drug involves the physical transfer of the relevant drug to another person to enable the recipient to make use of the drug for their own purposes. Depending on the circumstances the physical transfer might involve the use of a vehicle adapted to conceal the drugs prior to the transfer. It may require the provision of a secure place from which the drugs can be collected by the recipient. The person who provides the vehicle or the secure location will assist in the supply of the drugs. The same rationale must apply to secure means of communication by which supplier and customer make the arrangements necessary to complete the supply of the drugs.

Discussion

18. We do not accept the submissions made by the appellants in relation to the offence of conspiracy to commit an offence contrary to section 46 of the 2007 Act. That offence is distinct from aiding and abetting an offence and from attempting to commit an offence. It is completed by the doing of the act capable of encouraging or assisting the relevant offence(s). What is done by the person encouraged or assisted is irrelevant. The reasoning in Kenning is inapposite. The editors of Smith, Hogan and Ormerod's Criminal Law comment that a conspiracy to commit an offence under section 46 of the 2007 Act "is stretching liability so far that one begins to ask where criminal liability ends". Whether that is a fair comment on the ambit of the 2007 Act is not for us to say. For us, the only issue is whether there is any reason by reference to general principles of criminal liability or to the provisions of section 1 of the 1977 Act to conclude that in law it is not possible to conspire to do an act capable of encouraging or assisting an offence or offences. We can identify none.

19. Accomplice liability (to which Kenning is directed) is wholly different to inchoate liability. It is the latter with which we are concerned. We note that Part 2 of the 2007 Act may properly be described as highly prescriptive. Parliament chose not to prohibit an offence of conspiracy to commit an offence contrary to section 46 of the Act. This was in the context of legislation which, in section 49(4), excludes conspiracy as an offence which may be assisted or encouraged.

20. We also reject the proposition that the supply of an encrypted means of communication could not assist the substantive offence of supplying a controlled drug. The welter of criminal prosecutions for supplying drugs since 2020 based on messaging retrieved from the Encrochat server demonstrates how important Encrochat devices were to those engaged in large scale supply of drugs. A person so engaged possibly would never take physical possession of the drugs. That would apply particularly to someone at an organisational level. For such a person a secure means of communication with others involved in the supply including the customer would be essential. An Encrochat device would be of critical importance in the offence of supply. Whoever provided the device assisted in the commission of that substantive offence.

21. For those reasons we are satisfied that conspiracy to do an act capable of encouraging or assisting the commission of one or more offences is an offence known to law. In the context of the facts of this case, we are unconvinced that a charge of conspiracy was necessary. We were told that the prosecution decided against trying the appellants on a series of counts charging substantive offences contrary to section 46. Counts 2 to 6 on the indictment finally preferred against the appellants charged them with the provision of an Encrochat device to particular individuals. Count 7 charged them with providing such devices to persons unknown. The terms of section 46 do not require the identification of the person or persons encouraged or assisted. Therefore, individual counts were not required for identifiable individuals. Clearly the identity of those encouraged or assisted would be relevant to an offender's belief as required in section 46(1)(b). But the names or identities of the persons encouraged or assisted were not elements of the offence. It was not necessary for them to be particularised in the indictment.

22. More to the point "an act" in section 46(1)(a) is to be read in the light of section 67 of the 2007 Act. This is as follows: A reference in this Part to an act includes a reference to a course of conduct, and a reference to doing an act is to be read accordingly. There is no definition of "a course of conduct" in the 2007 Act. The term is used in the Protection from Harassment Act 1997 in a very different context. There a course of conduct means conduct on at least two occasions towards one person or at least one occasion where the conduct is directed to two or more persons. That is the minimum level of conduct required to meet the definition of a course of conduct in the 1997 Act. Frequently the conduct will take place on multiple occasions. The ordinary English meaning of a course of conduct is a series of acts demonstrating a continuity of purpose. On the facts of this case as put by the prosecution, the repeated supply of Encrochat devices had the purpose of assisting persons to supply drugs. This purpose continued throughout. In our view the prosecution case properly could have been placed before the jury on the basis of a single substantive count of the offence under section 46 of the 2007 Act. This would have avoided the supposed complications created by a count of conspiracy.

