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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 28 February 2019

B e f o r e:

LORD JUSTICE GROSS

MR JUSTICE SOOLE

MR JUSTICE MURRAY

R E G I N A
v
ISAAC COKER

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Mr E Renvoize appeared on behalf of the **Appellant**
Mr R Harding appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. LORD JUSTICE GROSS: The facts of this case are straightforward and, as will be seen, point overwhelmingly to the safety of the conviction. But en route a short point has arisen as to the direction given in respect of the offence charged under section 4(3)(b) of the Misuse of Drugs Act 1971 ("the Act"), namely being concerned in supplying a controlled drug, here a class A drug, to another. As will be suggested, the leading textbooks may, with respect, wish to clarify their treatment of this subsection.

2. Section 4 of the Act, in so far as material, provides as follows:

> "4(1) ... it shall not be lawful for a person-
>
> ...
>
> (b) to supply or offer to supply a controlled drug to another.
>
> ...
>
> (3) ... it is an offence for a person-
>
> (a) to supply of 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."

3. On 12 January 2018, in the Crown Court at Oxford, the appellant, now aged 25, pleaded guilty to possession of a controlled drug of class B, cannabis.

4. On 2 May 2018, again in the Crown Court at Oxford and before Her Honour Judge Smith, the appellant was convicted unanimously of being concerned in supplying a controlled drug of class A, crack cocaine, to another and possessing criminal property, counts 1 and 2.

5. On 2 May, he was sentenced concurrently on each count as follows. Possession of a controlled drug of class B, 2 months. Being concerned in supplying a controlled drug of class A to another, section 4(3)(b) of the Misuse of Drugs Act 1971, 5 years and 6 months - that was count 1. Count 2, possessing criminal property, 5 years and 6 months. All the sentences were concurrent, thus producing a total sentence of 5 years and 6~months' imprisonment.

6. He now appeals against conviction by leave of the single judge.

7. It is necessary to underline that, as appears from the indictment, count 1 charged the appellant with an offence under section 4(3)(b) of the Act, not section 4(3)(c).

8. We turn to the facts. On 21 November 2017, police officers attended an address in Banbury. The appellant was present in one of the rooms. He was, according to an officer, in bed fully clothed. A cannabis joint and a bag full of herbal cannabis were observed and there was a strong smell of cannabis. He was arrested. He gave a false name. He was searched and found in possession of a small phone, a black Zanco Wasp; a total of £1,850 in cash, of which some was found in a sunglasses case; a set of digital scales; a kitchen knife found under a pillow; two other mobiles, both Samsung, one white, one blue, were also recovered.

9. The phones were analysed. In the opinion of another police officer the user of the Zanco Wasp and the blue Samsung was involved in drug dealing.

10. He was interviewed. He answered no comment to all questions. He did not give evidence at trial.

11. In his defence case statement, he denied both counts. He did not accept possession of the blue Samsung. He denied involvement in any drug dealing associated with that phone. He accepted possession of the white Samsung and the Zanco Wasp. He said the SIM card used in the Zanco was found by him while he was sofa surfing. At the time, he was homeless and staying at various addresses. He denied using either phone to supply class A drugs. He did not accept possession of the kitchen knife or the digital scales. He was staying the night there and was at the address on a temporary basis. He accepted possession of the money, which he said was given to him by his family.

12. In summing-up, the judge directed the jury as to the elements of count 1 and what needed to be proved. She said this:

> "Now, in count 1, members of the jury, for an offence to be shown to be committed, 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."

13. There followed an extended courteous discussion between counsel and the judge, prompted, essentially, by the industry of Mr Renvoize, who appeared then and today for the appellant. In the event, no change was made by the judge to her direction.

14. The point raised by Mr Renvoize was that the wording "or the making of an offer to supply" and "or such an offer to supply" in the direction was incorrect. In a nutshell, subsections 4(3)(b) and 4(3)(c) of the Act created two separate offences. The direction, in the wording given, involved an impermissible "either/or" with the risk of the appellant being convicted under section 4(3)(c) with which he had not been charged or of leaving the jury with the impression that provided some agreed on one basis and some on another they would be entitled to convict. Instead, in order to convict the appellant, the jury needed to be sure that he was concerned in the supply of drugs to

another because that was the subsection under which the prosecution had elected to proceed.

