



No. 202300444 B1  
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IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM CROWN COURT AT CROYDON

HIS HONOUR JUDGE FLAHIVE

[2024] EWCA Crim 885

Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Thursday, 11 July 2024

Before:

LORD JUSTICE EDIS  
MR JUSTICE CHOUDHURY  
HER HONOUR JUDGE NORTON

REX

v

YVONNE ELIZABETH STEWART  
KEVIN FILKINS  
ROBERT HAMILTON

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Mr D. Murray appeared on behalf of the Applicant Stewart.  
Mr R. Paton-Philip appeared on behalf of the Applicant Filkins.  
Ms P. Bignall appeared on behalf of the Applicant Hamilton.  
Mr J. Loades appeared on behalf of the Crown.

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J U D G M E N T

LORD JUSTICE EDIS:

- 1 Yvonne Stewart, Kevin Filkins and Robert Hamilton each apply for leave to appeal against convictions which were returned by verdict of the jury on 13 January 2023 in the Crown Court at Croydon. Each was convicted of one count of fraudulent evasion of a prohibition on the exportation of goods. The allegation was that they had jointly participated in sending, by means of the DHL system, a package containing drugs.
- 2 In the case of Mr Hamilton, his application was out of time but he has now joined in the applications advanced on behalf of Ms Stewart and Mr Filkins.
- 3 Those applications were considered by the single judge who directed that they should be referred to the full court for consideration at an oral hearing. He also directed that counsel for all parties should attend that hearing, and extended representation orders for that purpose. Some uncertainty about that order arose from the fact that in part of his reasoning supporting it the single judge said:

"6 In view of the unusual turns in the case and the questions as to whether this had any effect on the conduct of the case and about disclosure and the fairness of the process and the safety of the convictions, the grounds of appeal merit consideration by the full court. The applicants should not consider that this is an indication that the appeal is likely to succeed, only that the matters need to be considered further."

- 4 That was understood on behalf of at least one of the applicants as a grant of leave to appeal. The matter may be somewhat technical. It is true that the single judge in that paragraph referred to the matter as an "appeal" rather than as what it is, namely an application.
- 5 Nothing of substance turns on the distinction in this case between an application for leave referred to the full court and the appeal itself. The reason for that is that the grounds of appeal have been very fully set out before us in documents which we have read and they have been supported before us by such oral submissions as counsel have seen fit to supply. We are, therefore, fully aware of everything which might be said in relation to the safety of these convictions as much as we would have been if leave had been granted; nevertheless, it clearly has not and we will deal with the question as an application for leave.
- 6 It is appropriate to refer also to a direction given by the single judge when referring these

applications to the full court. He clearly considered that the written material which had been supplied to him lacked clarity in relation to the impact of the three grounds of appeal on the fairness of the trial, on the issue of prejudice to the applicants and on the fundamental question of the safety of the convictions. He, therefore, directed that further documents should be supplied clarifying the position. A direction of this kind should not be necessary. The documents supplied when an application for leave to appeal against conviction is made, if drafted by counsel, ought clearly to address those matters which the single judge felt had not been dealt with appropriately. We have seen now additional documents which probably do not, in truth, take matters very much further than they were when the matter was considered by the single judge.

- 7 There is no doubt that in at least two respects matters took an unusual course during this trial. We shall turn to those respects in more detail shortly. But, in summary, the judge permitted the prosecution to put in evidence after all closing speeches had concluded. That is an unusual course. Further, the prosecution case did change in a material way during the course of its presentation, that is to say before the close of the prosecution case. The evidence before the jury concerned three packages which were sent on different days. The prosecution had alleged that all three contained drugs within class A. In fact, the first two which were sent did not contain class A drugs; they contained salt. That fact appears to have been revealed to the prosecution fairly late in the presentation of its case and that also is a relatively unusual turn of events. Those were the issues which the single judge appears to have thought merited additional consideration which they had, of course, never received.
- 8 Having said that these things were unusual, it is right always to recall that the fundamental question for this court is whether the convictions are unsafe. In this case the evidence was, in our judgment, overwhelming and there is no criticism at all by any of the applicants of the judge's summing-up. It is accepted that the case was left fairly to the jury and on a proper legal basis.
- 9 The points which the applicants rely on appeal were are, in truth, relatively peripheral in the overall weight of the case, and the inevitable conclusion must be that these convictions are

all abundantly safe. In those circumstances we refuse leave to appeal, and the applications for extensions of time do not arise because there is no arguable ground to advance.

