

Neutral Citation Number: [2019] EWCA Crim 904

Case Nos: 201804043; 201803630; 201803611

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM PORTSMOUTH CROWN COURT
HHJ MELVILLE QC
T201771714/T20177196

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/06/2019

Before:

LADY JUSTICE THIRLWALL DBE
MR JUSTICE FRASER
and
SIR DAVID FOSKETT

Between:

- 1. ADAM FOSTER**
 - 2. LEE SHEEHAN**
 - 3. JAMES HALLETT**
- and -**
REGINA

Appellant

Respondent

(Transcript of the Handed Down Judgment.
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Ms Ruth Becker (instructed by **Registrar of Criminal Appeals**) for **Adam Foster**
Mr Sebastian Gardiner (instructed by **Registrar of Criminal Appeals**) for **Lee Sheehan**
Mr Glenn Harris (instructed by **Registrar of Criminal Appeals**) for **James Hallett**

Hearing date: 16 May 2019

Judgment
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SIR DAVID FOSKETT:

1. Defendants by the names of James Whistler, Adam Foster, James Hallett, Billy Fitzearle, Lee Sheehan and Charlie Jeacock were charged on an indictment containing various counts to be tried in Portsmouth Crown Court in June 2018.
2. All were charged in counts 1 and 2 between 30 September 2015 and 2 April 2016 of being concerned in the supply of cocaine (count 1) and diamorphine ('heroin') (count 2). Hallett was also charged in counts 3 and 4 of possessing on 1 April 2016 a quantity of cocaine (count 3) and a quantity of diamorphine (count 4) with intent to supply to another. Jeacock faced similar allegations as those faced by Hallett in counts 5 and 6.
3. Prior to the trial before HHJ David Melville QC and a jury commencing on 4 June 2018 Jeacock had pleaded guilty to counts 1 and 2 and Fitzearle had changed his plea to guilty on counts 1 and 2. All the other defendants pleaded not guilty.
4. After a trial lasting 7 days, on 15 June 2018 Whistler was convicted on Count 2 and Foster, Hallett and Sheehan were each convicted on counts 1 and 2. Hallett was additionally convicted on counts 3 and 4.
5. On 2 August 2018, Whistler was sentenced to 4 years' imprisonment, Hallett to concurrent terms of 14 years' imprisonment with no separate penalty on counts 3 and 4, Fitzearle to 4 years and 6 months' imprisonment, Sheehan to concurrent terms of 10 years' imprisonment and Jeacock to concurrent terms of 7 years' imprisonment. Foster did not surrender to his bail on that occasion and was sentenced on 4 September 2018 to concurrent terms of 7 years' imprisonment and a concurrent 3-month term for failing to surrender to bail.
6. Foster and Sheehan appeal against sentence by limited leave of the single judge, Foster confining himself to that limited leave, Sheehan relying upon that leave, but also seeking to renew his application for leave on the grounds that were rejected by the single judge. Hallett renews his application for permission to appeal on all grounds.
7. Ms Ruth Becker appeared for Foster at the hearing of the appeal, as did Mr Sebastian Gardiner for Sheehan. Mr Glen Harris appeared for Hallett on his application. The single judge had wisely directed that a Respondent's Notice be served by the Crown to respond to the points advanced on behalf of the appellants/applicant. It was prepared by Mr Tom Wilkins, counsel for the Crown at the trial. We express our appreciation to all counsel for their assistance although it is to be noted that the respondent was not represented at the hearing before us and, accordingly, we did not have the benefit of any oral response to the submissions made.
8. With the exception of Whistler, who was concerned only in count 2, each of the other defendants played a role in both offences. The judge, who had been the trial judge, said that he had "no hesitation in concluding that this was a Category 1 operation" and not simply "a series of trades to end users". Although Ms Becker on behalf of Foster does not challenge that conclusion, her focus being on the level of Foster's participation (for which leave to appeal was granted), Mr Gardiner and Mr Harris do seek to challenge that conclusion although the single judge had refused leave to appeal on this ground.

