Neutral Citation Number: [2023] EWCA Crim 494

Case No: 202203116 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT PRESTON
HH JUDGE JEFFERIES KC
T2021 0713

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/05/2023

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE
MR JUSTICE HOLGATE
and
MRS JUSTICE FOSTER

- -

Between:

PIOTR LASKOWSKI	**Appellant**
- and -	
THE KING	**Respondent**

- -
- -

Simon Csoka KC (instructed by **Potter Derby Solicitors Limited**) for the **appellant**
Annabel Darlow KC (instructed by **CPS Appeals and Review Unit**) for the **respondent**

Hearing dates: 4 May 2023

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Approved Judgment

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Lord Justice Holroyde:

1. On 30 April 2020 two men exchanged messages via Encrochat phones discussing the supply of controlled drugs. The appellant, who was at that time in the Netherlands, offered to supply 5kg of cocaine to the other man, who was in England. Did such conduct constitute an offence contrary to s4(3) of the Misuse of Drugs Act 1971 of offering to supply a controlled drug of class A to another, in contravention of s4(1)? HH Judge Jefferies KC, sitting in the Crown Court at Preston on 24 March 2022, ruled that it did. The appellant then pleaded guilty to that offence. The appellant now applies for leave to appeal against his conviction on the ground that the judge's ruling was wrong in law. His application, which involves a point of law not directly covered by previous authority, has been referred to the full court by the Registrar.

2. The appellant contends that the offence was complete when the offer was made in the Netherlands and that the courts in this country accordingly had no jurisdiction to try it. He further contends that, by ruling otherwise, the judge deprived the appellant of any arguable defence. The appellant thus accepts that, save for the issue as to jurisdiction, his conduct satisfied all the legal ingredients of the offence charged and he has no defence. It is therefore unnecessary to go into any further detail about the facts.

3. It was common ground before the judge, and is before this court, that Part 1 of the Criminal Justice Act 1993 (which makes specific provision as to jurisdiction for certain listed offences) does not apply to this offence, and that accordingly the issue must be resolved on common law principles. The judge identified the principal question as being whether the offer must be communicated to another for the offence to be complete: if so, it was completed in the United Kingdom; but if not, it was completed in the Netherlands. In answering that question, the judge considered a number of decided cases, including the decision of the House of Lords, and in particular the dissenting speech of Lord Morris of Borth-y-Gest, in *Treacy v DPP* [1971] AC 537. He held that the offence requires two actors, the offeror and the offeree, and the effective communication of the offer by the one to the other. He derived support for his view from the words in the statute "offer … to another".

4. The judge concluded that the offence is only made out when an offer is received, "when it reaches the ears/eyes of another", and that accordingly the offer in this case was made in England at the point at which it was received. The offer was therefore made within the jurisdiction.

5. For the appellant, Mr Simon Csoka KC submits that the judge's conclusion was wrong. He submits that the offence is complete when an offer was uttered or sent, a proposition which he submits is supported by the decision of this court in *R v Prior* [2004] EWCA Crim 1147. It follows, he submits, that the offer in this case was made in the Netherlands, not in England, and no offence was committed in this jurisdiction.

6. Mr Csoka further submits that there is no extra-territorial jurisdiction in relation to an offence of contravening s4(1) of the 1971 Act, a proposition which he says is supported by the decision of this court in *R v Hussain (Shabbir)* [2010] EWCA Crim 970, [2010] 2 Cr App R 11. Although Mr Csoka accepts that this court in *R v Smith (Wallace Duncan) (no 4)* [2004] EWCA Crim 631, [2004] 2 Cr App R 17 countenanced the common law giving jurisdiction in this country over inchoate

crimes committed abroad, and intended to result in the commission of criminal offences in England, he submits that that is a limited exception to the general presumption against extra-territoriality and that it cannot assist the respondent in this case, not least because the offence of offering to supply a controlled drug is not an inchoate crime.

