Neutral Citation Number: [2023] EWCA Crim 368

Case No: 202201705 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LUTON
His Honour Judge Evans

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 April 2023

Before:
LADY JUSTICE MACUR
MR JUSTICE FRASER
and
MR JUSTICE BUTCHER

- -

Between :
REX
- and -
OLEKSANDR ROMANENKO — **Applicant/ Appellant**

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Judgment

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Mr Jason Cross (instructed by **Cantaris Locke Solicitors**) for the **Appellant**
Mr Ian Hope and **Ms Lisa Goddard** (instructed by **CPS**) for the **Respondent**

Hearing date: 22 February 2023

This judgment is to be handed down by the judge remotely by circulation to the parties' advisers by email and release to the National Archive.
The date for hand-down is deemed to be 5 April 2023.

Mr Justice Fraser:

1. This is an application for an extension of time of 82 days in which to seek leave to appeal against conviction, which was referred by the Single Judge directly to the Full Court. At the end of the hearing on 22 February 2023, during which we considered that application, the application for permission to appeal and the consequent appeal in respect of count 2, we allowed the appeal against conviction with reasons to follow. This judgment contains those reasons.

2. We received written and oral submissions from Mr Cross for the applicant/appellant, and also by Mr Hope and Ms Goddard for the prosecution, all of whom appeared at the trial below. We are grateful to them for their assistance. We shall refer to Oleksandr Romanenko as 'the appellant' throughout this judgment for convenience.

3. On 10 February 2022, in the Crown Court at Luton before His Honour Judge Evans, the appellant, who was aged 33, was unanimously convicted by the jury on two counts. The first count was one of being concerned in the supply of a controlled drug of class A, contrary to section 4(3)(b) of the Misuse of Drugs Act 1971. The second count was that of possessing criminal property, contrary to section 329(1)(c) of the Proceeds of Crime Act 2002. Count 1 had originally been charged on the indictment as a count of conspiring to supply controlled drugs of class A. The indictment was amended during the trial, following a successful submission of no case to answer by Mr Cross; the outcome of that application was to remove the charge of conspiracy to supply class A drugs, and replace it with a count of being concerned in the supply of class A drugs, upon which the appellant was convicted. The drugs in question were cocaine and the criminal property was cash, namely approximately £117,000 which was found in a car being driven by the appellant when he was stopped by the police. That money was contained in two places in the car. The significant proportion of it (approximately £112,000) being in a rucksack found in the boot of the car; and a smaller amount of over £4,000 being contained in an envelope, that was found in a pocket on the back of one of the front car seats.

4. On 3 January 2023, the appellant was sentenced to 5 years' imprisonment upon count 1 and 2 years' imprisonment concurrent upon count 2. There are two grounds of appeal; in summary the first ground relates to the amendment of count 1 on the indictment, and the second ground relates to the conviction on count 2.

5. Other defendants relevant to the conspiracy that was originally charged were as follows. George Hyde pleaded guilty to four counts, namely conspiracy to supply cocaine, conspiracy to supply cannabis, transferring criminal property and possession of cocaine with intent to supply. He was sentenced to 8 years' imprisonment. Another conspirator, Michael Southall, pleaded guilty to conspiracy to supply cocaine and was sentenced to 11 years' imprisonment. They both pleaded guilty before trial and therefore took no part in the trial. The case for the prosecution was that they were at the centre of the conspiracy, assisted by the other defendants, including the appellant, who denied their involvement.

6. Of the other defendants, Salman Butt was convicted of two counts of possessing criminal property and sentenced to 4 years' imprisonment. Another defendant, Steven Rose, was acquitted of possessing criminal property.

7. The original count 1, namely that of conspiracy to supply class A drugs, was one upon which the appellant was jointly charged with Rose, as being part of the conspiracy together with Southall and Hyde. The earlier guilty pleas by Southall and Hyde established a conspiracy in which at least they had been engaged. The principal issue for the jury was whether the appellant, and/or Rose, were part of that conspiracy with Hyde and Southall.

Background facts

8. On 18 December 2020, the appellant drove to Old Silsoe Road, Clophill, and met Hyde, who was already under police surveillance. Hyde had been observed leaving his property carrying a rucksack. Hyde got into the appellant's car and gave him the rucksack before leaving the vehicle. The appellant drove away; police officers stopped him a short time later. His car was searched and officers recovered the rucksack. It was found to contain £111,935 in cash. A further £4,355 was recovered in a white envelope in a pocket behind the front passenger seat. The prosecution case was that the money recovered was the proceeds of drug dealing or was payment for drugs. Alternatively, it was said that if the appellant was not involved in the conspiracy, he either knew or suspected that the money was the product of criminal activity, it was being given to him to launder and he was therefore guilty of a money laundering offence. The presence of the cash recovered from the car was therefore integral to the way that both counts against the appellant were put by the prosecution.

