Neutral Citation Number: [2011] EWCA Crim 147
No: 201001215 D3, 201001323 D3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 26 January 2011

B e f o r e:

LORD JUSTICE ELIAS

MR JUSTICE KENNETH PARKER

RECORDER OF LONDON - HIS HONOUR JUDGE BEAUMONT QC
(Sitting as a Judge of the CACD)

R E G I N A

v

(1) FERNANDO HURTADO
(2) JOHN ESQULANT

Computer Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 0207 404 1424
(Official Shorthand Writers to the Court)

Mr M Mulgrew appeared on behalf of the **First Appellant**
Mr M Pardoe appeared on behalf of the **Second Appellant**
Mr R Wigglesworth QC appeared on behalf of the **Crown**

J U D G M E N T

(As approved)

Crown copyright©

1. LORD JUSTICE ELIAS: On 9 February 2010 at the Crown Court at Leicester before HHJ Pert, each appellant was convicted of conspiracy to supply a controlled drug of class A, namely cocaine, contrary to section 1(1) of the Criminal Law Act 1977.

2. On 12 February 2010 each was sentenced to 28 years' imprisonment, with time spent in custody to count towards the sentence in the usual way.

3. There were a number of co-accused. Stedman pleaded guilty to count 1 and was sentenced to nine years' imprisonment. Two others, Jordan and Kirby, were each acquitted on count 1. Hurtado now applies for leave to appeal against conviction, and appeals against his sentence by leave of the single judge. Esqulant appeals against both conviction and sentence, the grounds of the appeal being limited to two specific grounds identified by the judge.

4. The evidence in relation to the offence committed in this case came from a number of sources. There were extensive telephone calls between two undercover police officers and the conspirators, and these were tape recorded. There were also meetings which were tape recorded and covertly filmed, and there were observations made of those alleged to be part of the conspiracy at various stages.

5. There was in fact little dispute about the primary facts. The issue was what construction should be placed on them. It was not disputed that there was a conspiracy, and in each case the question was whether the defendants were part of that conspiracy. The telephone evidence showed the passage of calls from one telephone to another. In most cases, the identity of the person phoning and receiving the call was not in doubt. In relation to the appellant Esqulant, however, there was an issue about this. Four telephones were alleged by the prosecution to be owned and used by him, but he submitted that two of them, which had been found in his car had been left there by one Dempsey who has disappeared and not been prosecuted. That was an issue which the jury had to determine.

6. The evidence before the jury related to events from 31 March 2009, when Hurtado met two undercover officers, "Rob" and "Eddie", as they were known, at a hotel in Waltham Abbey, until the drugs were finally seized on 22 April. So the material before the jury was essentially these phone calls, recordings of meetings and evidence of surveillance of those alleged to be part of the conspiracy in that relevant frame of time.

7. The judge dealt with the evidence in his summing-up chronologically, and that is how we will summarise the facts.

8. The prosecution case, as it emerged from the evidence, was essentially as follows.

There were discussions between Eddie, an undercover officer, and Hurtado as to how much would be paid for 299 kilograms of cocaine. There were negotiations as to whether the money would be handed over prior to the drugs being given or after or at the same time. The sellers wanted £521,000 and the purchasers wanted to pay only £300,000.

9. On 1 April Eddie telephoned Hurtado, who informed him that he had told the others of their request for £521,000 and not £300,000, and he was waiting for them to get back to him with further instructions. On 4 April there were a number of telephone calls between Hurtado and Esqulant, and later that date Hurtado called Eddie and told him that "his people" had an agreement that the paperwork (that is the money) was to be handed over the day after delivery. On 6 April Eddie told Hurtado that the deal was equipment first and paperwork the next day (that is the drugs to be delivered before the money was given). On 7 April there were further telephone calls between Esqulant and Hurtado. Eddie telephoned Hurtado, who was observed driving his van and stopping to return Eddie's call from the telephone kiosk. He maintained that the deal was delivery first, but suggested that someone could stay with the delivery until full payment was made. Hurtado then took a telephone call from Esqulant and was observed driving to the home of the parents of another alleged party to the conspiracy, namely Jose Pineda. Hurtado is not then recorded in any further telephone traffic from 7 April on that mobile. Thereafter it was used by an Hispanic-sounding male. The prosecution alleged it was Pineda, and that phone was used to telephone Eddie on 8 April 2009. The Hispanic male then told Eddie that there had been a few misunderstandings and that he wished to get negotiations back on track.

10. There then followed a number of telephone calls between the phone alleged to have been used by Pineda and the phone which the prosecution alleged had been used by Esqulant, which he denied. Somebody used that phone to offer a simultaneous exchange of goods and paperwork. As we say, the prosecution case is that it was Esqulant's phone and Esqulant using it.

11. Then there were a number of telephone calls on 9, 12, 13 and 14 April between the telephones ascribed to Esqulant, Pineda and Hurtado.

12. On 15 April Pineda and Dempsey met undercover officers at a motorway service station. Pineda and Dempsey sought to make arrangements by offering a deposit of £100,000, but this was rejected and they were told that £500,000 was required. This particular conversation was not successfully recorded on the covert listening device; it was the only one where the recording device had failed. In the course of that meeting and subsequent to it, a number of phone calls were made between Hurtado and Pineda and between what the prosecution allege was Esqulant and Pineda. After the unsuccessful meeting on 15 April, Pineda and Dempsey went back to Esqulant's home, arriving at about 9 o'clock. There were then a number of conversations that took place at Esqulant's home involving Pineda and Dempsey. Dempsey telephoned Rob, another

undercover officer, and indicated they would be able to provide £300,000 to make the purchase the next day.

