Neutral Citation Number: [2024] EWCA Crim 898

IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT

CASE NO 202402023/B1

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 23 July 2024

Before:

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE CUTTS DBE
THE RECORDER OF WOLVERHAMPTON
HIS HONOUR JUDGE MICHAEL CHAMBERS KC
(Sitting as a Judge of the CACD)

REX
V
AWQ

APPLICATION FOR LEAVE TO APPEAL A TERMINATING RULING UNDER S.58 CRIMINAL JUSTICE ACT 2003

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MR R HERRMANN appeared on behalf of the Applicant Crown
MISS C ABRAHAM appeared on behalf of the Respondent Defendant

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**J U D G M E N T**

1. LORD JUSTICE WILLIAM DAVIS: The provisions of section 71 of the Criminal Justice Act 2003 apply to these proceedings. We order that these provisions shall not apply so our decision may be reported. We consider that this is appropriate. However, the judgment will be anonymised. The defendant in the Crown Court will be referred to as AWQ. The details of the case will be set out in our judgment in such a way as to prevent any prejudice to future proceedings.
2. On 29 April 2024 the trial of AWQ commenced in the Crown Court. He was charged with participating in the activities of an Organised Crime Group, contrary to section 45(1) of the Serious Crime Act 2015. At the conclusion of the prosecution case the judge acceded to a submission of no case to answer made on behalf of AWQ. The prosecution now apply for leave to appeal under section 58(4) of the Criminal Justice Act 2003 against the ruling of the judge that AWQ had no case to answer. Pursuant to section 58(7) of the 2003 Act the prosecution have nominated a ruling by the judge in relation to the admissibility of hearsay evidence to be treated as subject to appeal.
3. We must begin with a procedural issue. The judge ruled that AWQ had no case to answer on 9 May 2024. The prosecution applied for an adjournment to permit consideration of whether to seek leave to appeal against the ruling. The judge agreed to that course. On 10 May 2024 at a hearing before the judge the prosecution stated that they proposed to seek leave to appeal against the ruling of no case to answer and in respect of the earlier ruling in relation to hearsay evidence. The prosecution gave the required undertaking as to acquittal were leave to appeal not to be granted. For reasons which will become apparent there was no order for expedition of the application to this court.

4. Pursuant to Criminal Procedure Rule 38.3(2)(b) the prosecution were required to serve an Appeal Notice no later than five business days from 10 May 2024 on the Crown Court, the Registrar and AWQ. On 15 May 2024 an Appeal Notice was served by email. Service on the Crown Court and on AWQ was effective. The email address to which the notice was sent in expectation of serving the Registrar was a defunct email address, albeit that it was shown as being an appropriate address for service on the Gov.UK website.
5. The solicitors for AWQ instructed counsel to draft a response to the application, which she did. The response should have been served on the Registrar within five business days of the receipt of the Appeal Notice: see CPR 38.7(3)(b). A junior employee of the solicitors uploaded the response to the DCS in the mistaken belief that this constituted proper service on the Registrar. This error was appreciated on 30 May 2024. At that point the response was sent to the Registrar. It was only then that the Registrar was aware of the application for leave. The prosecution were informed that they had not affected service as required by the rule and notice was served properly on 3 June 2024.
6. Against that background the prosecution apply for an extension of time to serve the Notice of Appeal under CPR 36.3(a). In addition, AWQ applies for an extension of time to serve his response. The critical application is that made by the prosecution. Although the requirement on a respondent to a Prosecution Appeal is to serve the response within five business days of the service of the Notice of Appeal on them, it must be implicit in that requirement that the Notice of Appeal has been properly served on the Registrar.
7. We consider that the interests of justice require us to extend time for service of the Appeal Notice to 3 June 2024. The reason for late service was an error caused by an out of date email address still being shown on a government website. No prejudice was caused to the respondent. The Appeal Notice was served on him. Neither he nor those

whom he had instructed were aware that the appeal had not been validly served until the Court of Appeal Office alerted them to the position. Within a business day of the response to the Appeal Notice being filed with the Court, the Registrar was served effectively with the Notice of Appeal. The delay caused was minimal. No real steps could have been taken to list the application for leave to appeal until the respondent's position was known.