9. The prosecution evidence included agreed facts of the guilty pleas of Hyde and Southall, and their involvement in the conspiracy in dealing cocaine. It was the prosecution case that the appellant's meeting with Hyde matched the pattern of Hyde's previous meetings with others who were involved in the conspiracy. The evidence concerning the recovery of the money in the rucksack given to the appellant by Hyde was agreed and the prosecution sought the drawing of an adverse inference from the appellant's silence at interview following arrest

10. At the close of the prosecution case, on 3 February 2022, Mr Cross made a submission of no case to answer in relation to count 1, on the basis that there was no evidence connecting the appellant to the conspiracy; and that the appellant's meeting with Hyde on the single occasion and taking the rucksack were not evidence of his involvement in any conspiracy.

11. The judge rejected the prosecution submissions to the contrary. He observed that a "perfectly proper inference" in the circumstances was that the money was the proceeds of criminal activity, but that, "there is no other evidence, for instance telephone evidence or that sort of thing that either [Rose and/or the appellant] were involved…in the wider conspiracy with other people". He concluded that for both Rose and/or the appellant to be guilty of conspiracy, they "must know that there is in existence a scheme which goes beyond the illegal act which he agrees to do, and the same principle, of course, applies to the case of [the appellant]".

12. Consequently, the prosecution made an application to amend count 1 of the indictment, to charge the appellant with being concerned in the supply of cocaine contrary to the same section of the Misuse of Drugs Act. Mr Cross made a cross application to discharge the jury. He submitted that, as a result of the case initially proceeding on a charge of conspiracy against the appellant, evidence before the jury

concerning the admitted conspiracy between Hyde and Southall was inadmissible as regards the proposed amended count 1 and was highly prejudicial to the appellant. Further , he submitted that the appellant's case had been prepared and conducted to meet the charge of conspiracy to supply class A drugs, and the shift in the prosecution's case against the appellant caused unfairness.

13. The judge decided that no prejudice would be caused to the appellant by the proposed amendment since "the evidence that's been put before the jury so far, is the evidence that would be relied upon, and it may be that Mr Romanenko in that sense is in rather a better position than he had been before I came to this judgment." The second count remained as before, namely one of possessing criminal property, contrary to section 329(1)(c) of the Proceeds of Crime Act 2002. He refused the application to discharge the jury, finding that there was no unfairness and that the evidence in relation to Hyde and Southall and other features of that conspiracy would have been admissible against the appellant under the bad character provisions in any event.

14. Significantly, as regards the second ground of appeal, during the prosecution submissions on the application of no case to answer, count 2 was expressly described as an alternate count to the, then charged, conspiracy in count 1. We note the following exchanges between Mr Hope and the judge in discussing what the evidential difference was between the two counts:

"MR HOPE: Well, the way that we've put it is – that we're putting it that Mr Romanenko has been paid basically for the drugs. And if the jury agree with that, the reason he's taken £111,000 direct from Mr Hyde is that represents payment for cocaine ---
JUDGE: Right. So ---
MR HOPE: --- then that is part and parcel, we say, of count 1. If that's wrong and he's merely – it's boxed off, it's merely laundering money ---
JUDGE: Yes.
MR HOPE: --- we'd have to see what he has to say about it.
JUDGE: So count 2 is an alternative, is that what you're telling me?
MR HOPE: It's effectively an alternative, yes. I think in fairness, I opened it pretty much as that. I think I used the phrase, "in any event " or "even if that's not right. "
JUDGE: All right. Well, I ---
MR HOPE: It's effectively – yes."
(emphasis added)

Subsequently:
"MR HOPE: It's effectively an alternative is how I would put it. I understand that we haven't got to discussing how the jury are going to be directed yet. But I can well understand how the court might say if you convict of count 1, there's no requirement to return a verdict in relation to count 2. Because his involvement in count 1 is caught up with the accepting of the bag. I accept that.
JUDGE: Well, I think it's more acute than that. I think what you've just explained to me, if he was guilty of count 1 he couldn't be guilty of count 2. It's either payment or it's money laundering. It can't be both, can it? Because it's the same amount – it's the same money."
(emphasis added)

