

Neutral citation No. [2022] EWCA Crim 396



IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NOS 202100854/B2 & 202100856/B2

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 15 March 2022

Before:

LORD JUSTICE DINGEMANS
MR JUSTICE SAINI
HER HONOUR JUDGE WALDEN-SMITH
(Sitting as a Judge of the CACD)

REGINA
v
BASHAR AL-SAFEE

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MR R JORY QC and MR B WAIDHOFER appeared on behalf of the Applicant

J U D G M E N T
(Draft Approved)

LORD JUSTICE DINGEMANS:

1. This is the hearing of renewed applications for permission to appeal against conviction and for permission to appeal against sentence.
2. On 25 February 2021, following a trial in the Crown Court at Southwark, the applicant, who was aged 31 years on the date of his conviction, was convicted of conspiracy to fraudulently evade the prohibition on the importation of a controlled drug on count 1 and conspiracy to supply a controlled drug of class A on count 2.
3. The conspiracies were alleged to have run between October 2015 until arrests were made on 9 June 2016 and were said to involve two main shipments. On 26 February 2021, the day after conviction, he was sentenced to 21 years' imprisonment.
4. The ground of appeal against conviction is that the judge was wrong to exclude evidence of shipments beforehand which related to two particular people, a Mr Villegas, who was an associate of the co-defendant, a Mr Lopez. The ground of appeal against sentence is that the judge was wrong to assess the applicant as having a leading role.

The circumstances of the offence

5. The circumstances of the offence were wide-ranging, but the case for the prosecution was that there was a conspiracy which concerned two importations from a company called IMDN which was arranged by a company in this jurisdiction using the identity "Fruity Fresh". That was referred to at trial as the "fake Fruity Fresh", that is because there was a genuine Fruity Fresh. The fake Fruity Fresh was set up on 24 March 2015 and effectively stole the identity of a genuine company known as Fruity Fresh. The fake Fruity Fresh, it was alleged as part of the prosecution case, had been set up by the applicant and operated by him from Coutts Automobiles, which was a car trading company also owned and operated by him. The first importation offence was said to be

in early 2015 and the second in late May 2016.

6. The case against the applicant was based on evidence from an undercover officer, other surveillance evidence, evidence linking him to an email address which was info@me4marketing which had been used to establish the fake Fruity Fresh company, and evidence linking him to a bank account in the name of Mourchidi, which was used to make payments. There was evidence relating to that account on the applicant's computer and his phone contained texts about the Mourchidi bank account. There was also evidence about the applicant's link to Trading Global Limited which made various payments to IMDN for shipments.
7. The case for the applicant was, as has been put in the advice and grounds before us, to put the prosecution into its proper context and to explain the evidence about the applicant's presence and phones. There was, it was alleged, an established drugs importation network operating independently of the applicant and he was not an equal stakeholder and did not know what was being imported. The applicant was unaware of any agreement to import cocaine and he was acting under the direction of an investor who was called Mr Villegas. He was effectively an innocent dupe in all of this.
8. The case for the defence was that Mr Villegas was an established importer of drugs and he had pre-existing links with the co-defendant Mr Lopez, together with other known or suspected drug dealers being a Mr Vijay Bagga and a Mr Piper. The applicant gave evidence in his defence and also relied on a video of a meeting between, amongst others, Mr Villegas and Mr Lopez in a pub in February 2016 on a date which happened to be the date on which payment had been made for a warehouse said to have been involved in the importation conspiracy. The applicant said he knew nothing about any of those meetings.

9. The period of the conspiracy as pleaded - and part of the complaint made on behalf of the applicant is that there was an impermissible restriction of relevant evidence by reference to the pleadings - spanned the two importations using the fake Fruity Fresh identity. The first was, as we have already indicated, early December 2015. The prosecution could not say whether this importation contained drugs or whether it was a test run. The second was in May 2016 and that contained approximately 436 kilograms of cocaine.
10. The early December importation was organised by emails from the fake Fruity Fresh address and the use of various burner phones that were attributed to the applicant. Cell site analysis was used to show that the phone was used by masts covering the place where the applicant worked - but it is also fair to point out that it was a place where Mr Lopez worked - and the phone was only used at times when the applicant's 'clean' phone was also using masts covering where he worked.
11. Mr Lopez' involvement with the applicant and the applicant's place of work began in either late December 2015 or early January 2016 on the prosecution case. The May 2016 importation which did contain drugs began to be arranged in February 2016 with an email from the fake Fruity Fresh address. The payment for the cover load was organised by the applicant on the prosecution case. By the time he gave evidence he accepted that the voice on the telephone recording during which payment was made was his. A further burner phone was activated in May 2016 which was also attributed to the applicant and it used the same handset as the earlier December phone and it used only masts that provided coverage where he worked and was used only at times when it was co-located with his clean phone. Voice analysis of recorded phone calls showed that the person using the phone for those calls was said to be the applicant and again by the time he gave evidence the applicant accepted those calls were made by him.