- 10 We will deal with these three grounds of appeal relatively briefly in the circumstances which we have just explained, but it is first necessary to say something of the facts to illustrate the strength of the prosecution case here.

### **The Facts**

- 11 The count in respect of which each of these applicants was convicted related to a consignment which arrived in Australia on 3 July 2021, having been sent from the DHL facility at Croydon where Ms Stewart was employed. When it was opened on arrival in Australia it was found to contain 24 bags of methylamphetamine, each weighing 1 kilogram. The drugs were of 80 per cent purity. It was, therefore, a very substantial shipment of a class A controlled drug. It was addressed to a person who lives in New South Wales. The sender was referred to as Max Coates and an address in Croydon was given. Max Coates did exist but he had nothing to do with the sending of the package. A mobile telephone number and an email address was supplied but it did not belong to Max Coates. Max Coates also knew nothing of the named recipient of the parcel. An interesting fact emerged on investigation, namely that Mr Coates had applied for the renewal of his British passport on 17 March 2021 but had subsequently been informed by the Passport Office that it had been lost in transit.
- 12 The discovery of the drugs in Australia of course triggered an investigation in the United Kingdom. That investigation showed that the shipment was accepted at DHL in Croydon by Yvonne Stewart. She was responsible for searching the parcel to ensure that its content could lawfully be transmitted through the DHL system and she recorded that she had done that. She completed the reception of the consignment as if a full inspection had been carried out and fixed on to it a security-inspected label. Once it left the depot in Croydon she also tracked it through the DHL tracking system on five occasions during its transit. The fee for this consignment was paid to DHL using a card ending 6352. That was a card issued by Revolut Ltd. The account to which it was attached had been opened by Kevin Filkins on 6

September 2018. That account had seventeen separate debit cards registered to it.

- 13 The investigation turned, as inevitably it would, to mobile phone and WhatsApp communications. It was established that on the morning of 25 June 2021, when the package was received by Ms Stewart but before that happened, her phone was in contact with Mr Hamilton's phone. Mr Hamilton's phone was in contact with Mr Filkins's phone. At 7 in the morning Mr Filkins sent Mr Hamilton a message saying "on way". Mr Filkins's phone was tracked by the usual methods and was seen to travel from the vicinity of his home in Sevenoaks to the vicinity of the DHL premises in Croydon. His car was also seen to be making the same journey by ANPR material. That journey took him past two other DHL centres which he could have used to send this parcel much more easily than driving into Croydon. Of course Ms Stewart was not employed at those other two DHL centres and that would be a plausible explanation for his choice of the DHL depot at which he would place his business. The prosecution case was that she was an insider participating in this transaction in order to ensure that DHL received the package containing the contraband but that it was marked as though it did not contain contraband. That was her part in this transaction.
- 14 WhatsApp communications also revealed contact between Mr Filkins and Mr Hamilton and between Mr Hamilton and Ms Stewart. Ms Stewart sent Mr Hamilton an image of a document which was the tracking information for the consignment at 10 o'clock that evening. Mr Hamilton forwarded the image to Mr Filkins. In all the circumstances of this case this was one among many pieces of highly incriminating evidence. One of the issues which is advanced on behalf of the applicants and which was fully canvassed at the trial is the suggestion that there may have been no drugs in the box that day and that they may have been inserted into the box at some point during its later transmission by some other person wholly unassociated with any of these three applicants. That submission needs to be measured against the evidence which we have just briefly summarised. The matter, however, does not stop there.
- 15 As indicated at the start of this judgment, the prosecution evidence in fact concerned not

only the shipment that was the subject of the count on the indictment but also two earlier consignments. These two consignments were also sent via the DHL depot at Croydon. The first was sent on 2 June 2021, purporting to be two John Lewis dinner sets; the second was dated 24 June 2021 and purported to be a chandelier. Both of these packages were received by Ms Stewart and processed by her in the same way that she processed the critical shipment on 25 June.