7. The principal submission of Ms Annabel Darlow KC, for the respondent, is that the judge was correct to find that the offer was made in England. It is not, she submits, necessary for the prosecution to prove that an oral or written offer was in fact heard or read by the person to whom it is made, provided that the offer has been made available to that person to be heard or read. Ms Darlow submits that, in the circumstances of this case, the offer was only made when the relevant message was received by the other man and available to be read by him. That occurred in England, not in the Netherlands. The judge therefore did not need to consider whether the court had jurisdiction over an offer made in the Netherlands.

8. Ms Darlow submits in the alternative that, if the judge did fall into error, the court nonetheless had jurisdiction because a substantial measure of the activities constituting the offence took place in England. She relies in this regard on the principle endorsed in *R v Smith (Duncan Wallace) (No 4)*.

9. We are grateful to both counsel for their written and oral submissions, which were of a high quality. We have summarised their detailed arguments very briefly, but we have in mind all the points they put forward and we have considered all of the case law to which they referred.

10. We start by setting out the terms of s4 of the 1971 Act. It provides:

> "**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."

11. In *Hussain (Shabbir)* it was held that a supply of drugs to another, if it is to fall within the 1971 Act, must be a supply in this country. That principle, which is based on the presumption that a criminal statute has territorial effect, was stated in general terms. Accordingly, notwithstanding that the offence charged in that case was one of possession of a controlled drug with intent to supply, contrary to s5(3) of the Act, it applies equally to the offence charged in the present case. However, whilst *Hussain (Shabbir)* is authority that the supply must be in this country, we do not accept Mr Csoka's submission that it is also authority that the offer must made be in this country.

12. Further, it is in our view clear that the words used in both s4(1)(b) and s4(3)(a) refer to supply to another: they are not to be read as if they said "offer to another". The judge, with respect, was therefore wrong to support his conclusions on the basis that the Act referred to "offer to another".

13. With those considerations in mind, we would state the ingredients of the offence charged in this case as follows: s4 of the Act requires an offer; it must be an offer to supply to another a controlled drug; and the offered supply must be a supply in this country. The conduct concerned in such an offence is, accordingly, conduct involving an offer to make a controlled drug available in this country.

14. What, then, is required to prove an offer? In our view, what must be proved is that an offer is made to one or more persons in a manner which is capable of being heard (if oral) or read (if written) by the person(s) to whom it is sent, whether or not any person does in fact hear or read it. By way of obvious examples, words spoken quietly to an empty room, or words spoken to the winds, or a text message composed but not sent, could not amount to a offer; but a text message, or bulk text messages, composed and sent to one or more mobile phones can amount to an offer, whether or not there is evidence that anyone actually read the message. It will be a question of fact in each case whether an offer is made. There will no doubt be cases in which the facts and circumstances lead to the conclusion that there has been an attempt to commit the offence, but not the commission of a completed offence.

15. This analysis of what must be proved is consistent with the decision of this court in *R v Prior* [2004] EWCA Crim 1147, in which Auld LJ said at [24], with reference to an oral offer, that the important thing was the effect of the words, they way in which they were said and any other relevant circumstances apparent at the time to the person to whom the offer was made. Those matters plainly cannot be considered if the offer is not capable of being heard or read.

16. The court in *R v Prior* [2004] emphasised more than once that it is a matter for the jury to determine whether what took place amounted in ordinary parlance to an offer

to supply a controlled drug: it is not necessary that the requirements of the law of contract be satisfied. If it did amount to such an offer, the fact that the offer was not genuine – in the sense that the person making it did not in fact intend to supply a controlled drug – is irrelevant.

17. Applying those principles, the appellant made his offer when he composed and sent the relevant message, whether or not it was read by the other man. We therefore accept Mr Csoka's submission that the judge fell into error in ruling that the offer was complete only when it "reached the eyes" of the other man. It follows that the appellant was as a matter of fact in the Netherlands when he made the offer.

18. Was it nonetheless an offence which the courts of this country had jurisdiction to try? The starting point is the general principle of interpretation that there is a presumption against the extraterritorial application of a criminal statute. That presumption may however be displaced by the express terms of a statute or by necessary implication; and in relation to the latter, the mischief against which the statute is aimed, and the public interest, are important considerations.