12. A further burner phone was attributed to him and was activated in the days before the drugs delivery. It was activated once the fake Fruity Fresh had received an email confirming that the shipment was on its way to be delivered and again cell site analysis was used to show that this was co-located with the applicant's clean phone. This phone was used to communicate only with Mr Lopez, who was (as will become apparent) present when the drugs were delivered to their final destination.
13. So far as that final delivery was concerned, on 31 May 2016 a container arrived at London Gateway Port aboard a vessel. It was selected for examination. The seal was broken and the door was opened. There were boxes of yams marked "Product of Costa Rica". There were 20 pallets containing 54 boxes of yams. The pallets were removed. The first 12 pallets were broken down and each box contained negative results. But another pallet was broken down and there was a false floor discovered in boxes removed from that. Underneath the false floor were packages and in total some 301 packages were recovered.
14. On 5 June the officers returned the yams to the container. On 9 June the container was released and went to Cumberland Business Park in London. Surveillance officers who were in place observed the activities of the applicant and Mr Lopez. The lorry itself was being driven by an undercover officer who parked it up. He spoke to Mr Lopez, who said he had a delivery for Fruity Fresh. Mr Lopez said he was expecting a car and needed to call his "boss", the applicant, which he did on a Samsung smart phone. He reported that there was a delivery. He reported to the undercover officer that he had to unload the delivery and the lorry was then unloaded, albeit after a delay to obtain a further gas canister for the fork-lift truck.
15. At around 13.00 hours the applicant arrived in a smart car and he was observed driving

around the business park and directing two men towards the unloading. He left at some time between 1.15 and 1.30. The unloading was completed at about 2.00 pm and the HGV left the lorry park. At 14.18 hours Mr Lopez closed up a unit and he and another man walked towards the exit. At 15.00 hours the applicant drove into the business park, he had a mobile phone held to his ear. The car drove towards the end of the business park and a few seconds later back towards the exit. The exit was blocked by various enforcement authority vehicles. He was approached, searched and subsequently arrested. Various phones were recovered.

16. The inspection of the packages showed that the 301 packages weighed 436 kilograms. They were examined by a forensic scientist. Various purities between 63 and 70 per cent were identified. The value of the importation was alleged to be in the region of £32 million once broken down and sold as street deals.
17. There followed arrests. Mr Lopez was arrested and he was searched. He gave a prepared statement that he was expecting a car to be delivered and made contact with his boss, the applicant.
18. The applicant was arrested. When first interviewed he answered "no comment" to all questions, before giving a prepared statement in a second interview saying that he had no knowledge of the importation of class A drugs, was shocked by the allegations, he was tired and fasting and did not feel fit to deal with the matter in the first interview. The third statement he made was to the effect that he managed Mr Lopez at the car company. Mr Lopez was off work on the day and had asked him as a favour to get the gas canister for the fork-lift truck and that was the end of it.
19. So far as IMDN was concerned, there was a search of their premises in 2017 when drugs were found at the packaging plant and cash at the address of the then President, Mr Salas.

It is relevant to note that although he was made President of the company in 2017, at the time when importations were made that were the subject of these counts, he had been involved with the company, it was said, throughout the whole relevant period and he signed paperwork as the exporter.

20. The evidence in relation to all those matters was introduced by agreement between the parties. The purpose was to show, by inference, that the drugs imported in May 2016 had been in the container from the outset, rather than having been slipped in at some later stage in the import chain.

The bad character evidence relating to non-defendants

21. So far as the evidence was concerned, what was sought to be adduced was evidence of shipments of yams which were effectively alleged to be drugs or test runs for drugs organised by Mr Villegas' company and evidence of his movements and drug convictions of associates of Mr Villegas. The applicant wanted to establish that Mr Villegas was involved in class A drugs, that he knew Mr Lopez before he knew the applicant and that the applicant was therefore the innocent dupe in all of this.

