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IN THE COURT OF APPEAL
CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT
LEEDS
HHJ BATTY T20210529/T20227460
CASE NO 202203467/B1

[2024] EWCA Crim 964

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 17 July 2024

Before:

LADY JUSTICE MACUR

MRS JUSTICE STACEY

THE RECORDER OF WOLVERHAMPTON
(HIS HONOUR JUDGE MICHAEL CHAMBERS KC)
(Sitting as a Judge of the CACD)

REX

V

REECE DAVID O'FLAHERTY

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NON-COUNSEL APPLICATION

J U D G M E N T

MRS JUSTICE STACEY:

1. This is the renewed application for leave to appeal against conviction following refusal by the single judge. In the Crown Court sitting at Leeds before HHJ Batty, the applicant was convicted after trial of one count of possession with intent to supply the Class A drug of cocaine (count 2 of the trial indictment) and he was acquitted of a separate like count (count 1 of the trial indictment). There had been a joinder of two separate indictments to form the trial indictment comprising cases T20210529 and T20227460, which were respectively counts 1 and 2 of the trial indictment. There were a number of other counts on the trial indictment that did not affect the applicant. He was sentenced the same day, before the same court, to a term of imprisonment of 54 months.

2. He renews his application for an extension of time of 59 days, for leave to appeal against conviction, for bail, for leave to call witnesses and for a representation order. His explanation for the delay in making the application is the difficulty he had in contacting his solicitor and their negative advice on the merits, leading him to make this application without representation.

3. There are four grounds relied on by the applicant. Firstly, the conduct of his defence counsel in two regards separate to the other grounds that also fault his legal advice, namely her negative advice on the prospects of acquittal prior to the start of the trial and her timidity and passivity before the judge. Secondly, the failure of his legal team to oppose the application to join the two separate indictments which the applicant considers would have been successful if it had been made and would have resulted in his being acquitted of both counts in separate trials. Thirdly, the failure of his legal team to instruct

expert evidence that would have aided his defence, which was also the basis of his application to admit fresh evidence. Fourthly, that the judge was biased in favour of the prosecution, in both his legal directions and summary of the evidence.

The Facts

4. On Sunday 22 September 2019, the applicant was arrested alongside two co-defendants after a member of the public reported a disturbance. Whilst in custody the police searched an address associated with the applicant under section 18 of the Police and Criminal Evidence Act 1984, and recovered a rucksack containing 248 grams of cocaine from the address (count 1). On Saturday 5 December 2022, whilst under investigation for count 1, the applicant was arrested whilst driving over the limit. At the time of his arrest he was a guest at the Rivlyn Hotel Scarborough, having checked into Room 205 a week before. In a search of his room, again conducted under section 18 of the Police and Criminal Evidence Act 1984, the police recovered a plastic bag which contained 274 individual plastic bags, each of which contained 0.2 grams of diamorphine with an estimated total weight of 67.58 grams, with a street value of £2,740. Another bag containing 12 smaller bags of diamorphine, with an estimated total weight of 2.26 grams and with a street value of £120 was also found together with £460 in banknotes.

5. The applicant's DNA was found to be the main contributor of the mixed profile DNA found on the knotted section of three of the bags from the bag containing the smaller 12 bags. The knotted sections of ten of the individual bags from the larger bag were also swabbed and yielded a mixed DNA profile of which the applicant was a possible contributor. It was not possible to determine whether the DNA was present because the

applicant had touched the bags directly or because his DNA had been transferred onto the bags indirectly.

6. The applicant was interviewed under caution. Apart from explaining that the £460 recovered came partly from a loan and partly from his parents, he exercised his right to silence.

7. The prosecution case was that the drugs recovered from the Rivlyn Hotel on 5 December belonged to, or were in the applicant's control. They submitted that due to the quantity of the drugs recovered he must have intended to supply them. The prosecution relied on the evidence of the drugs found in the room, the DNA evidence, the largely "no comment" interview and evidence of the hotel manager which was read to the jury. She confirmed that the room had been booked for one month and paid for in advance. It was booked for two people but the applicant was the only guest and sole visitor. She never saw him with anyone else except on one occasion (the day before the room was searched on 4 December) when she saw him outside the room at 2.00 am with another unidentified person.

8. The applicant's case was that he denied being in possession or control of the drugs recovered. His case was that he had left the hotel room before the search and given the key to a male who he would not name, who must have left the drugs there. His explanation for the DNA evidence was that when he had given the key to the male, the male had supplied him with cocaine and during that transaction he had touched two bags containing drugs. The defence submitted that the prosecution evidence was entirely

consistent with the applicant's account and accordingly the prosecution could not prove their case. The applicant gave evidence in accordance with his defence case. He denied the £460 found in the hotel room was his and stated, in evidence, a different explanation to the one that he had provided in his police interview and said that his police interview account was wrong.