15. In the ruling on the application of no case to answer, the judge said:

> "[The appellant] was in possession of criminal property, on the Crown's case. By any definition, that was either payment for or the proceeds of wholesale drug dealing amounts, the very amounts that Hyde has admitted, and it's open to the jury properly to conclude that that money related to Hyde's cocaine wholesaling. The division of the money is suggestive of a payment to Romanenko for either selling drugs to Hyde or for taking money from Hyde to launder. In view of the high amount of cash it's open to the jury, in my judgment, to infer that it was payment for drugs, for cocaine. If they not sure, it would be open to them to consider the alternative of being in possession of criminal property. But in the case of Romanenko the same principles with regard to the conspiracy count apply. There is no evidence that he was involved before or after the date that we're concerned with. There's no telephone evidence suggestive of a relationship beyond this period and, in my judgment, no proper evidence from which the jury could conclude or infer that he had an awareness of the particular conspiracy that Hyde was involved in, together with Southall and the others." (emphasis added)

16. The issue for the jury on count 1 was whether the appellant was concerned in the supply of cocaine; the issue on count 2 was whether he knew or suspected that the money was the product of criminal activity.

17. The defence case was that the appellant believed that both the sums of money recovered, namely the £111,935 in the rucksack and the £4355 in the envelope, were from legitimate sources and he did not know or suspect that they were the product either of drug dealing or wider criminal activity. The appellant gave evidence in his own defence. He stated that the £111,935 belonged to a friend in Ukraine. His friend had told him that he had earned the money from the sale of cryptocurrency, and the friend had asked the appellant to collect the money and deliver it to a company who would then deliver it to Ukraine. The appellant said that he agreed to do this. He also explained that the £4355 was given to him by another friend, who had asked him to arrange for it to be delivered to her parents in Ukraine.

18. In summing up the case to the jury, the judge correctly identified the prosecution case that the two counts were alternatives, saying:

> "The prosecution say that there are only two possibilities. Either the money in his car was from the sale of drugs, plus the smaller amount payment for him, his part in that sale, or that it's money earned from the sale of drugs, by Hyde for instance, that Mr Romanenko is in the business of laundering. In either case, the prosecution say that the money does constitute a person's benefit from crime, and Romanenko knew it. He'd either sold the drugs, or he was laundering the money. Both were criminal activities and he knew it. That's the prosecution case."

19. However, this was not made clear in the Route to Verdict document provided, and in the event the jury convicted the appellant of both counts.

20. The amended Grounds of Appeal assert that the judge was wrong:

> (1) to allow the prosecution to amend the indictment to add a count of being concerned in the supply of cocaine. This allowed the prosecution to shift its ground considerably; led to a real risk of injustice by depriving the appellant of the proper opportunity to

consider and meet the prosecution case; and there was no evidence upon which the jury could safely conclude that the appellant played some part in an enterprise to supply cocaine.

(2) to direct the jury that they could convict the appellant if they concluded that he knew the money was payment for drugs or criminal property, which contradicted the prosecution case that count 2 was an alternative count. Moreover, it was unfair to the appellant because it allowed the jury to treat the counts as cross-admissible rather than as alternatives.

21. Ground one was expanded upon in terms that since the agreed facts concerning Hyde and Southall implicated the appellant in a conspiracy, it had been in his interest to agree the facts at the start of trial. However, that evidence of the conspiracy between the others was irrelevant to the amended count 1 and highly prejudicial. The appellant was unable to remedy this unfairness. Therefore, the judge should not have allowed the prosecution to add the new count or should have discharged the jury.

Discussion

22. It is clear that the amendment of count 1 was to reflect two things. First, as the judge found, the lack of any evidence that the appellant had been involved in the conspiracy. Secondly, that the judge considered that there was sufficient evidence for a jury, properly directed, to find that the appellant was guilty of the underlying substantive drugs offence that reflected the evidence concerning his involvement including his dealing with Hyde. That is, whether or not he was involved in a conspiracy, there was sufficient evidence of him being concerned in the supply of class A drugs.

23. We are not persuaded that this was a "shift of ground" by the prosecution, as is argued by Mr Cross. Rather, it is more accurately described as a narrowing of the prosecution case to the substantive offence.

24. The power to amend an indictment arises under section 5(1) of the Indictments Act 1915:

"Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice."

25. Criminal PD10A "The Indictment" provides:

"Where the prosecutor wishes to substitute or add counts to a draft indictment, or to invite the court to allow an indictment to be amended, so that the draft indictment, or indictment, will charge offences which differ from those with which the defendant first was charged, the defendant should be given as much notice as possible of what is proposed."