15. That, essentially, was Mr Renvoize's submission then and remained his submission today and we are grateful to him for raising it then and arguing it now.

16. For the Crown, Mr Harding sought to defend the direction both at the time it was given and now. The essence of his submission appears succinctly from the respondent's notice:

> "The Crown submits
>
> (i) That the learned Judge directed the jury that being concerned in the supply of a drug of Class A may include the offer to supply. The Judge went on to direct the jury that it must also include factors (b) and (c) as set out in the case of *Hughes (1985) 81 CrApp R* p.348.
>
> (ii) In response to submissions that the Defence made stating the direction was wrong, submissions were made on behalf of the Crown that further to the case of *Martin [2015] 1 WLR 588 (11)* which said the term 'supply' is a broad term, an 'offer of supply' can be included in the broader term 'being concerned in the supply of drugs'."
>
> (iii) Provided the additional requirements as per p 348 of Hughes, as above, were included in the directions, the directions were in accordance with the law.
>
> (iv) Accordingly, whilst offering to supply is a separate offence, it does not preclude an 'offer of supply' from being included in 'being concerned in the supply' contrary to section 4(3)(b). A person can be concerned in the supply of drugs by making an offer."

17. We return in a moment to consider the rival cases.

18. As to sentence, the judge emphasised the aggravating feature of the appellant having previous convictions for dealing in class A drugs. She then passed the sentence she did on count 1. The sentence on count 2 was made concurrent to the sentence on count 1.

19. Unsurprisingly, the single judge observed that the sentence on count 1 was fully justified. So too the total sentence was not manifestly excessive. However, having given leave to appeal conviction on count 1 and in the event that that appeal proved successful, he referred the application for leave to appeal on count 2 to the full court. The point as to sentence thus only acquires any traction should we allow the appeal against conviction on count 1.

<u>The appeal against conviction</u>

20. The starting point is the decision of this court in *R v Hughes* (1985) 1 Cr App R 344. The accused was charged with an offence under section 4(3)(b) of the Act and the crucial question was whether the Recorder had properly directed the jury on the meaning of the expression "concerned in" in that subsection. After setting out the relevant provisions of section 4, Robert Goff LJ (as he then was), giving the judgment of the court, said this 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."

21. At page 348, he went on as follows:

> "... for an offence to be shown to have been committed by a defendant contrary to sub-section (b) or sub-section (c), as the case may be, the prosecution has to prove (1) the supply of a drug to another, or as the case may be the making of an offer to supply a drug to another in contravention of section 4(1) of the Act;(2) participation by the defendant in an enterprise involving such supply or, as the case may be, such offer to supply; and(3) knowledge by the defendant of the nature of the enterprise, ie that it involved supply of a drug or, as the case may be, offering to supply a drug."

22. In the event, the Recorder's misdirection was such in that case, in particular his failure to assist the jury with the meaning of the expression "concerned in", that the appeal was allowed.

23. In *R v Martin and Brimecome* [2014] EWCA Crim 1940; [2015] 1 Cr App R 11, the issue was the meaning of the word "supply" in section 4(3)(b) of the Act and in particular whether, as the appellant there submitted, the offence required a completed supply by delivery. This argument was rejected, with the court holding at paragraph 16 that the word "supply" is a broad term.

24. For present purposes, the analysis of *Hughes* contained in *Martin* at paragraph 11 is to be accepted, as this court held subsequently in *R v Abi-Khalil and Porja* [2017] EWCA Crim 17; [2017] 2 Cr App R 4. In this regard it is to be noted that, in *Martin* at [11], the court said that Robert Goff LJ in *Hughes* had drawn attention "to the fact that there were three principal offences contained within subsection(3)", namely those set out at subsections (a), (b) and (c).