9. The issue for the jury was whether the drugs recovered from the hotel had been left there by the applicant or were in his control and, if so, whether he intended to supply some or all of those drugs to another person.

10. Following the applicant's arraignment on the count in case T20227460, the Crown applied for joinder of the two indictments. It was unopposed and granted. In light of the criticism of his legal team, the applicant has waived privilege and counsel has provided detailed comments on the grounds of appeal and provided a copy of her advice on appeal against conviction.

Discussion and Conclusions

11. **Ground 1**. Both criticisms of counsel are misplaced. It was her duty to give realistic advice to her client on pleas, particularly since shortly before trial the prosecution had indicated that they would accept a guilty plea for the lesser offence of allowing premises to be used and not pursue the possession with intent to supply charge. Although the evidence was largely circumstantial, counsel's advice about the strength of the case against the applicant was accurate and realistic. As to the second criticism, it was not allowed for counsel to speak to her client whilst he was being cross-examined and under

oath. The applicant has not identified any inappropriate questions or behaviour in court by either prosecuting counsel or the judge that would have required an intervention by his counsel and the extent to which it is helpful for his counsel to intervene is very much a matter of professional discretion and can often be counterproductive. It is rarely a good idea for counsel to have a direct confrontation with a judge, and is likely to hinder more than help a defendant in the eyes of the jury. There is nothing in the transcripts supplied with the appeal that would suggest that the applicant's counsel should have challenged the judge or intervened more actively than she did.

Ground 2. The offences in the two indictments both concerned the dealing of Class A drugs. Although different drugs were involved (diamorphine in count 1 and cocaine in count 2) with different defendants, on different dates, 12 months apart and on different occasions (Leeds and Scarborough), they were both incidents of large quantities of Class A drugs found at properties connected to the applicant that formed part of a series of offences of similar character. In each case the defence advanced was that the applicant was not knowingly involved in the drugs found. There was therefore sufficient nexus to justify joinder and no prejudice to the applicant beyond the obvious probative value. The judge gave clear directions in writing over 13 paragraphs to the jury about separate consideration and the two limited ways (coincidence and propensity) in which the evidence in relation to one count could be used in considering the other. The fact that the jury acquitted the applicant of count 1 demonstrates that they followed the judge's direction and did not hold against him their conclusion in relation to count 2.

Ground 3. The application for fresh evidence in the form of expert evidence on the

contents of the applicant's phone and the linked ground, criticising the applicant's legal team for not obtaining expert evidence before the trial, is also misplaced. It was not for the applicant to prove the absence of incriminating data on his phones; it was for the prosecution to prove the case against the applicant. The applicant's counsel ensured that the important evidence, that his phone was clean was reduced to an Agreed Fact before the jury. It meant that the jury knew and had it in writing, that the applicant's phone had been forensically examined and no messages relating to the supply of drugs were discovered on it. There is nothing that defence expert evidence could have added to assist the applicant at trial in relation to the phones.

Ground 4. The applicant criticises the judge, as well as his counsel, for what followed after he had named the person he said was the custodian of the drugs found in his mother's house during his evidence relevant to count 1 which we note was the count on which he was acquitted. The prosecution would inevitably have needed to discuss the unanticipated development of the applicant revealing the name in court, with the judge in the absence of the jury. It was also inevitable that the prosecution might need time to investigate the identity of the named custodian before cross-examining the applicant on the matter. What happened did not demonstrate either actual or apparent bias on behalf of the judge or any dereliction of defence counsel's duty in the exchanges between the judge and prosecution and defence counsel in court. There was in any event no prejudice to the applicant in relation to this matter since he was acquitted of this count.

12. The jury directions and summing-up do not demonstrate either actual or a perception of bias. The jury directions were clear and balanced and accurately reflected the law, both

as to the offence and how the jury should approach aspects of the evidence. The judge preceded his summary of the evidence to reiterate to the jury that he was not intending to express any personal view and, if the jury were to think he was, they should ignore it, unless they agreed with it. He told them that it did not matter what he thought, as the jury was the judge of the facts. The summary of the evidence was also balanced, containing a detailed account of the applicant's explanation for why he was in Scarborough, his explanation for £14,000 resting in his bank account and how it came to be that he gave the hotel key to a friend who had a quantity of cocaine with him, who gave him a small amount for personal use, explaining the presence of his DNA on the bags.

13. There was clearly sufficient evidence before the jury to safely convict. There are no arguable grounds for appealing against conviction. The fresh evidence application for expert evidence sought to be adduced would not have afforded any ground for allowing the appeal (see section 23(2)(b) of the Criminal Appeal Act 1968). Since it is not arguable that the conviction is unsafe, the bail application must also fail. If there had been any arguable grounds for an extension of time to cover the 59-day delay in making the application for leave to appeal, it would have been granted, given the difficulties in obtaining advice and contacting lawyers whilst in custody. But since the appeal is not arguable, it is not in the interests of justice to extend time. All applications are refused.

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

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