23. One such complication which was the subject of oral submissions was the mental element of the offence of conspiracy. The substantive offence will be committed when the defendant believes that the offence(s) they encourage or assist will be committed and that their act will encourage or assist the commission of the offence(s). The mens rea of the offence of conspiracy as set out in section 1(2) of the 1977 Act is intention or knowledge as to the facts and circumstances which comprise the actus reus of the offence which the conspirators have agreed to commit.

24. Section 1(2) and its effect was considered in detail by the House of Lords in Saik [2006] UKHL 18; [2006] 2 Cr App R 26. Saik concerned a count of conspiracy to convert the proceeds of criminal conduct. The substantive offence then was contained in the Criminal Justice Act 1988. By the time of the appeal in the House of Lords the relevant legislation was the Proceeds of Crime Act 2002. One part of the mental element of the substantive offence was that a defendant had to know or to have reasonable grounds to suspect that the property in question was the proceeds of criminal conduct. The count charged the conspirators with agreeing to convert cash paid into a currency exchange. They were alleged to have known or have had reasonable grounds to suspect that the cash was the proceeds of criminal conduct.

25. The "particular fact or circumstance necessary for the commission of the offence" was that the money emanated from a crime. The House of Lords held that the prosecution had to prove that, for a person to be guilty of the conspiracy, they had to intend or know that this fact would exist when the conspiracy was carried out. Where the conspiracy related to identified property, it was necessary to prove that the conspirator knew that it was the proceeds of criminal conduct. If the property was not identified, the prosecution must prove that the conspirator intended that the property would be the proceeds of crime. The indictment averred that the appellant knew or had reasonable grounds to suspect that he was dealing with criminal proceeds.

26. The appellant pleaded guilty to the count. His basis of plea was that he suspected that the property was the proceeds of crime. He then changed his legal team for the purposes of an appeal to the Court of Appeal Criminal Division and then to the House of Lords. His case was that what he had admitted was not an offence known to law by reason of the operation of section 1(2) of the 1977 Act. That was the submission upheld in the House of Lords.

27. With Saik in mind the prosecution in this case charged the appellants with knowing that an offence of supplying drugs would be committed and that their act would encourage or assist the commission of that offence. The judge provided the jury with a route to verdict which included two questions in respect of these elements in relation to each appellant, namely:

    i) Are we sure that when he did join the agreement, when he did so, he intended that his agreement with others to sell those phones would assist others to supply drugs?

    ii) Are we sure that he knew that drugs would or were being supplied by those others to whom he and his co-defendants provided telephones?

    The jury were required to answer both questions in the affirmative before they could convict the appellant whose case they were considering.

28. The appellants argue that the proposition that they properly could be found to have known that an offence of supplying drugs "will be committed" is fanciful. Earlier in his summing up the judge dealt with two possible circumstances in relation to the supply of drugs and the appellants' knowledge. He said that, if the drug supplying was going on at the time the devices were being sold to the customers and the defendant knew that, the requisite knowledge would be established. If the supply of drugs was something that would happen in the future, the jury had to be sure that the relevant defendant knew that that the offence of drug supplying would be committed. He directed the jury that "knew" meant that the defendant must have been sure of it. The appellants' argument is that the use of the word "believe" in section 46(1)(b) is telling. The legislation recognises that a person cannot **know** what another will do in terms of unlawful activity. Thus, it was impossible for the jury to answer the question posed to them by the judge. That was a misdirection. It renders the verdicts unsafe.

29. The first point to note in relation to the wording of the indictment and the consequent directions of the judge is that knowledge is not an ingredient of the substantive offence. Unlike the offence of money laundering, section 46 of the 2007 Act does not refer to knowledge at all. In the course of the hearing we raised the question of whether it was

appropriate to introduce knowledge when this is not part of the substantive offence. We concluded that there was more than one answer to the question. First, if knowledge was not necessary, this did not disadvantage the appellants: rather the reverse. Second, the greater includes the lesser. If belief is a lesser state of mind, to require knowledge encompasses belief. Third, if the issues with which the judge dealt in his directions involved a "particular fact or circumstance necessary for the commission of the offence", section 1(2) of the 1977 Act required proof of knowledge. It is this last point which is critical. The focus must be on the offence charged, namely conspiracy, and the mental element required for that offence.

