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No: 201802298 B1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 4 February 2020

B e f o r e:

LORD JUSTICE SIMON

MRS JUSTICE CUTTS DBE

and

MRS JUSTICE EADY DBE

REGINA

- v -

AFTAB ULHAQ KHAN

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Mr S Knight appeared on behalf of the Appellant

Mr A Newman appeared on behalf of the Crown

J U D G M E N T

LORD JUSTICE SIMON:

1. The main point on this appeal raises the issue of whether the appellant's bad character should have been admitted under Part 11, Chapter 1 of the Criminal Justice Act 2003 as part of the prosecution case. It arises in relation to a ruling made by His Honour Judge Batty QC in the Crown Court at York on 8 June 2017. It comes before the court with the leave of the full court, which granted an extension of time.

2. On 29 October 2014, police executed a search warrant at a homeless hostel in Harrogate, North Yorkshire. The search was conducted as the result of the unexplained, sudden death of a resident. The appellant was living at the hostel at the time. When his room was searched, the police discovered 34.2 grams of heroin with a purity range of 50 to 71 per cent. The heroin was found in two places: a larger amount hidden in a pillow case, and a smaller amount in a drawer. In another drawer of the same piece of furniture, a wallet containing £340 was also found, along with a list of numbers. The potential street value of the drugs was between £885 and £2,000.

3. The appellant was initially arrested in connection with supplying controlled drugs to the deceased man in circumstances linked to his death. However, he was eventually charged with offences of possession with intent to supply and possessing criminal property.

4. The appellant was interviewed under caution on two occasions: between 1.45pm and 3.16pm on 29 October 2014, and between 7.03pm and 8.26pm on 14 June 2015. He admitted possession of the heroin, but said that it was for his own use. He claimed that the cash came from the sale of tobacco pouches ("baccy") and that money identified in his bank account came either from the tobacco sales or from deposits made by members of his family into the account. He gave "no comment" answers to some of the questions posed in interview in circumstances to which we will come.

5. As the judge put it in his ruling (at page 1F), he "almost made a virtue out of the fact that he was a heroin user, and a long-term user, but emphatically denied that he sold heroin.

6. In the first interview, the appellant was asked for an explanation for the drugs found in his room. Excluding hesitations, he replied:

I'm a drug user. I said that before and I'll say it now again. I'm a drug user. I admit that, but I do not sell drugs and I haven't sold any drugs in that house at all to anybody.

Later, he said this:

I decided to say my piece and then after that no comment because I've already said I'm a user. I've been arrested before twice for intent to supply. I've never supplied drugs. I don't sell drugs. The only thing I do sell is tobacco pouches, which I've said from day one that's all I do sell. I'll put my hands up when I say that. I do sell tobacco pouches. I do have a bit of a drug habit. Any money in my wallet has been taken out of my bank account and I have not supplied anybody in the hostel or anywhere else with Class A or other drugs and that's all I have to say.

7. In his second interview, it was put to him that, with the amount of heroin found, he might be assumed to be selling to other people. He replied:

No, I wasn't selling it, definitely ... definitely wasn't selling it.

Q. You weren't dealing it to anybody else?

A. No.

Later, he was asked to confirm that the heroin was for personal use. He replied:

It is, yeah. I have been asked, to be absolutely honest with you, I have been asked by people who I don't even know in the hostel to sell a bag and I've fallen out with a couple of people as well over it, you know, because I've said no.

When questioned about whether he had sold drugs to the deceased resident, he said:

No, I haven't supplied any drugs at all.

Later it was put to him, in view of the quantity of heroin and cash found, that he was selling heroin. He replied:

No, no, I've never sold heroin, not once.

8. It was some of these answers in interview that gave rise to a later prosecution application to adduce evidence of the appellant's bad character. So far as material to this case, he answered "No comment" to further questions.

9. At trial, the appellant faced two charges: count 1, possession with intent to supply; and count 2, possession of criminal property (the £340 cash). On 9 June 2017, he was arraigned on count 3 (possessing Class A drugs), to which he pleaded guilty.

10. The prosecution case was that the appellant intended to supply the heroin that was found on him. He had large amounts of money going through his bank accounts due to his selling drugs. This was not, as he asserted, because relatives had given him money, nor the result of sales of pouches of tobacco, as he claimed. It was, on the contrary, because he was supplying heroin for money. The prosecution relied on the evidence given by Detective Constable Spivey (a drugs expert), who referred to the adulteration of drugs. She also gave evidence that the second page of a handwritten list found among the appellant's possession looked as if it might relate to drugs due to the half values.

11. The prosecution also relied on agreed facts as to the finding of the drugs, the quantity, purity, the cash sums found, as well as the sums credited to the appellant's bank account. The prosecution further relied on the appellant's decision to give "no comment" answers part of the way through his interview. That is a matter to which we will return later.