- 16 The first of these (the 2 June consignment) was sent apparently by a Mr Carl Hossler of Orpington. Like Mr Coates, Mr Hossler is a real person. Like Mr Coates, Mr Hossler said he had had nothing to do with the sending of this package. Like Mr Coates, he had also just applied for a new British passport and he had also been informed that it had been lost in transit. That passport was recovered at Mr Filkins's home address in the course of this investigation. The package was sent to an address in Australia. The fee for its consignment was paid using the card issued by Revolut. This card was also a card that was issued to Mr Filkins. There was CCTV which showed that it had been Mr Filkins and his son who had attended the premises of DHL in Croydon and handed the package to Ms Stewart.
- 17 Events surrounding the second of these packages, on 24 June 2021, are also strikingly similar. The sender, a Mr Stothart of Orpington, was also a real person. He said that he had had nothing to do with the sending of the package, and he also said that he had applied for renewal of his British passport on 15 March 2021 but had been informed that it was lost in transit. It, therefore, appeared that a criminal group must have been able to access some of these passports and use them for criminal purposes. This third package was also addressed to someone in Australia. The fee was paid using a credit or debit card. This one was issued to Mr Stothart. It was found in Mr Filkins's home when it was searched by the police in February.
- 18 The prosecution case as originally advanced at trial was that the jury could safely infer from the similarity of the three transactions, and the involvement in all three of Mr Filkins as the consignor and Ms Stewart as the person who received them on behalf of her employer, that those first two consignments also contained drugs. Why else would you pay £200 to send a

package to Australia and take such care to ensure that you could not be identified easily as the person who sent it? It transpired, as a result of an inquiry which was provoked by some of the oral evidence given during the prosecution case, that actually those two first consignments had been opened and inspected on arrival in Australia and they did not contain prohibited drugs. They contained an inert substance described as salt. Of course, it followed that they did not contain either two John Lewis dinner sets or a chandelier. It appeared that someone had paid £200 to send some relatively worthless salt all the way from the United Kingdom to Australia. This fact was discovered during the course of the prosecution case, and the Crown applied for leave to adduce evidence that the first two packages had contained salt and the judge allowed that to happen.

- 19 That sequence of events is the subject of one of the three grounds of appeal.
- 20 The defendants at the trial gave evidence. That evidence had not been foreshadowed by any of it being volunteered when they were interviewed, and they, therefore, faced an adverse-inference direction in the course of the judge's summing-up.
- 21 Mr Filkins's case was that his association with Mr Hamilton was entirely innocent and wholly unrelated with any packages being sent anywhere. His case was that he had had a tenant at his home who asked him to deliver packages to DHL for various reasons, and it was the tenant who had had the highly incriminating material which was discovered at his home when it was searched. It was, said Mr Filkins, nothing to do with him. His Revolut account was used because the tenant told him that he had a problem with his bank card, so he used Mr Filkins's cards with Mr Filkins's consent. He said also that a passport and two telephones were found when the barn which had been occupied by the tenant was cleared and a ceiling removed.
- 22 Ms Stewart's case was very straightforward. She said she did her job properly and never knowingly accepted any package for shipment which she knew contained prohibited drugs.
- 23 Mr Hamilton's case was that he knew Mr Filkins and that the conversations that he had with him were entirely innocent, as were his contacts with Ms Stewart. He knew nothing of any drug exports to Australia, and was wholly innocent.

### The Grounds of Appeal

- 24 There are three grounds of appeal which we will take from their formulation by Mr Murray on behalf of Ms Stewart. The other two applicants advance the same points although they express them in some slightly different terms but they all come to the same thing.
- 25 Ground 1 says that the judge erred when he allowed the prosecution to re-open its case after the conclusion of the final defence closing speech to adduce a photograph of the box which was sent on 25 June on its arrival in Australia. Ground 2 says that the judge erred by not discharging the jury following the discovery by the prosecution during its case that the first two transactions did not contain class A drugs but they contained salt. Ground 3 contends that the judge further erred when he refused to allow further material to go before the jury about two Australian nationals whose identity was revealed to the defence during the trial. We will call these "the parcel issue, "the salt issue" and "the Australian criminal issue" respectively, by way of shorthand.