19. In *Treacy v DPP* the appellant, in the Isle of Wight, sent a blackmail letter to a person in Germany. The House of Lords, by a majority of 3 to 2, held that the offence of blackmail had been committed when the appellant wrote and posted his letter. Lord Diplock, one of the majority, began his speech by emphasising that the question was not whether the English court had jurisdiction to try the appellant on that charge, but whether the facts proved against the appellant amounted to a criminal offence under the relevant statute. He went on to say that the words used in section 21 of the Theft Act 1968 were quite general and could be satisfied wherever the unwarranted demand was made: if, therefore, there was to be implied any geographical limitation, it could only be derived from broader considerations of the purpose of the statute. At pp561-562, Lord Diplock said:

> "The Parliament of the United Kingdom has plenary power, if it chooses to exercise it, to empower any court in the United Kingdom to punish persons present in its territories for having done physical acts wherever the acts were done and wherever their consequences took effect. When Parliament, as in the Theft Act 1968, defines new crimes in words which, as a matter of language, do not contain any geographical limitation either as to where a person's punishable conduct took place or, when the definition requires that the conduct shall be followed by specified consequences, as to where those consequences took effect, what reason have we to suppose that Parliament intended any geographical limitation to be understood?
>
> The only relevant reason, now that the technicalities of venue have long since been abolished, is to be found in the international rules of comity which, in the absence of express provision to the contrary, it is presumed that Parliament did not intend to break. It would be an unjustifiable interference with the sovereignty of other nations over the conduct of persons in their own territories if we were to punish persons for conduct which did not take place in the United Kingdom and had no

> harmful consequences there. But I see no reason in comity for requiring any wider limitation than that upon the exercise by Parliament of its legislative power in the field of criminal law.
>
> There is no rule of comity to prevent Parliament from prohibiting under pain of punishment persons who are present in the United Kingdom, and so owe local obedience to our law, from doing physical acts in England, notwithstanding that the consequences of those acts take effect outside the United Kingdom. Indeed, where the prohibited acts are of a kind calculated to cause harm to private individuals it would savour of chauvinism rather than comity to treat them as excusable merely on the ground that the victim was not in the United Kingdom itself but in some other state.
>
> Nor, as the converse of this, can I see any reason in comity to prevent Parliament from rendering liable to punishment, if they subsequently come to England, persons who have done outside the United Kingdom physical acts which have had harmful consequences upon victims in England. The state is under a correlative duty to those who owe obedience to its laws to protect their interests and one of the purposes of criminal law is to afford such protection by deterring by threat of punishment conduct by other persons which is calculated to harm those interests. Comity gives no right to a state to insist that any person may with impunity do physical acts in its own territory which have harmful consequences to persons within the territory of another state. It may be under no obligation in comity to punish those acts itself, but it has no ground for complaint in international law if the state in which the harmful consequences had their effect punishes, when they do enter its territories, persons who did such acts."

20. Lord Diplock's statements were followed by this court in *R v Smith (Wallace Duncan) (No 1)* [1996] 2 Cr App R 1. The appellant appealed against convictions for offences of obtaining by deception on the ground that, although the deception had taken place in London, the obtaining (said to be the essence of the offence) had taken place in the USA. The court noted that the transfer of funds to a bank in New York was "the only feature of the circumstances which occurred outside England". At pp19-20, Rose LJ said:

> "In our judgment it would be astonishing if the English courts did not have jurisdiction in such a case and certainly there would be nothing inimical to international comity in the English courts assuming jurisdiction. Questions of jurisdiction, though involving substantive law, contain a strong procedural element. There have in recent years been significant advances in electronic communications both within and across national

boundaries. These have brought added sophistication to the ways in which offences involving frauds are committed. The reliance of international banking on ever developing and advancing communications technology has added new weapons to the armoury of fraudsters, especially those whose purpose it is to perpetrate fraud across national boundaries. If the issue of jurisdiction in cases of obtaining is to depend solely upon where the obtaining took place it is likely that the courts, and especially juries, will be confronted with complex and, at times, obscure factual issues which have no bearing on the merits of the case. This Court must recognise the need to adapt its approach to the question of jurisdiction in the light of such changes. In *Liangsiriprasert v. Government of the United States of America (1991) 92 Cr.App.R. 77, 89, [1991] 1 A.C. 225, 250A*, Lord Griffiths, giving the opinion of the Privy Council in a conspiracy case, having referred to the judgment of the Chief Justice of Hong Kong, Roberts C.J. said:

"The passage in *Treacy v. D.P.P. (1971) 55 Cr.App.R. 113, [1971] A.C. 537* to which Roberts C.J. refers is the celebrated discussion by Lord Diplock of the bounds of comity and the judgment of La Forest J. in *Libmen v. R. (1985) 21 C.C.C. (3rd) 206* contains a most valuable analysis of the English authorities on the justiciability of crime in the English courts which ends with the following conclusion at p. 221:

'The English courts have decisively begun to move away from definitional obsessions and technical formulations aimed at finding a single situs of a crime by locating where the gist of the crime occurred or where it was completed. Rather, they now appear to seek by an examination of relevant policies to apply the English criminal law where a substantial measure of the activities constituting a crime take place in England, and restrict its application in such circumstances solely in cases where it can seriously be argued on a reasonable view that these activities should, on the basis of international comity, be dealt with by another country.'"

Lord Griffiths also said at p. 90 and p. 251C:

"Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England."

21. In *R v Smith (Wallace Duncan) (No 4)* a constitution of this court presided over by Lord Woolf CJ held that the court in *R v Smith (Wallace Duncan) (No 1)* had been

entitled to develop the law in the way it did in order to meet the needs of contemporary society. At [56], the court summarised Rose LJ's reasoning as including the following:

> "(ii) For the policy reasons which he identifies, particularly in relation to complex fraud, where there are no reasons of comity which require a different approach, when substantial activities constituting a crime take place in England the court here should have jurisdiction in accordance with the approach indicated by the Chief Justice of Hong Kong, Roberts CJ.
>
> (iii) Thus as to jurisdiction, there does not have to be a distinction in relation to the principles of jurisdiction between different crimes. Conspiracy in inchoate crimes and obtaining by deception can be governed by the same general, less rigid approach."

22. Having considered other, conflicting, decisions, the court followed the judgment in *R v Smith (Wallace Duncan) (No 1)*. In doing so, Rose LJ reiterated, at [61], the point made at [56(iii)]:

> "… it does not necessarily follow that because the broader approach has been developed in connection with conspiracy and inchoate offences the same process of development would not be appropriate in cases involving offences of obtaining by deception. The opinion of Lord Griffiths in *Liangsiriprasert* extending the jurisdiction in relation to conspiracy should not be summarily brushed aside as of no relevance. The message of his opinion as a whole is that the common law must evolve to meet current circumstances."

23. The "substantial measure of the activities constituting a crime" test explained by Rose LJ was again followed by this court in *R v Sheppard and Whittle* [2010] EWCA Crim 65, [2010] 2 Cr App R 26. That case related to a different kind of offence: the appellants had been convicted of publishing material intending to stir up racial hatred, contrary to s19 of the Public Order Act 1986. They had argued that, although their activities had occurred in England, the written material had been uploaded to a website hosted in California, and that the publication therefore fell outside the jurisdiction of this country. Dismissing the appeal, the court held that there was nothing in the 1986 Act to exclude the rule that the Crown Court had jurisdiction to try a defendant if a substantial measure of the activities constituting the crime took place in England. That test accorded with the purpose of the Act, namely to restrict the publication of material intended to stir up racial hatred, and reflected the practicalities of the case where almost everything relating to it had occurred in England.

24. Mr Csoka has pointed to distinctions between the facts and circumstances of each of those cases and the facts and circumstances of the present case. We accept that there are differences. In our view, however, they do not affect the principle which those cases recognise. We see no reason why that principle should not extend to a case such as the present. We have considered Mr Csoka's submission that the

extraterritorial jurisdiction provisions of the Criminal Justice Act 1993 were enacted precisely because of the territorial limitations of the common law. We are not, however, persuaded by that submission, given that in the years since the 1993 Act came into force *R v Smith (Duncan Wallace) (No 4)* and *R v Sheppard and Whittle* have developed the common law in the way we have summarised.