9. In order to be sure that this was properly to be regarded as a Category 1 operation the judge needed to be satisfied that the indicative quantity of drugs involved either in count 1 or count 2 or both combined was 5 kgs.
10. Given the proposed challenge to the judge's conclusion, we need to refer to his reasoning that led to his conclusion. Before doing so, it is necessary to summarise the Crown's case. It is to be noted that, notwithstanding the way in which the case was advanced, the allegation in counts 1 and 2 was of "being concerned in the supply" of Class A drugs, not conspiring as such to supply such drugs. It was presented as a joint enterprise case. In the circumstances of this case, it does not seem to us that much, if anything, turns on this distinction. Mr Wilkins' opening note suggested that these three, along with others, "together formed a syndicate concerned in the supply of crack cocaine and heroin within the Hampshire area over a period from October 2015 to April 2016." From March 2016 he suggested that -

"... the supply was controlled by a mobile telephone line ending in the numbers "2880". A handset operating that number was recovered from Jeacock when he was arrested."

11. The prosecution case was that "the enterprise was managed by Hallett with the others involved in different aspects of the day-to-day running of the business." The case advanced in relation to Fitzearle and Jeacock is that the former was the latter's regular driver when individual transactions were conducted and that Jeacock was "the syndicate's trusted courier and front man." Jeacock lived at 52 Harbour Towers in Gosport and it was from that address that Fitzearle collected him. They were observed by police officers on a number of occasions when individuals approached the car with money being given to Jeacock in exchange for something handed over by Jeacock. The inference was that Class A drugs were being supplied, an inference confirmed by the guilty pleas of Jeacock and Fitzearle.
12. The case against each involved in the proceedings before us was summarised in the opening note as follows:

Hallett

He was arrested on 1 April at a property known as 6 Meon Mews in Cosham, the address of Foster when a search warrant for that address was executed. He had £330 cash on him and crack cocaine and heroin with a value of approximately £150,000 was found at the premises. Police also found in excess of £4,000 cash there, together with benzocaine, used for cutting drugs. His fingerprints were found on a carrier bag in the kitchen and on packaging for ½ kg of very high grade heroin, at import purity level, found in that bag. The police also found premium quality, uncut cocaine. His fingerprints were also found on the wrapping of drugs which were found on Jeacock when arrested. Hallett had the most telephone contact with the others and the Crown's case was that he was at the centre of the telephone traffic because he was at the heart of the "conspiracy" (incidentally, the word used in the opening note). He was found with the main quantities of cash and drugs and was directing the others. He did not actually conduct any transactions but was telling others what to do and using 6 Meon Mews to warehouse his supplies. A figure of approximately £11,000 was paid into his bank account over a one year period. During the surveillance period between mid-February and 1 April, Hallett was seen passing money to Jeacock on March 10, when Jeacock

was being driven by Fitzearle. It was the prosecution case that he would have been passing on money from a customer and taking the drugs to give to them, rather than actually buying them for himself.

Foster

He was not present when the search warrant was executed and he handed himself in to the police on 6 April 2016. He provided a prepared statement saying that he had left his keys with someone else who was living at the address and that he did not know Hallett was in his address at the time the warrant was executed. He was interviewed subsequently in April 2017 and in a prepared statement said that from early 2016 to December 2016 he was a heroin addict. He would inject up to £40 worth per day. He funded his drug habit through his work as a tree surgeon until he could no longer work. He moved into 6 Meon Mews in late 2015. He moved out of the property in April 2016 following the police raid. However, his role was said by the Crown to assist the syndicate by letting his premises be used to warehouse the drugs.

Sheehan

The Crown suggested that Sheehan assisted the syndicate by driving Jeacock. The specific occasion on 1 April was when Fitzearle met with Jeacock who was a passenger in a car registered to and driven by Sheehan. Fitzearle returned home but police followed Sheehan's car. An exchange was observed between Jeacock and another person in Gosport. The car was then stopped by the police. Jeacock was found in possession of heroin and cocaine, as well as £1,170 cash. Sheehan was in possession of £320 cash. Jeacock had two mobile phones on his lap and another in his bag. In the console of the car was a Nokia mobile and an iPhone was strapped to the rear view mirror, being used as a Sat Nav. This was the occasion when Jeacock and Sheehan were arrested.