30. The second point which is determinative of the submission of the appellants on this issue is that, on the evidence before the jury, the real question was whether the appellants knew that drugs were being supplied. The prosecution case was that the only proper inference was that the appellants were fully aware from the outset of the use to which the Encrochat devices were being put. The jury must have concluded that this inference was a fair and proper one. In those circumstances, the jury will not have addressed an impossible question. Their verdicts were safe.

31. In any event, we consider that the prosecution introduced an unnecessary complication by the reference to knowledge. In Saik Lord Brown of Eaton-under-Heywood said at [119]:

> "I should say at this stage that the problem arising here is not one that arises in the context of handling offences. Handling is committed by those who know or believe that the goods are stolen. True, the offence is not committed if the goods, albeit believed stolen, in fact prove not to be. But if an agreement is made to handle goods believed to be stolen I for my part would have little difficulty in concluding for the purposes of section 1(2) of the 1977 Act that the conspirators intended or knew that they would be stolen. Section 1(2) looks to the future so that the putative conspirator's state of mind is in any event better described as belief than as knowledge—a point well made by *Hooper LJ in R v Liaquat Ali and others [2005] EWCA Crim 87, [2005] 2 Cr App R 864 (at para 98).* One can never be certain that goods that are to come into one's possession at a future time will be stolen but a firm belief can be held and that is sufficient."

We agree with that analysis of how a conspiracy to handle stolen goods will be charged. We cannot see why the same should not apply to a conspiracy to commit the offence in section 46 of the 2007 Act. However, we repeat our view that the charge of conspiracy on the facts of this case was unnecessary. The appellants engaged in a course of conduct which could have been reflected in a single substantive count.

The submissions of no case to answer – evidential insufficiency

32. We have already set out in summary form the nature of case against the appellants. Every Encrochat device was assigned a "handle". In the case of the devices supplied by the appellants, it was Russo who provided the handle name. Each of the appellants had a handle assigned to the Encrochat device they used: Russo was "figures", Ahmed was "notes" and Miah was "deliveries". Because they had devices of their own, the

appellants were well aware of the features of the devices being supplied. They had layers of security. Messages would be automatically deleted within a "burn" time. Everything on the device could be removed remotely, a helpful facility if the user were concerned about the device falling into the hands of an unwanted third party. The handsets had very limited function compared to any base level smartphone. They had no Wi-fi capability. Yet they were very expensive when compared to telephones available on the open market.

33. The appellants did not supply the devices via a recognised outlet. Any meetings were arranged away from their homes or Kwikfit where they all worked. Payment was always in cash. The devices were hand delivered to pre-arranged meeting points in London, the South Midlands and elsewhere. On occasion several devices were supplied at once.

34. Although the appellants did not message each other in relation to the purpose for which they were supplying Encrochat devices, Russo in the early part of 2020 was in regular contact via Encrochat with a man named Bashir. Bashir had been supplied with an Encrochat device by the appellants. In the messaging Bashir made explicit reference to supply of drugs by him. At one point he sent Russo a picture of a substantial quantity of Class A drugs. Bashir pleaded guilty in August 2020 to conspiracy to supply cocaine. Ahmed in May 2020 exchanged Encrochat messages with a man named Rangzeb Khan who subsequently was convicted of conspiracy to supply cocaine. Miah was also involved in the exchange of messages. Khan wanted Ahmed to contact a third party. Miah intervened to say that Russo was sorting it. Ahmed told Khan that they did not use normal telephones or telegram messaging.

35. Ahmed and Miah argued that the totality of the evidence was insufficient to establish knowledge on their part that the Encrochat devices supplied by them were or were to be used to facilitate the supply of Class A drugs. They accepted that knowledge could be proved by circumstantial evidence. However, for a prima facie case to be established in that way, a reasonable jury would have to be in a position to reject all inferences consistent with an absence of such knowledge. The submission was that a reasonable jury could not be sure that the Encrochat devices would be used to facilitate the supply of drugs. It also was argued by the appellants that the evidence concerning the people to whom devices had been supplied was that they had been convicted of conspiracy to supply Class A drugs. This did not demonstrate that those people had supplied drugs as opposed to agreeing to do so. Moreover, the judge should have directed the jury to disregard those convictions.