22. The applicant wanted to adduce in particular evidence that on 25 February 2014, IMDN carried out an export of 9,600 kilograms of fresh yucca and 9,600 kilograms of fresh yam from Costa Rica to the United Kingdom. The values were declared as \$5,700 and \$9,300 respectively. The export was shipped within a 40-foot container and the date of lifting was stated to be 2 October 2014.

23. What was said in oral submissions today by Mr Jory QC on behalf of the applicant - and we should record that we are very grateful to Mr Jory QC, Mr Waidhofer and those representing the applicant for all their assistance - was that this shipment was strikingly similar to the first count on the indictment when no one knew whether drugs were

contained as well and that it was effectively unfair, wrong or knocked out a key pillar of the defence to have excluded it because the material which needed to be considered also needed to be considered alongside details of Mr Lopez' travel, all of which pre-dated the applicant's relationship with Mr Lopez. In particular there was travel on 27 October 2014 and cash payments for airline tickets. On arrival at Gatwick Airport Mr Lopez said he had been on holiday in Majorca travelling with Mr Turku and Mr Villegas.

Mr Villegas had reported that he dealt with property in Spain. There was also a meeting on 15 February 2016 on which a tape was caught between Mr Villegas, Mr Lopez and in fact another person suspected of dealing in drugs called Mr Vijay Bagga.

24. There was an application to adduce this evidence which was heard by the judge on 8 February 2021. A number of matters were admitted as being relevant to the facts of the case and it is apparent from looking through the application that the applicant was suggesting that the position was that he was the dupe of Mr Villegas and Mr Lopez. The judge referred to the fact that the applicant had by this stage given evidence to the effect that Mr Lopez was innocent, but as was fairly pointed out by Mr Jory on behalf of the applicant, that was something that was really not within his knowledge and what he wanted to explore was a relationship between Mr Villegas, who had originally been referred to in the defence case statement as "Twinkle" because the applicant said he was concerned about naming him, and Mr Lopez which predated his involvement.
25. The judge ruled that all of this was insufficiently relevant. All that was being asserted was that there was a coincidence of arrival of the shipment and the arrival of Mr Villegas and Mr Lopez within the month. The judge confirmed that there could be exploration of contact between Mr Villegas and the applicant over a period for which there were telephone schedules, but as to Mr Villegas there was an absence of data before 2020

when he came to the attention of the authorities.

26. There was an admission to the effect that Mr Villegas was suspected to be a class A drug dealer and that went in, as we will see, under (it seems) section 100(1)(c) of the Criminal Justice Act 2003.

Judge right to refuse to accept the further evidence

27. Mr Jory this morning has argued that the judge wrongly deprived the applicant of the chance to establish his defence and the evidence that he sought to call was relevant. It was, Mr Waidhofer submitted when he followed Mr Jory, to do with the facts of the case and therefore outwith the bad character provisions. It was said that there are authorities making it plain that a defendant should not be prevented from calling relevant evidence: see R v Lobban [1995] 1 WLR 877. It was fundamentally relevant to expose and show that the co-defendant Mr Lopez had connections with Mr Villegas of IMDN which pre-dated any involvement of the applicant and Mr Lopez.
28. So far as whether this was bad character or dealing with the facts of the offence, it is perfectly apparent from a careful consideration of the application that was made in writing and the argument before the judge that what was effectively sought to be asserted was that Mr Villegas and others, including Mr Lopez who was the co-defendant, had been involved in the importation of class A drugs before the facts of this offence.
29. So far as Mr Villegas' own criminality is concerned, it was admitted that he was a suspected drug dealer. So far as Mr Lopez was concerned he obviously denied any wrongdoing and indeed it was submitted on his behalf in closing (which has caused particular irritation to the applicant's legal team and no doubt to the applicant) that the biggest mistake he made was going to work for the applicant. What is said effectively, and we hope fairly as a summary of Mr Jory's point, is that there has been a fundamental

misrepresentation of the true facts of this case.