### **Discussion and decisions**

- 26 The parcel issue: the prosecution placed before the jury a photograph of the box taken in Australia after it arrived in Australia. It was suggested by the prosecution that that photograph which they had chosen to put before the jury on that basis had been taken at the time of its arrival in Australia. Mr Murray, on behalf of Ms Stewart, in his closing speech to the jury, submitted correctly that it revealed additional DHL tape beyond that which had been visible on CCTV footage taken at Croydon of the package prior to its transmission. Mr Murray was, therefore, submitting that that suggested that the box must have been tampered with during the course of its journey from Croydon to Australia and that this tampering would have been an opportunity when the drugs might have been inserted into it by some other criminals wholly unrelated to any of these applicants.
- 27 This was an issue which had not been explored during the course of the trial. It first emerged during the course of counsel's closing submissions. The prosecution had in its possession another photograph which had been taken some weeks before the photograph we have just referred to. That further photograph together with others actually were taken at



the point when the parcel was first intercepted in Australia. Most of those photographs were of the contents of the box but one of them showed one view of the exterior of the box, and that did not show all of the additional tape which was visible on the first photograph put before the jury, which was taken weeks later. The prosecution had, therefore, been in error in putting the first photograph before the jury as a photograph taken contemporaneously with the box's arrival in Australia. That error had enabled Mr Murray to make the submission that he did. That submission was unjustified by the totality of the evidence that was available. If the point had been canvassed during the course of the evidence it would, no doubt, have been addressed then.

- 28 Mr Murray's submission is that the witness statements which accompanied the photographs taken at the point when the box was first intercepted and searched in Australia do not deal with the application of additional tape and, therefore, the evidence is incomplete to explain what happened. The interception and search of the box took place at the DHL facility in Australia. No doubt the DHL branded tape which was added to the box after that search was available for use in that facility if people chose to use it.
- 29 The point that was made by defence counsel was a point of inference from photographs. It was not a point that depended on oral evidence. It is important to recall that the witness statements and the photographs which accompanied them of the first search of the box in Australia had been uploaded on to the Digital Case System and available to all parties in the case from an early stage. No one had any reason to be in any doubt about their existence. It was at all times possible to compare the photograph which had first been put before the jury with the photograph which was now put before the jury to establish whether there was any credible point to be made to the jury or not on the basis of all that was known by the parties in the case.
- 30 In those circumstances the judge decided to allow the prosecution to put that additional photograph before the jury and to put also the contents of the witness statement before the jury about it. The parties were allowed an opportunity to say whatever they wanted to say about that additional piece of evidence which was adduced at that very late stage.

- 31 Mr Murray relies on a decision of this court in *R v Day* (1940) 27 Cr App R 168 in which the court applied a dictum of Lord Tindal CJ in *R v Frost* (1839) 9 C&P 418. The suggestion is that the law prohibits evidence to be adduced at that stage after speeches except where the need for it properly arises *ex improviso*. "*Ex improviso*" in those decisions is defined as describing circumstances where it was not realistically possible for the prosecution to anticipate the need for that evidence until something emerged in the course of the defence case or defence speeches which revealed its necessity. In fact, the position in law is not as absolute as that. Later decisions subsequent to *Day*, including *R v Owen* [1952] 2 QB 362, *R v Milligan* (1969) 53 Cr App R 330 and *Malcolm v Director of Public Prosecutions* [2007] EWHC 363 (Admin), all show that the matter is rather more nuanced. In particular, they show that the trial judge has a discretion when an application of the present type is made.
- 32 In the circumstances which we have described, if the judge had refused the prosecution's application the jury would have been misled. This would not have been a satisfactory state of affairs. The only complaint that could be made would arise if the conduct of the defence case had been in some way prejudiced by treatment by the original stance of the prosecution and by permitting the prosecution to change its stance and supplement the evidence in the way it occurred. In our judgment, nothing of that kind happened here. Mr Murray's essential point is that he had been undermined in the eyes of the jury who may have thought that he was "clutching at straws". They may indeed have thought that. However, the reason why they might have thought that is that he had made a point on the basis of one photograph when consideration of two photographs and comparisons between them and the dates when they were taken would have revealed that it was a bad point. That is one of the hazards of advocacy.
- 33 In our judgment, in the circumstances which arose in this case, it is not arguable that the judge's exercise of discretion had any adverse impact upon the safety of the conviction. Accordingly, we (as we have already said we will) refuse leave to argue the parcel issue.
- 34 The salt issue is, in our judgment, very clear indeed. It is regrettable that the United

Kingdom authorities had not asked, it would appear, the Australian authorities what had happened to the first two shipments during the course of their reception into Australia. Because they were found to contain material that was entirely benign they were, in fact, delivered to the recipients. What the United Kingdom authorities did not appreciate was that before that happened they had been searched. Although criticism has been made of the disclosure exercise in this respect, the United Kingdom authorities do not have the Australian law enforcement authority's material under their control. They are not in a position to make a schedule of everything which the Australian inquiry possesses and to review it in a way in which they would view their own material or other material which comes into their possession in the course of the inquiry. However, that is perhaps something of a technicality here because the evidence reveals very close co-operation between the United Kingdom and the Australian authorities. When, finally, Mr Loades, counsel for the prosecution, caused an inquiry to be made about what had happened to these two shipments, he received an answer without delay.