26. All will depend upon the facts of any particular case, the stage of the trial at which the amendment is sought, and the nature of the amendment. Here, the amendment narrowed down, rather than changed or shifted, the nature of the case that the appellant had to meet. This was done at the close of the prosecution case and it was made clear to the

jury there was no basis for count 1 as originally charged, and the jury formally returned a not guilty verdict on that count. In those circumstances, we are unpersuaded that there was any injustice or prejudice to the appellant.

27. Mr Cross relies upon ***R v Gregory*** [1972] 1 WLR 991. In brief, the defendant, a police officer, was convicted of handling stolen property. The count on the indictment had originally stated that the 'property' – a starter motor - was the property of someone called Wilkes. At the conclusion of the defence case, the judge deleted the words in the indictment which identified the details of the alleged owner of the property, leaving the charge that the starter motor had been stolen. The defendant argued that the only case which the defence had dealt with at trial was that alleged by the Crown at the commencement of the trial, namely that the motor had belonged to Wilkes. However, after the count had been amended, the jury were directed that they could convict if they were sure that the starter motor was the property of some unknown person. The Court of Appeal held that because the starter motor was of such a common and everyday kind, it was necessary for the indictment to provide details of who was said to have actually owned it when bringing a charge of handling it as stolen goods. Edmund Davies LJ, giving the judgment of the Court, held that:

"We do not agree with the view of the recorder that in the present case the assertion as to ownership contained in the particulars of count 8 were mere surplusage. It was desirable that they should have been inserted, they were properly inserted, and they informed the defence of the nature of the case and the only case that the Crown set out to establish, a case which (for the reasons we have already indicated) later dissolved into thin air. Accordingly we do not think that the recorder was justified in allowing the amendment to be made, although it is true that a very extensive power of amending is conferred upon the court by section 5 of the Indictments Act 1915. But, quite apart from the question as to whether the amendment permitted in this case was a proper one or not, this court is strongly of the view that to allow it at so late a stage was to run the risk of injustice being done…."

28. In our judgment, that was a decision on the specific facts of the case and is wholly distinguishable from this case. The amendment in that case changed the entire nature of the case that the defendant had to meet and was made *after* all the evidence had concluded. The injustice was obvious. In this case, the later, narrower, ground was founded on the same evidence and did not change the focus of the defence.

29. Indeed, in our judgment, the jury would have been entitled to convict the appellant of the amended charge even if there had been no amendment of the indictment if they were sure that he was guilty of the charge of supplying class A drugs, pursuant to section 6(3) of the Criminal Law Act 1967. That is, the elements in the unamended count 1 on the indictment amount to or include the elements of the amended offence. See ***Blackstones' Criminal Practice 2023*** at D19.42 and ***R v Lillis*** [1972] 2 QB 236,

30. Section 1 of the Criminal Law Act 1977 (as amended by the Criminal Attempts Act 1981) provides that:

"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."

31. Evidence admissible against two or more conspirators is admissible against them all, without there necessarily being any direct connection between all of the other conspirators; see section 118(1)(7) Criminal Justice Act 2003

32. Once count 1 was amended, not all of the agreed facts concerning Hyde and Southall were relevant in the case against the appellant. However, that did not mean that it was unfair for the judge to permit the amendment of the indictment. In his summing up, the trial judge addressed the jury solely in relation to the agreed position regarding Hyde; he was the person who had passed the rucksack to the appellant and his plea of guilty and conviction as a drug dealer were plainly admissible on the amended count 1 against the appellant.

33. The jury already knew that the conspiracy count could not proceed and had been directed to find the appellant not guilty on that count following the submission of no case to answer. That, together with the directions given relating to the agreed facts, ensured there was no unfairness or prejudice to the appellant. There was no good basis to discharge the jury.

34. There was plainly evidence upon which the jury could conclude that the appellant had been involved in the supply of cocaine: he had received a very large amount of money in cash in the rucksack from a man with extensive drug connections, who had accepted that he was involved in a conspiracy to supply class A drugs.

35. There is no merit in this ground. We refuse the application for permission to appeal. The necessity to consider an extension of time falls away.

The second ground of appeal

36. Alternative counts can arise in different circumstances. Some more serious offences contain within them the elements of lesser offences, for example, a charge under section 18 of the Offences Against the Person Act 1861 ("OAPA 1861"), causing grievous bodily harm with intent to cause such an injury, includes the lesser offence of inflicting grievous bodily harm under section 20 OAPA 1861.

37. A separate alternative count will not always appear separately on the indictment, but the jury will be directed that the lesser offence is an alternative as appropriate. This type of situation is described in ***Blackstone's Criminal Practice 2023*** at D19.71 as "not strict alternatives" but "counts of descending gravity".