8. We turn then to the substance of the application. The indictment on which the respondent appeared charged 14 people. Twelve were charged with conspiracy to supply cocaine. Of those charged with the conspiracy seven had pleaded guilty by the start of the trial in April 2024. The conspiracy was alleged to have run from 1 March 2022 to 25 August 2022. The prosecution relied on more than 30 separate events as demonstrating the existence of the conspiracy, namely occasions on which drugs or money or both had changed hands. This was proved *inter alia* by evidence of what was observed on surveillance and of telephone contact between conspirators. The principal conspirator and head of the Organised Crime Group was said to be the respondent's brother. He was one of those who had pleaded guilty prior to the commencement of the trial.

9. The case against the respondent related to the period 7 July 2022 to 25 August 2022. He was said to have assisted the activity of the Organised Crime Group by enforcing debts owed by wholesale customers of the group. The allegation was that he knew, or that he reasonably suspected that what he did would assist in the supply of controlled drugs.

10. The prosecution relied on two particular episodes. The first concerned someone to whom we shall refer as "JL" who was a wholesale customer of the Organised Crime Group. He had pleaded guilty to the conspiracy charged on the indictment. On 11 July 2022 the respondent's brother made repeated attempts to call JL's mobile telephone. Eventually,

shortly after 9.30 in the evening, he was able to make contact with JL. The sequence of calls in quick succession thereafter was a call from the respondent's brother to the respondent, a call from the respondent to JL and a call from the respondent to his brother. JL then called another conspirator who was part of JL's drug dealing enterprise. This man was seen later that evening to visit the home address of the respondent's brother. He stayed at the house for only two minutes.

11. Four days later on 15 July 2022 there was contact in the early afternoon between the respondent and his brother. For the rest of the afternoon and into the evening there were calls or attempted calls between the respondent, his brother and JL. At around 10.30 in the evening, JL and the other conspirator who was part of his enterprise, travelled over to the area in which the respondent's brother lived. They arrived in separate cars. They left shortly afterwards in a single car. The other car was apparently retained by the respondent's brother. He was seen to return the car about a week later to JL. The inference which the prosecution invited was that the car had been handed over as security for the debt.

12. The second episode concerned someone to whom we shall refer as "JB". On 23 August 2022 the respondent's brother was aggressively chasing a debt owed to him by JB for drugs. That was apparent from messages recovered from the brother's mobile telephone. The brother contacted the respondent, following which the respondent made several attempts to contact JB's mobile telephone. The brother sent JB a text message threatening female members of his family. After that, both the respondent and his brother had extensive contact with JB's sister before she travelled to the area where the respondent's brother lived. She there met the respondent and his brother very briefly before returning home.

13. On the basis of this evidence the prosecution said that a reasonable jury properly directed would be able to conclude that the respondent's brother on those days was chasing debts owed to him and that the respondent had assisted him in that endeavour. The respondent's argument was as follows. There was no evidence of the nature of the debt owed by JL. The content of the telephone calls was unknown and there was no evidence of what was in any text messages passing between JL and the respondent's brother. The contact between the brother and JL was not unusual in comparison to what had gone before. The leaving of the car, if it did relate to a drug debt, occurred seven hours after the last contact in which the respondent had had any involvement.
14. In relation to JB there was evidence that the respondent had a legitimate reason for being in the area in which his brother lived, the respondent's home being some distance away. The argument was that there was no evidence as to the purpose of JB's sister's visit to the brother of the respondent. These various submissions are repeated in the respondent's opposition to the prosecution's application.
15. We can set out in full the judge's written ruling in relation to the submission of no case to answer. Appropriately anonymised it reads:

> "I have carefully considered the evidence the Prosecution rely on against [AWQ] in respect of count 2 and remain mindful of the particulars of the offence alleged against him. [AWQ's] contacts and association with some of those involved in count 1 [conspiracy to supply cocaine] may give rise to a healthy suspicion that he was involved in a 'wrongdoing' during the operational period of the conspiracy. However, in my judgement the nature, quality and the amount of the Prosecution evidence as a whole and in particular that evidence identified by the Prosecution at paragraphs 3, 4 and 6 in their response to the Defence application to dismiss does not give clarity to the nature of the 'wrongdoing' he in fact may have been involved in. Certainly, it does not reach the threshold necessary for count 2 to be determined by the jury.

> Accordingly, applying the law as I have set out above, it is without hesitation I conclude that the evidence the Prosecution rely on against [AWQ] is not such that a properly directed jury could properly convict upon it.
>
> Thus it is that the application made on behalf of [AWQ] that there is no case for him to answer on the particular count alleged against him succeeds."