30. That said, a judge is only entitled to admit relevant evidence through certain gateways if it is bad character evidence. So far as the evidence in relation to the earlier shipment was concerned, it was plainly intended to assert that this was either a shipment of drugs or indeed a dummy preparatory shipment of drugs. It could not be said that this was to do with the facts of the offence charged against the applicant because this was not the indictment period. This is more than just a narrow pleading point as to dates (and we have already referred to the issue of dates) because the shipments that were the subject of the indictment were arranged by the fake Fruity Fresh company. They were not to do with the facts of any earlier offence. Mr Waidhofer helpfully referred us to R v Kearney and the fact that what was permitted to be adduced on behalf of the prosecution in that case was possession of a rifle a year before it was used and the applicant's possession of a rifle the year before it was used. What will be the facts of the case will depend always on the particular circumstances of the case, but in our judgment the judge was entitled, if he had been confronted with this argument, and it does not appear that he was, to find that these were not to do with the facts of this particular offending.

31. A judge must always ensure that evidence of bad character is properly adduced through the gateways, particularly when the evidence is designed to ensure and show that a co-defendant has been involved in earlier offending.

32. Section 100 of the Criminal Justice Act 2003 had a legislative background, the details of which have been set out in other authorities. It was designed to ensure that only proper probative evidence of other person's bad characters was adduced in criminal trials.

Section 100 reads:

"(1) In criminal proceedings evidence of the bad character of a person other

than the defendant is admissible if and only if—

(a) it is important explanatory evidence... "

That is not relevant here:

"(b) it has substantial probative value in relation to a matter which—

(i) is a matter in issue in the proceedings, and

(ii) is of substantial importance in the context of the case as a whole ... "

33. The matter in issue in the proceedings was, Mr Jory says, the question of whether Mr Lopez and Mr Villegas were associated in drug dealing beforehand or test runs beforehand, and that was an important matter in the proceedings because it was directly relevant to the applicant's defence.
34. So far as substantial probative value is concerned, however, in our judgment it simply cannot be said that it had substantial probative value. There were a number of coincidence of dates which were relied on, but as the judge said this was effectively speculation. The material which the applicant sought to introduce pre-dated the creation of Fruity Fresh which had been used. The judge did permit information which might satisfy the provisions of section 100 to be adduced, but did not permit other evidence to be given, and much of the evidence in this respect was speculative in nature and it was designed to show, whatever is said about it in the facts of this particular case, that Mr Villegas and Mr Lopez were effectively conspiring to import drugs before the relevant date. As was noted by the single judge, there was no evidence that the September 2014 importation concerned drugs. That is not an end of it because of course it could have been a test run, but there was no evidence that it was indeed a test run.
35. We have looked carefully throughout the whole of the record and the argument and the applicant's evidence to see whether there was anything which might indicate that this

conviction was unsafe, but the main evidence implicating the applicant was the evidence relating to his use of the bank accounts and various phones and emails. He gave clear evidence of that and we cannot see, no matter how strongly he and the applicant's legal team feel against the exclusion of this evidence, that the exclusion of this evidence rendered the conviction unsafe. For all the reasons we have given we consider that the judge was right to make the ruling that he did.

36. So far as sentence is concerned, the judge noted that the operation was highly sophisticated and on a commercial scale. It was intended to yield an importation with a street value of £32 million-worth of cocaine. The judge found that the applicant played a leading role and that was because the judge said he was at the centre of the arrangements for the importation of drugs, he directed and organised the importation and onward supply and he was instrumental in the theft of or creation of fake identities to mask his activity, including Fruity Fresh Limited. He instigated the use of burner phones and he had used his company Coutts Automobiles and another company as a front to give the impression of lawful importation. There was an expectation of substantial financial gain.
37. The judge identified properly the mitigating factors which, to be fair to the applicant, included the fact he had no previous drug-related convictions and there was a considerable delay caused by Covid in the prosecution of the trial.
38. So far as the proposed grounds of appeal against sentence are concerned, the difficulty with the submission that the judge was wrong to assess the applicant as having a leading role was that the judge was the trial judge who had heard and seen all of the evidence. The judge made clear findings. We may of course set them aside if they do not withstand analysis - for example if they are irrational or have no foundation in the

evidence or are internally inconsistent. There is however nothing of that sort here.

There was evidence showing that it was the applicant who set up fake Fruity Fresh, that Mr Lopez rang the applicant as the container arrived, that Mr Lopez described him (before knowing that he was talking to police officers) as his "boss" and that Mr Lopez was involved in the grunt work of removing the fruit while the applicant turned up to claim the proceeds in the end. It is clear that the applicant disagrees with the characterisation of his role but in our judgment there are no arguable grounds to appeal against sentence.

39. Therefore for all those reasons, notwithstanding the skill and care that has been taken to present this matter, we can find no arguable grounds of appeal against conviction or sentence and refuse the renewed applications.

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

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