36. In rejecting these arguments, the judge said that the evidence demonstrated that the appellants were engaged together in a scheme to sell Encrochat devices in a clandestine fashion. They were aware of the features of the devices which were attractive to those intending to engage in criminal conduct. Russo could be shown to have had direct knowledge of the purpose to which at least one customer was putting his device. The judge concluded that a reasonable jury would be entitled to find that, as a result of the totality of their dealings together, the appellants would have known what their customers intended to do with the Encrochat devices. The judge declined to direct the jury as requested on the basis that the convictions were relevant to the nature of the criminality which was anticipated by the appellants.

37. We are satisfied that the judge, who was fully immersed in the detail of the evidence, was entitled to conclude that there was sufficient evidence for a reasonable jury to infer that the appellants knew of the proposed and/or actual use of the devices supplied by them. The nature of the devices and the manner in which they were supplied by the appellants demonstrated that the appellants were aware that the devices were to be used for criminal purposes. It was a proper inference that the appellants would have spoken about the particular market they were serving i.e. drug dealers. We also conclude that the judge was correct when he declined to direct the jury to disregard the convictions for conspiracy to supply Class A drugs. This evidence was admitted by way of agreed facts. It would have been a curious position for the appellants to admit matters which were irrelevant. We are sure that they were not. As the judge put it in his ruling, the convictions indicated that the persons convicted were "members of the drug trafficking community". The convictions were material for the jury to consider in relation to the issue of whether the persons to whom the devices were supplied went on to supply drugs.

The questions put to Russo by the judge

38. We shall set out the examination of Russo by the judge insofar as it is said to have created unfairness. The judge questioned for 20 to 25 minutes. The transcript of this part of Russo's evidence covers slightly in excess of 9 pages of transcript. After preliminary questions about which no complaint is made, the examination continued as follows:

> "Q. Yes, who arranged that?
>
> A. I'm going to assume that it was all arranged by Staunch.
>
> Q. Yes, Staunch was a friend of yours ---
>
> A. Yeah.
>
> Q. I think you've just, I can't remember the word you just used, but I think you just neatly, a good friend with him through life I think you just described it as, primary school friends, and he'd come and see you at Kwik Fit on a reasonable basis.
>
> A. Yeah, from time to time he would.
>
> Q. Yeah, well, but you help us, it sounded to me as if you were describing a good friend and all of us are going to think about our good friends who we're in touch with all of the time on the telephone, how're you doing, did you see the football last night, what's going on with you, how's your partner, how's the kids, that sort of friend.
>
> A: Yeah.
>
> Q. Yeah, OK, so where did the phones, who arranged for the phones to go to Staunch's mum's house?

> A. So, the phones, just going by the structure, he would deal with all of -- Q. What structure? What do you know about that?
>
> A. The only thing I know about that is they would get delivered to his mum's address but I can't say where from I'm afraid.
>
> Q. Are you telling us that you never asked him about that?
>
> A. I never asked where they were coming from.
>
> Q. Can you think of a good reason why not? I mean did you ever make a casual enquiry, where have the phones come from?
>
> A. I didn't ask where the phones came from."

On behalf of Russo it is said that the judge conveyed scepticism about the account he had given. The phrase "are you telling us" and the question "can you think of a good reason why not" is the language that would be used by a prosecutor. The judge failed to act as the impartial referee in these exchanges.

39. The judge asked some more questions about the source of the Encrochat devices:

> "Q. All right. You've told us you were ambitious in a way about business, so where the stock came from was going to be an issue wasn't it?
>
> A. It was definitely an issue.
>
> Q. Did you not at that point say who is it that's providing us with these phones? Can you get them geed up a bit or do you want me to call them?
>
> A. He would always say they were on order, where from I'm afraid didn't ask.
>
> Q. You just didn't ask.
>
> A. No, sorry."

It is said that these questions were designed to undermine the appellant's credibility. The judge went on to ask questions about the sums Russo and the others involved with the supply of the devices generally would receive. The complaint is that these were matters with which Russo already had dealt in his evidence. Further, the judge interrupted Russo so as to prevent Russo from being able to present his case properly.