13. That, in summary, is what was in the opening note. It was made clear that it did not contain "the totality of the Crown's case at trial". As would be expected, there was a good deal of evidence about the mobile telephone links between the various defendants and others, particularly those wanting to purchase drugs. We have mentioned the 2880 'phone above in respect of which cell-site evidence showed it to be travelling to meet people and to drop off drugs. The jury was given a document showing known drug users who had been in contact with the telephone during March.
14. Additionally, analysis of a 'phone attributed to Sheehan, which was active on 19 November 2015 for one message and then fully active from 17 March 2016 to 1 April 2016, showed that the 'phone had been in contact with seven other phones investigated in the investigation (including those attributed to Hallett, Jeacock, Foster and Fitzearle) 134 times, 48 of which were initiated by Sheehan's phone. Analysis of a 'phone attributed to Foster, active between 25 March 2016 and 1 April 2016, showed that the number was one which was stored in one of the 'phones seized from Jeacock and was stored in 'phones attributed to Hallett, Sheehan and Fitzearle. The number had been in contact with seven other phones involved in the investigation 254 times, 106 of which were initiated by Foster. A total of three mobile phones were attributed to Foster and were shown to have been in contact with all the other defendants 505 times with 189 calls having been initiated by Foster's 'phone. Finally, Analysis of Hallett's mobile 'phone showed that he had been in contact with 11 other 'phones involved in the

investigation 1414 times, with 872 of the calls being initiated by his 'phone, and the contact encompassed all the other suspects in the investigation.

15. That there was continued close contact between the various defendants was plainly established by the telephone evidence to which we have referred and to the meetings there were between them. A perfectly reasonable inference from all this evidence is that each knew that he was involved in a Class A drug-dealing operation. The initial question for the purposes of the appeals/applications before us is the scale of that operation. Can it fairly be said to come within Category 1?
16. The answer to that question is to be derived from a number of factors, one of which is the length of time it can be shown that the defendants were operating together. Plainly what was observed by the police during the surveillance period can only be a snapshot of what happened if there is evidence that the defendants had been operating together over a much longer period of time. The judge concluded that, by taking the period of observation and the amount which was found together, there was "well over one kilo of Class A drugs which had been either traded or stored when the police raided on 1 April." That conclusion is, we understand, derived from aggregating the quantities of drugs found at both premises to which we have referred. We do not understand that there is any substantial complaint about that conclusion. If there is, we reject it. It seems to us entirely justified by the evidence. However, the judge went on to say that "this supply had been going on for many months before that."
17. He reached that conclusion by expressing himself in this way: that the probability was that the plan was "well afoot by July 2015 because in that time [Sheehan], who was still at that stage in custody, received an unusual amount of money into his bank account" From October 2015, "by which time the conspiracy had certainly started, significant sums of money not relatable to lawful employment were being paid into [the defendants'] accounts." Hallett, Jeacock and Sheehan "each received substantial sums."
18. So far as Sheehan is concerned, Mr Gardiner submits that the judge was wrong in a number of respects in relation to this. First, the only evidence the Crown relied upon to establish that the offence had started no later than October 2015 was the discovery of a SIM card when 52 Harbour Towers was searched which contained a text message referring to "spending a grand a week with you." He said in his Grounds of Appeal that there were no text messages recovered from the SIM card for the next 6 months and the SIM could not be linked to any defendant other than Foster. (Foster, incidentally, did not give evidence at the trial; neither did Hallett.) Although Mr Wilkins' Respondent's Notice asserted that the judge was entitled to have regard to this SIM card, it does not controvert what Mr Gardiner said about it. Second, he complains that the judge was wrong to have any regard to the payment made into Sheehan's bank account in July 2015. He asserts that there was no evidence at the trial about this payment and that it was not relied upon by the Crown. The payment was, in any event, outside the period covered by the indictment. All that is correct, but the judge said expressly in his sentencing remarks that he placed no reliance upon it for the purposes of assessing Sheehan's role. However, he did express himself in the way we have recorded in paragraph 17 above which suggests that he did have regard to it in deciding when the joint offence started.
19. Mr Wilkins did draw attention to what must have been the jury's rejection of Sheehan's evidence that whilst he was regularly in Portsmouth, Gosport and Fareham he