25. In our judgment, the wording of the section as authoritatively explained in *Hughes* and *Martin* (endorsed in *Abi-Khalil*) is clear. Section 4(3) of the Act gives rise to three separate and distinct offences. Section 4(3)(a) deals with "supply" or an "offer to supply". Subsections 4(3)(b) and (c) broaden the ambit of the section by applying to those who are "concerned in" *either* the supply *or* an offer to supply controlled drugs. This view is underpinned by Robert Goff LJ's use of the wording "as the case may be" throughout his exposition of the section (at page 349 of *Hughes* set out above).

26. 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). Here, the appellant was charged under subsection (b).

27. We therefore accept the argument of Mr Renvoize as to the true construction of the section and his criticism of the direction given by the judge. Conversely, we are unable to accept Mr Harding's submissions in this regard. On his construction there is a danger of rendering subsection (c) otiose. Moreover, his construction does not give effect to the wording "as the case may be" used by Robert Goff LJ in *Hughes*.

28. Accordingly, applying *Hughes, Martin* and *Abi-Khalil*, the elements of the offence under section 4(3)(b) of the Act, of which the prosecution must make the jury sure, are:

29. (1) that there has been the supply of a controlled drug to another in contravention of section 4(1);

30. (2) that the defendant in question participated in an enterprise involving such supply;

31. (3) that the defendant knew the nature of the enterprise, namely that it involved such supply.

32. Necessarily, therefore, subject to such tailoring as is required for the individual facts, these elements of the offence are to be included in directions given to the jury when considering a charge under section 4(3)(b). To reiterate, there is no room for an "either/or" direction encompassing the separate offence of an offer to supply which falls under section 4(3)(c).

33. With respect, therefore, we are persuaded that the judge's direction was incorrect in the manner we have sought to explain.

34. We are not without sympathy for the judge. Though counsel approached the matter with admirable diligence, the treatment of this offence in *Archbold* (2019) at paragraph 27-41 is, perhaps, with respect, unduly compressed. For its part, *Blackstone* (2019), at paragraph 19.49, wrongly it would seem, in our respectful view, includes the "either/or" formulation in its summary of the ingredients of the offence. As it appears to us, that formulation involved a misreading of *Hughes*. We draw the matter to the attention of the learned editors of both works for their consideration.

35. We add only this:

(1) 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.

(2) No argument was addressed to us on the construction of s.4(3)(a) of the Act. Other than that it constitutes one of the three principal offences contained within s.4(3), as explained in *Martin*, at [11], we express no view on s.4(3)(a).

(3) Equally, nothing in this judgment deals with the situation where the indictment contains separate counts, one under s.4(3)(b) and another under s.4(3)(c). No such question arose in this case and we heard no argument upon it. If, however, the facts should so warrant, we cannot envisage a difficulty in an indictment containing both counts, doubtless as alternatives.

36. It remains to consider whether the misdirection rendered the appellant's conviction unsafe.

37. In his submission today, Mr Renvoize contended that there was here a risk with regard to whether the jury had been unanimous.

38. For his part, Mr Harding submitted that on the facts of this case there was no such risk. He pointed to all the evidence and indeed the conviction on count 2 of possessing criminal property, namely the cash, knowing or suspecting it to represent the proceeds of criminal conduct.

39. For our part, we have no hesitation in concluding that there was no risk of the conviction being unsafe. The evidence as to the Zanco Wasp and blue Samsung phones, the cash and its location, the scales and the kitchen knife, made for an unanswerable case against the appellant under section 4(3)(b). It is, in our judgment, fanciful to suppose that that conviction was unsafe.

40. We therefore dismiss the appeal against conviction.

The sentence application

41. As earlier foreshadowed, this application hinged on the conviction appeal succeeding. It has not. This application therefore falls away and we refuse leave to appeal against the sentence on count 2.

42. We were very impressed with the way this matter was raised and dealt with before the judge and subsequently and are, accordingly, grateful to both counsel.

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

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