12. In addition, before putting the record of the appellant's police interviews before the jury, the

prosecution applied to adduce a previous conviction of the appellant for attempting to supply heroin in April 2007. They relied on two provisions of the Criminal Justice Act 2003: section 101(1)(d) (propensity), and section 101(1)(f) (correcting a false impression given during interview). The facts of the conviction were that on 12 July 2007 the appellant had pleaded guilty in the Crown Court at Birmingham to attempting to supply a controlled drug of Class A (heroin). On 3 September 2005, he had gone to a police station where his brother was being detained in custody and handed over to a police member of staff a packet of cigarettes to be given to his brother. When the packet was searched, heroin was found inside. In consequence, the appellant had been charged with attempting to supply heroin, to which he had later pleaded guilty in the Crown Court.

13. The judge ruled in favour of the prosecution application to adduce this evidence. He recited the facts of the previous conviction and the statutory basis of the application. He also set out the defence objections to the admission of the evidence: the conviction was of some antiquity; it was a single offence; it was for an attempt; it was not for selling drugs for profit; the appellant had denied in interview that he was selling drugs for profit; and, in any event, the prejudice far outweighed any probative value. Lying at the heart of the case was the context of the appellant's possession of a significant quantity of drugs, coupled with money and a lifestyle he asserted he had. The judge found that there was a potential to create a false impression from the assertions made by the appellant in interview, and it would not be appropriate, as had been submitted, simply to edit those assertions out of the interview, because if the appellant gave evidence the issue would inevitably be raised again. Further, irrespective of whether the appellant created a false impression, the fact that he had attempted to supply the same drug in circumstances which were fraught with danger indicated on one view of the matter that the appellant was indeed steeped in the culture not only of using, but of supplying. Notwithstanding the fact that it was some time before, the judge said that he was satisfied that the interests of justice required the

admission of the previous conviction, coupled with appropriate directions.

14. Following the ruling, the previous conviction was placed before the jury as part of the prosecution case. The appellant then gave evidence in his own defence.

15. In the grounds of appeal no complaint was made of the summing-up although for reasons to which we will come, we granted leave to Mr Knight, who appears on behalf of the appellant, to amend the grounds of appeal to raise a specific point to which we will come later.

16. In the grounds of appeal, as drafted, Mr Knight (who was not trial counsel) submitted, first, in so far as the previous conviction was admitted to correct a false impression (section 101(1)(f)), it was unnecessary for that purpose and risked having an adverse effect on the overall fairness of the proceedings. Second, the statements that the appellant made in interview were technically true: he had not, in fact, supplied drugs; he had only attempted to do so on one occasion. He had not created a false impression which required correction. Third, the answers given by him were given in response to explicit questions which were directed to low-level supplying to users. In the circumstances, the admission of the evidence was unfair. Fourth, in any event, such false impression as he gave could have been corrected by editing the police interviews so as to remove any potentially misleading statements, as envisaged by section 105(6) of the Criminal Justice Act 2003. The answers relating to his personal use of the heroin, his answers about not supplying to other residents at the hostel, as well as his explanations for the money, would have remained. The record of the interviews had already been heavily edited to remove the potentially prejudicial references to the death of the hostel resident and could have been extended to removing references to general denials of ever having supplied drugs. There was no reason to think that the assertions made in interview would be repeated in evidence. Fifth, as to the application based on propensity (section 101(1)(d)), there was only one offence,

which had been committed seven years before, with no similar offending in the meantime. Sixth, the earlier offending did not show any distinctive features similar to the later offending; it had been an attempt to smuggle a small quantity of drugs to his brother while his brother was in custody. It was doing the brother a favour. In contrast, the indicted offence charged street level drug dealing to fund an addiction. The circumstances were markedly different. Finally, Mr Knight submitted that there was no warrant for the judge to have identified the propensity from the single conviction on the basis that, as he expressed it, "on one view of the matter, the [appellant] was indeed steeped in the culture not only of using, but also of supplying heroin".

17. For the prosecution, Mr Newman submitted essentially that the judge was right for the reasons he gave; and that, in any event, the court could be satisfied that the convictions were safe in the light of the strength of the circumstantial evidence. He drew the court's attention to *R v Renda* [2005] EWCA Crim 2826 and *R v Ullah* [2006] EWCA Crim 2003, on the proper approach to the admission of evidence under section 101(1)(f), and to a number of familiar cases, starting with *R v Hanson* [2005] EWCA Crim 824, on the admission of bad character evidence under section 101(1)(d).

18. Whether to admit evidence under Part 11, Chapter 1 of the Criminal Justice Act 2003 is not a matter of discretion, but one of judgment to be exercised by reference to established principles. In these circumstances, the question is whether, in admitting the evidence, the judge was in error; and if so, whether the relevant conviction unsafe?