associated with people involved in the use or supply of drugs because he was considering robbing drugs dealers in the area of money. That was why he was associated with his co-defendants. Mr Wilkins contends that rejection of what was plainly a fanciful story entitled the judge to draw the inference that Sheehan was actively involved in what was going on at least from January when he started staying at Jeacock's premises.

20. Whilst we have not the slightest doubt that the judge was entitled to view what Sheehan said with the deepest suspicion, we are troubled that the evidential basis for concluding as against Sheehan that the offence started well back into 2015 was as slender as we have indicated. The difficulty in relation to all the defendants is that the "hard" evidence of the telephone traffic and the surveillance was focused in the period from mid-February until the beginning of April. Whilst it is entirely legitimate to draw the inference that the operation had started before the observations started, we consider that the extrapolation exercise back as far as October 2015 on the evidence to which we have referred was insufficient to justify the sure conclusion that it began around about that time and that a total weight of 5 kgs had been traded by the syndicate. Mr Harris adopted much of what Mr Gardiner had advanced, but added that, so far as Hallett was concerned, there was no evidence of significant financial payments that would have been apparent if this was a "wholesale" operation and that the evidence was more akin to the evidence of simple "street dealing".
21. We disagree. This was not simple street dealing. This was organised, large scale dealing by 6 people over a period of at least three months. Whilst the evidence does not safely establish a total weight of 5 kg we have no doubt that the volume was at least 1kg per month from the beginning of 2016 and so in the region of between 3kg and 4kg over a period of more than three months. This operation (involving 6 people) could not arguably be placed in Category 3 ("street dealing"). It falls between Category 2 and Category 1.
22. For those reasons, we give leave to appeal on the grounds sought to be relied upon in this regard by Hallett and Sheehan and we grant Mr Harris a representation order in consequence. Their role within the parameters set out in the preceding paragraph must be assessed. Foster's role within the operation also falls also to be assessed within those parameters. We will deal with Hallett first because he was rightly treated by the judge as the prime mover in the overall operation and played a "leading role".

Hallett

As we have indicated, he falls to be sentenced on the basis that he played a "leading role" in an operation falling between Category 2 and Category 1. In our judgment, a sentence of 12 years' imprisonment fairly reflects that role in the circumstances of this case and we substitute concurrent sentences of 12 year's imprisonment for the sentences imposed by the judge.

Sheehan

We consider that the judge was entirely justified in concluding that he played a "significant role". The fanciful story he advanced in his evidence was such as itself to justify the inference that there were actions of his over at least the period since he started living at Harbour Towers with Jeacock in January 2016 for which he needed a cover

story. The suggestion that he was just a driver is also plainly fanciful. For our part, we would have said that the sentence imposed by the judge properly reflected his participation even in an operation between Category 2 and Category 1, particularly given his previous convictions, but given the reduction we have made in Hallett's sentence we consider that we should make a relatively modest adjustment by reducing the sentence to one of 9 years' imprisonment. The appeal is allowed accordingly.

Foster

Ms Becker has contended that Foster's role should, as the judge found, be regarded as a "lesser role" and that he should be treated as being a participant in a Category 2 case because all that was established against him was that he permitted Hallett and Jeacock to use his premises for a very short period and that there was no evidence that he himself was present in those premises with the drugs. However, we consider that the evidence, particularly of the telephone traffic, indicates a closer involvement than that, as indeed the judge himself observed. Bearing in mind our conclusion about how the offence should be categorised by reference to the guidelines, we consider that the appropriate sentence in Foster's case is one of 6 years' imprisonment and the appeal will be allowed accordingly.

23. It follows that the application made by Hallett succeeds and his appeal and the appeals of Sheehan and Foster succeed to the extents indicated.