38. In ***R v McEvilly*** [2008] EWCA Crim 1162, a defendant had attacked his victim, whom he stabbed many times. He was charged with three counts; attempted murder, an offence under section 18 OAPA 1861 and also an offence under section 20 OAPA 1861, each in the alternative. All of the offences arose out of the same attack by him.

The defendant pleaded guilty to the section 20 offence, then stood trial on the other two counts. He was convicted of the section 18 offence shortly after the judge had given the majority direction. The judge then asked the jury, having taken that verdict, whether, if they were given more time, there was a reasonable prospect of their reaching a majority verdict on count 1, which was the charge of attempted murder. The jury said that there was; they retired again, and then returned a guilty verdict on that charge too. As Keene LJ observed in the Court of Appeal:

"[9] The result of the procedure adopted in this case is that the applicant now has a record which shows convictions for attempted murder, section 18 wounding with intent and section 20 wounding, when all those charges had been laid in the alternative…."

39. He went on to state:

"[12]….. Where there are two charges in the alternative on the indictment arising from the same facts, and with one more serious than the other, the judge should not take a verdict on the less serious count until finality has been reached on the more serious charge. Such finality may take the form of a not guilty verdict, or a decision to discharge the jury on that count because there is no realistic prospect of agreement on a verdict. If this course is not followed, then there is a serious risk of the very situation arising which arose here, with charges in the alternative leading to a multiplicity of convictions. That, as this court pointed out in the case of ***R v Harris*** [1969] 1 WLR 745 cannot be right. It is not right."

40. In ***R v Harris*** [1969] 1 WLR 745 the defendant had been charged with both indecent assault and buggery against a 14 year old boy, arising from the same facts. In giving the judgment of the Court in quashing the conviction on the lesser charge, Edmund Davies LJ stated:

"It does not seem to this court right or desirable that one and the same incident should be made the subject-matter of distinct charges, so that hereafter it may appear to those not familiar with the circumstances that two entirely separate offences were committed. Were this permitted generally, a single offence could frequently give rise to a multiplicity of charges and great unfairness could ensue."

41. In the extant case, the two counts are not ones of descending gravity, but rather arise because the case had been opened and prosecuted as alternative counts.

42. However, by the time the jury came to be directed, and the route to verdict document provided, the alternative nature of the two counts appears to have been either forgotten or swept up in events. Although the judge distributed his proposed draft directions of law and route to verdict by email in good time, counsel agreed the contents of both despite the fact that both prosecution and defence had proceeded on the basis that the counts were alternatives. Counsel ought to have submitted that if the jury convicted the appellant on count 1, count 2 would not arise. We regret that the trial judge did not receive the assistance that he was entitled to expect from counsel in this regard.

43. We do not wish this judgment to be interpreted as stating any proposition that a drug dealer, caught with a substantial amount of cash, cannot be charged in respect of their alleged drug dealing and concerning their possession of 'criminal property'. Each case depends upon its own facts. On the specific facts of this case , there could have been

two charges brought against this appellant, not least as there were two packages of money found in his car in different locations and packaging. However, there was no differentiation between those two sums of money in the way that the case was advanced by the prosecution at trial, and despite Mr Hope's efforts to explain to us (notwithstanding the way that the case was opened at the trial) how the jury's verdicts on both counts 1 and 2 could potentially stand together, this is not an exercise in which he engaged before the jury. In these circumstances, we conclude that once the jury had returned their verdict on count 1, a verdict should not have been taken on count 2, but neither counsel intervened. The verdict was 'irregular'. However, and for the avoidance of doubt, this irregularity does not render the conviction on the amended count 1 unsafe.

44. Consequently, we are persuaded that there is merit in the application for permission to appeal the conviction following the guilty verdict returned on count 2. We grant an extension of time in which to make the application in the circumstances we refer to below, and allow the appeal and quash the verdict on count 2.

45. The failure to lodge the notice of appeal within time is not the fault of the appellant, it is the fault of the appellant's legal representatives. Mr Cross mistakenly thought that he had sent an email with the relevant documents to his solicitors, but he had not done so. The appellant's solicitors were waiting for the advice on appeal so that Form NG1 could be lodged, and were therefore waiting for the documents; they did not realise that Mr Cross had finished, but not sent, them. This situation would have been avoided had Mr Cross sought an acknowledgement when he sent the documents; in future, that would be good practice when documents have to be filed by particular deadlines. A failure to receive any acknowledgement would highlight to counsel that the documents required by solicitors had not been received.