19. The appellant's assertion was made in interview, which meant that he was responsible for the making of the assertion for the purposes of section 101(1)(f): see section 105(2)(b)(i) and *Ullah* (referred to above). However, it is important to identify the express or implied assertion he was making. It is true that he said in the earlier stages of the first interview: "I've never

supplied drugs", and "I have not supplied anybody in the hostel or anywhere with Class A or other drugs"; and in the later stages of the second interview: "I've never sold heroin, not once". But the point he was addressing, and which he reiterated, was an accusation that he had supplied drugs in the hostel. In the earlier interview, the suggestion of supplying drugs to the man who had died was particularly addressed. On this suggestion, the appellant's case was clear: that he had possession of the drugs as a user.

20. In these circumstances, we can see no good reason why the record of the interview could not have been further edited, under section 105(6), so as to remove references to any more general implied assertion that he was not the sort of person who supplied drugs, so as to correct any false impression. The transcribed interviews were inordinately long and repetitive. They should have been very much shorter in any event. Nor do we understand why the judge thought that the evidence would be bound to come out. It was certainly not in the interests of the appellant to raise it, and we cannot see how the prosecution could have put questions with the intention of eliciting a damaging admission which would introduce the appellant's previous conviction.

21. We are less impressed by the argument that the assertion was literally correct, because he had been convicted of an attempt to supply and not the completed offence. Subject to the points we have just made, to the extent that it was an implied assertion that he was not the sort of person who would ever supply another with Class A drugs, it was untrue.

22. So far as propensity is concerned, although the earlier offence was not so remote in time as to make it unfair for that reason to adduce it, we are not persuaded that the appellant could properly be described on the basis of that earlier conviction as someone who was "steeped in the culture" of supplying Class A drugs. He had on a previous occasion obtained access to Class A

drugs in an attempt to supply them to his brother. The circumstances of the offending were markedly different.

23. Although we have concluded that the evidence of the previous conviction should not for these reasons have been admitted, Mr Newman submitted, nevertheless, that the court should conclude that the convictions were safe. There was, he pointed out, evidence of both cash and high purity heroin found in the appellant's possession. There was a letter from the appellant's bank, together with a note pad which contained mathematical workings; although the evidence of the drug officer was that, nevertheless, the calculation could not conclusively be said to be a debtor list. Records from the Department of Work and Pensions and Her Majesty's Revenue and Customs showed that the appellant had no declared income, other than the payment of Jobseeker's Allowance. The sum was paid directly into his bank account and did not account for the large amounts of money that were found in his bank account in the year 2014.

24. On the other hand, his phone had been examined and there were no indications from that of any drug dealing.

25. While we accept that there was a circumstantial case for the appellant to meet, not least the relatively large deposits paid into his bank accounts, in our view, the admission of the evidence of his previous conviction may have tipped the balance in favour of the prosecution.

26. In addition, there is the further point that arises from the judge's summing-up. At page 4 of the 8 page summing-up, there is a half page containing the following:

The final matter that I need to give you a direction about is in relation to his interview. The [appellant], you know, when interviewed, and you have a copy of the interviews before you, or interviews, partway through decided to say 'No comment' in interview. Well, of course he had been cautioned and it was his right to remain silent, but he was also told that it may harm his

defence if he did not mention when questioned something that he later relied upon in court and that anything he did say might be given in evidence. And, ladies and gentlemen you will want to consider in this case the reason for the [appellant] saying 'no comment'. Is it because he realised that to further answer questions by the police he might incriminate himself and that it was far better from his perspective simply to clam up and see what else the prosecution could find and then later give an explanation for it? On the other hand, the defence say: 'No'. They say he effectively answered as much as he could in interview. The police were rather going on at some length, some inordinate length, the defence would say, and he had frankly had enough, and that is why he said 'no comment' from thereon in. If, ladies and gentlemen, that was the reason why he took that stance, of course you would not hold it against him. It is only if you thought there was a sinister reason for him going 'no comment' that you may draw an adverse inference against him, but again you would not, as with a previous conviction, convict him solely or mainly in relation to that stance.

27. That, as we understand it, was a direction by reference to section 34 of the Criminal Justice and Public Order Act 1994. However, no later statement was identified. Although the judge referred to the warning that it might harm his defence if the appellant did not mention when questioned something he later relied on, there was no reference to what he later relied upon. The suggestion that the jury might consider "no comment" sinister was, in our view, a misdirection. In addition, in the final remarks, the judge linked this direction to the previous conviction which, in our view, should not have been admitted.

28. It is in these circumstances that we regard this as a material misdirection which, together with the wrongful admission of the previous conviction, leads to the conclusion that these convictions cannot be regarded as safe.

29. Accordingly, we allow the appeal and quash the convictions on counts 1 and 2.

30. We record that the prosecution do not, in the circumstances, apply for a retrial.