40. The judge concluded the examination as follows:

> "Q. All right, so what did, tell me, I'm going to make the assumption that you asked your good friend, Mr Staunch, all about the people who were asking for these phones.

> A. I never asked a question about the people that were using them.
>
> Q. All right, no, where he got his customers from?
>
> A. No, he did have a customer base prior to me starting but I didn't ask where they were from.
>
> Q. You didn't ask him about that, no? All right."

This passage is said to be scornful of Russo's evidence. By his questions the judge implied it was not worthy of belief. He sought to create a close link between the appellant and Staunch and to undermine Russo's evidence that he did not know that the purchasers of encrypted handsets were involved in organised crime.

41. Once the judge had finished asking his questions, the court adjourned for lunch. After the adjournment counsel representing Russo addressed the judge in the absence of the jury. He argued that the effect of the judge's questions was to provide the jury with the judge's view of the facts. It did not amount to clarification of the evidence thus far given by Russo. When the jury returned to court, the judge said this:

> "….just before lunch I, do you remember I told you that I was going to ask some questions by way of clarification? Now, if any of you think, you might well have done, that I dealt through them, didn't give the defendant the opportunity to answer the questions or pressed him before I did, or in any way expressed any view about the case, would you take it from me that that wasn't my intention and in any case the facts of this case are for you and not for me at all.
>
> If you think I was somehow giving an indication of what I thought please put that out of your minds, that wasn't my intention, that wasn't what I was doing, and if I interrupted him I shouldn't have done that and he can have my apologies for having done so."

When the judge summed up the case, he directed the jury in conventional terms about the facts being wholly within their province. He said that, if he appeared to express a view, the jury were to ignore it. He referred back to what he had said in the immediate aftermath of Russo's evidence.

42. We consider that the questions put by the judge at times went beyond clarification. They did not provide the jury with any assistance on the issues in the case. However, they were directed primarily to the issue of the source of the Encrochat devices. If anything, this issue was irrelevant. There was no suggestion that knowledge of the source of the devices could have informed Russo or the other appellants of the use to which the devices were used by their customers. It was only at the end of the examination that the judge asked whether Russo had asked Staunch about the people who were using the devices. The question was posed. The answer was given. The judge took it no further. We do not agree with the proposition that the overall effect was to imply that the judge considered Russo's evidence to be unworthy of belief.

43. In any event, the point having been made to the judge that the jury would have gleaned his view of the case from his questions, he immediately directed the jury that (a) he did not intend to give his view and that (b) if the jury did understand him to have done so, they should ignore it. This is very different to the position in Lake [2023] EWCA Crim where the judge's direction to the jury about ignoring his view of the facts was simply given in the course of his summing up without it being tethered to the questions he had asked of the appellant. The court in Lake concluded that this was insufficient to remove the effect of the judge's questions which amounted to cross-examination. Even in those circumstances, the court in Lake did not conclude that the trial was rendered unfair by the questions. Rather, that aspect of the trial was one feature amongst others which had a cumulative effect.

44. When counsel raised the matter with the judge, he said in terms that he did not apply for a discharge of the jury. Counsel said that this was in part because Russo had been waiting for his trial for two years and it would not be in his interest for there to be a retrial. The other factor referred to by counsel was that any application would have no chance of success because it would involve the judge accepting criticism. We do not understand the second factor. If a defendant can demonstrate by reference to the nature of the questions asked by a judge that incurable unfairness to the defendant has resulted, there is no reason why an appropriate application should not be made. If a judge is shown that unfairness has occurred, the judge will take whatever action is required irrespective of where the fault lies. To suggest otherwise is to impugn the integrity of the judge. We understand Russo's personal reasons for not wishing to have a re-trial. But, if what had occurred truly had rendered his trial unfair, those personal reasons would not have overcome the need to discharge the jury. The reality was that any unfairness was capable of being cured by a direction to the jury as given by the judge. That is what happened. There is no tenable argument that Russo's conviction was unsafe by dint of the questions asked by the judge.

Conclusion

45. For all of the reasons we have set out, we find that the conviction of each appellant was safe. The appeals are dismissed.