16. With respect to the judge this ruling does not begin to grapple with the evidence relied on by the prosecution. The respondent's brother, JL and JB were party to a conspiracy to supply cocaine. That was the nature of the dealings between them. On two days in July 2022 the respondent's brother was in repeated contact with JL. On each occasion the day culminated in JL and/or his co-conspirator travelling to see the brother. On the second day JL left a car with the brother. The circumstances were sufficient to demonstrate that the events were concerned with the drug debt. There may have been no direct evidence as to the nature of the debt but the relationship between JL and the respondent's brother permitted the relevant inference to be drawn.
17. The sequence of contacts between the respondent, his brother and JL gave rise to a permissible inference that the respondent was assisting his brother to recover the debt. The alternative proposition was that the various contacts were coincidental. A reasonable jury would have been able to reject this proposition as fanciful. The lack of an immediate temporal link between the respondent's demonstrable involvement and the leaving of the car was of limited significance. At best it was a matter of argument to put to the jury.

18. In relation to JB, there was direct evidence from text messages as to why the respondent's brother was trying to contact him. There was a clear and obvious inference to be drawn as to the purpose of the visit by JB's sister. The fact that the respondent had a legitimate

reason to be in the relevant area was of limited effect. Again, it was a matter to be argued before the jury.

19. Because the judge's ruling was so brief it is not possible to see how he reached his conclusion that the inferences argued for by the prosecution could not be drawn. All we can do is to assess how the evidence could have been assessed by a reasonable jury properly directed. Without hesitation we reach the opposite conclusion to that reached by the judge. We do not consider any other outcome to be reasonable.

20. Prior to the conclusion of the prosecution case the judge had declined to admit the content of text messages passing between JB and his sister. The critical messages were from the sister in which she said: "I fucking took your drug money to them brothers for you so leave me alone" and "I took your drug money to them brothers so you didn't get hurt". The context of the messages was some sort of argument between JB and his sister. She was pointing out what she had done for him.

21. Appropriately anonymised the judge's ruling was as follows:

> "[The] Prosecution argued that they should be permitted to adduce the evidence in question, it being in the interest of justice test (s114(1)(d) that they be allowed so to do. There was no evidence before the court of the Prosecution having made any meaningful effort to secure the co-operation or attendance of the statement maker for the evidence to be adduced and statement maker being made available for cross-examination.
>
> Further the statement in question referred to 'brothers'. The Prosecution's ambition is to invite the jury to conclude that it referred to ... [the] brother who has admitted his guilt to Count 1 and the other brother being [AWQ]. There is no evidence before the court that there are only the 2 [indicted] brothers. Absent which there is the potential of 'brothers' referred to not involving the defendant on trial.
>
> In the circumstances, giving regard to the courts obligation to consider matters set out in Section 114(2) I refuse the Prosecution

> application. There being no evidence of the credibility of the statement maker before the court coupled with an inability of the defence to obtain clarification of the import of what was said and to whom it referred were the deciding factors."

22. We consider that the judge was wrong to rule as he did. There was evidence that JB was involved in a conspiracy to supply cocaine with the respondent's brother. That was inconvertible evidence. JB had pleaded guilty. In August 2022 JB had amassed a debt to the brother in relation to drug supply. At that time there was contact between the respondent and JB. Eventually the respondent and his brother were visited by JB's sister. The suggestion that the sister was not referring to the respondent and his brother in her texts to JB is not sustainable. The proposition that the prosecution could have made efforts to secure the attendance of JB's sister ignores reality. Had she been summonsed to attend and had she gone into the witness box she would have been warned about self-incrimination. The prospect of her saying anything about the text messages would have been vanishingly small. Whilst there was no direct evidence as to the credibility of the sister, these messages were part of an unguarded conversation between her and JB. There was no reason to suppose that the sister was engaged in false accusations about JB's involvement in drugs and her trip to hand over money to his creditors. As to her general credibility, had the evidence been admitted it would have been open to the defence to seek disclosure as to any matters relating to the sister's reliability.
23. It follows from what we have said that we give leave to appeal. We reverse both rulings made by the judge. Both were rulings which it was not reasonable for the judge to have made. The trial of those charged with conspiracy continued after the ruling of the judge that the respondent had no case to answer. The respondent's case was severed with a view to him being retried on his own in the event of the application for leave being

successful. That is the reason why no expedition was necessary.

24. We order that a fresh trial take place at a venue to be determined by a Presiding Judge of the relevant circuit.

**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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