35 Having done that, it was obviously essential that the jury had to be told that the content of the first two boxes was not the same as the content of the third box and was not class A controlled drugs or controlled drugs of any other variety. To do otherwise would have been to mislead them. The point is made that the original inference which the prosecution had invited the jury to draw would have caused a significantly longer sentence of imprisonment to be imposed on these applicants in the event of their conviction. That is true, and that is why it is highly regrettable that the jury was invited to draw an inference which it transpired would have been false. It does not, however, follow from that that the sequence of events we have described in relation to the salt issue caused the conviction to be arguably unsafe. Again, the point made on behalf of the applicants is, in essence, that the credibility of their case was undermined and the jury should have been discharged because they had heard a suggestion that there had been three exportations of class A controlled drugs whereas, in fact, there had only been one.

36 We reject that submission as misconceived. The inaccurate contention which the

prosecution had advanced was corrected during the prosecution case in time for the defendants to deal with it in evidence if they wanted to or in closing submissions in any event. It was clearly overwhelmingly in the interests of justice that this case should be presented on an accurate factual basis. That is what ultimately transpired. Accordingly, there is no merit in this ground of appeal either, and we refuse leave to argue the salt issue.

37 The Australian criminal issue relates to failure by the prosecution to disclose full details of the activities of two identified Australian criminals. According to press reports which the defence were able to discover, they had a method of operation which involved intercepting packages in the course of their transmission in DHL systems, putting drugs in them and thereby importing those drugs into Australia. They asked for disclosure from the prosecution of full details about the activity of those two people. That did not occur. What happened was that agreed facts were placed before the jury, saying as follows:

"55 Following an inquiry made on Monday 28 November 2022 by the prosecution, it was established that the Australian Federal Police were engaged in a drug importation investigation targeting two Australian nationals and there were numerous drug importations into Australia concealed within DHL air cargo consignments.

...

58 In the course of Australian inquiries, six mobile phones were seized. The data from the mobile phones has been searched electronically by Detective Constable Nicholas Edwards to determine whether there were any links to connections between those phones and any of the defendants. No such connections were found."

38 Those agreed facts placed everything before the jury which was capable of assisting these applicants.

39 It was of course obvious that the prosecution accepted and, indeed, asserted that there were criminals involved in this transaction in Australia. Somebody was going to receive this very large quantity of amphetamine and then sell it in Australia. That fact was only capable of being of assistance to the applicants in two ways: first, if it supported their hypothesis that the drugs must have got into the box by means of insertion after the box had left Croydon; secondly, if it could be shown that those identified criminals were involved in this

transaction and wholly unconnected with these applicants.

- 40 It appears to us that the agreed facts which we have read in the course of this judgment do make the two points available to the applicants. In agreed fact 55, it is not specifically stated that that inquiry in Australia involved the drugs being inserted into cargo consignments at any particular stage. Agreed fact 58 is what can properly be said about the absence of any evidence of contact between those who were the subject of the inquiry in Australia and these applicants. The points are, therefore, there to be made.
- 41 In those circumstances we also refuse leave to argue the Australian criminal issue.
- 42 Finally, we observe that the recitation of the evidence which we have engaged in in the course of this judgment makes good the assertion at its start that the strength of the case here was very great, and the criticisms made of the judge's ruling concerned relatively peripheral matters. The heart of this case was the evidence of the activities of the three applicants in June 2021 and of the connections between them. That evidence was supported by the discoveries at Mr Filkins's house and by the strikingly similar method adopted on each of these three occasions. The way in which the prosecution ultimately put its case was to invite the jury to conclude that the first two transactions in which salt was transmitted were both "dry runs", testing the method to see whether it worked. It is very hard to see any other reason why anybody would want to spend so much money sending salt to Australia, a nation which, as far as we know, is not short of salt.
- 43 In the overall scheme of the case, therefore, these points are relatively minor. They do not for a moment suggest to us that these convictions were anything other than wholly safe, and the applications for leave are, as we have said, refused.
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