25. We are therefore satisfied that it is necessary and appropriate, in circumstances such as arise in this case, to consider the purpose of the statute concerned and the mischief at which it is aimed. The purpose of the 1971 Act is the control of dangerous or harmful drugs, and the mischief at which it is aimed is, or includes, the supply and possession of such drugs in the United Kingdom. The supply of drugs inevitably involves a chain of transmission by which controlled drugs pass from their source to a user in the United Kingdom. The purpose of the statute is not achieved, and the mischief at which it is aimed is not met, if the courts of this country are denied jurisdiction at one stage of that chain of transmission. As Lord Thomas CJ said in *R v Martin* [2014] EWCA Crim , [2015] 1 WLR 588 –

> "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."

26. In our judgement, the policy principles underlying the 1971 Act apply throughout that process. Mr Csoka acknowledged that a person who engaged abroad in a conspiracy to supply drugs into this country could in principle be tried in this country for that conspiracy; and he was prepared to accept that activities in another country might be capable of constituting an offence of attempting to supply a controlled drug in the United Kingdom. That being so, we can see no reason why a different approach should be taken to the antecedent stage in the process of an offer to supply. The anomalous consequences of drawing such a distinction are illustrated by the present case: the appellant was originally charged with an offence of conspiracy to supply a controlled drug, but the view was taken (for reasons which were not made clear to us) that such a charge was evidentially weak and that it would be preferable to charge the appellant's conduct as an offence of offering to supply.

27. It is also necessary and appropriate to reflect on whether any considerations of international comity militate against the courts of this country trying a defendant for activities abroad such as occurred here. Given that the offer was an offer to supply controlled drugs in the United Kingdom, we see no reason why any such considerations should militate against the courts doing so. On the contrary, we would expect every state to wish to be able to prosecute those whose conduct is aimed at bringing dangerous drugs into its territory. Moreover, all states have an interest in trying to stop the international trade in dangerous drugs.

28. We are therefore satisfied that, if the judge had held that the offer was made when the appellant was in the Netherlands, he would then have had to consider whether a substantial measure of the activities constituting the crime charged took place in the United Kingdom.

29. If the judge had considered the "substantial measure" test, we have no doubt he would have concluded that it was satisfied in the circumstances of this case. We regard the

following features of the case as important considerations. The mischief at which the 1971 Act is aimed is, as we have said, the unlawful possession and supply of controlled drugs in the United Kingdom. The appellant has accepted that his offer was an offer to supply cocaine in England. The harm which would be caused by the offered supply of controlled drugs would therefore be suffered in the United Kingdom. The man to whom the offer was made was as a matter of fact also in England. In those circumstances, a substantial measure of the activities constituting the crime did in our judgement take place in England.

30. Although the offence was committed when the relevant message was composed and sent from the Netherlands, it would in our view be artificial to regard the intended destination of the drugs as irrelevant. We reiterate that the purpose of the Act is the control of dangerous drugs, in the United Kingdom, and the making of an offer to supply controlled drugs in the United Kingdom is part of the conduct of the offence created by s4(3). The appellant did not, for example, offer to supply controlled drugs in the Netherlands. It would be equally artificial, and wrong, to focus only (as Mr Csoka invites us to do) on the moment when the relevant message was sent, ignoring the fact that the message was an offer to supply drugs in England. The artificiality becomes the greater when one takes into account Ms Darlow's submission that in text-based communications a message may be received at almost the same time as it is sent. Such artificiality could lead to absurd results. It could deprive the courts in this country of jurisdiction to try conduct which would have its criminal and harmful consequences in this country, and could do so regardless of whether the country from which the message was sent would be willing or able to prosecute the accused. Further, we see no basis on which it could be said that recognising the jurisdiction of the English court in these circumstances would be contrary to principles of international comity.

31. For those reasons, we are satisfied that, although the offer was made from the Netherlands, the "substantial measure" test was satisfied and the Crown Court had jurisdiction. When the offer was made from the Netherlands, the conduct of offering to supply controlled drugs in the United Kingdom was complete and the offence contrary to s4(3) of the Act was committed. Accordingly, whilst we have respectfully found that the judge fell into error in his reasoning, his decision was correct. The conviction is accordingly safe, and this appeal is dismissed.