13. On 16 April Hurtado was observed driving to Pineda's UK address in south London. He dropped Pineda and another male a White City tube station. Pineda and the other male then took the underground to Loughton in Essex, where they were collected by a car driven by Dempsey. The car was later observed containing Pineda, his associate and Dempsey, and they went to Esqulant's house. The associate was a man who has been referred to as "Heathrow" and had been picked up on 12 April by Hurtado. Dempsey was observed loading hessian shopping bags from the house into the car. When those shopping bags were later recovered, they were found to contain £322,000 in cash hidden in packs of beer cans.

14. Pineda made a number of telephone calls to the undercover officers in order to arrange to meet them. He and Dempsey travelled north to Pontefract, and at some point in the journey it was alleged that the money in the hessian shopping bags was transferred from Dempsey's car to a hire car driven by Stedman, the prosecution alleging that Pineda and Dempsey wished to minimise the risk of being caught with a large amount of cash. Dempsey's car arrived at the Pontefract retail park, followed by Stedman's car, and the undercover officers were waiting. Pineda engaged in conversation with the two officers while Stedman removed the hessian shopping bags from the boot of his hire car and placed them in the boot of the officer's car. The undercover agent, Rob, then placed a third hessian bag in the boot.

15. Arrangements were made for the delivery of the drugs the following day. Dempsey gave Rob a mobile telephone with two numbers stored in it, namely those for "B" and "C". The contact number for B was for a telephone later recovered from the home of Terry Jordan.

16. Pineda and Dempsey then went back to Esqulant's house in Essex. Dempsey left shortly after they arrived. Pineda telephoned Rob and told him that Fernando would call him to finalise details. A number of phone calls are then logged between Hurtado and Pineda.

17. On 17 April Hurtado visited Pineda's UK address in South London and they went to Holloway Road in North London, where Pineda made various telephone calls from a public phone box and on a mobile telephone. Hurtado later dropped Pineda in Hammersmith in West London. Esqulant was observed in the company of Dempsey on that day at a golf club in Abridge. Dempsey was observed getting into Esqulant's cab and being driven to a telephone kiosk in Debden in Essex. He used the telephone in the Kiosk and Esqulant used his mobile phone.

18. A number of telephone calls were then made during the course of that day between all parties involved. Arrangements were made between Rob and the owner of the C mobile telephone to meet at the Sandbach motorway service station on the M6.

Subsequently those collecting the delivery were for some reason unhappy with the location and arrangements were made for exchange to take place on 22 April. It was agreed that they would meet at a service station, where Rob would hand over a set of keys to a van parked in a different location which contained the goods. Jordan and Stedman were given the keys on that day. Stedman gave the officer £60 to purchase a new mobile telephone and a piece of paper bearing a telephone number. Jordan then drove on to meet with Kirby, to whom he gave the keys of the van and directions to get it. Kirby went to the location of the van and drove it towards the M1. He was stopped by officers and the cocaine was retrieved.

19. Esqulant gave no comment interviews which he said in evidence was on the advice of his solicitor. He was interviewed on six occasions in all. He did, however, give two short statements, and they are material to part of this appeal and I will refer to them later.

<u>The defence evidence</u>

20. Hurtado chose not to give evidence. Esqulant did. He said he had been a cab driver since 2003 and had met Hurtado and Pineda in 2004. He agreed that had he contacted Hurtado between March and April as Hurtado had done labouring work for him. He had known Dempsey since 2006 and acted as a driver. He did not know that Dempsey knew Pineda, but agreed that they both now appeared to be international drug dealers. He gave evidence about the three occasions when he had been in contact with his co-conspirators and they had come to his home. On 15 April he had been at a funeral. He agreed that he had spoken to a man named Steve, who was talking to Dempsey on his mobile phone, and he (Esqulant) had said hello to Dempsey through Steve. Dempsey and Pineda had later visited his house as a social call and because Dempsey wanted him to do some driving for him the following day.

21. On 16 April, when money was taken up to Pontefract, three men had earlier been to Esqulant's house (Dempsey, Pineda and the man who was referred to as Heathrow). Esqulant said that he was asked to drive his cab to Yorkshire, but he refused. He did not know why they were going there. He said that Dempsey had left his house for a few minutes and returned with two bags. He knew nothing about the money subsequently found in the bags. He had asked his son to help load the bags into Dempsey's car but he did not know what was in them. He then looked after a third man Heathrow, a man whom he said he had not met before, while the other two drove up to Yorkshire.

22. On 17 April, when he and Dempsey had been in the company of others at the golf club, he said Dempsey had asked them for a lift to Epping, and they went to Esqulant's house for a short time, but then Dempsey had changed his mind and wanted to go back to the golf club. It was when he was cleaning his cab the following day that he found two mobile telephones and stored them in the front luggage well of his cab. They were phones which he therefore believed belonged to Dempsey. He said one of the phones

found about his person when he was arrested had been given to him by the man named Steve who he had met at a funeral. He alleged that Steve had given him the mobile on 20 April and told him to turn it on the next day and that Dempsey would call him. He said he was not able to question Steve about that rather cryptic message because Steve had gotten into his car and driven away.

23. Hurtado, as we have said, did not give evidence. His case, however, as put through his counsel, was that Pineda had asked him to attend a meeting on his behalf on 31 March 2009, but did not know it was a discussion about cocaine. He did not know there was a conspiracy to supply cocaine and he thought he was involved in a legitimate operation.

24. When the judge sentenced these defendants, he had the antecedents, which showed that Hurtado had been before the courts on three occasions for six separate offences and had been convicted in 1992 of drug possession, but otherwise had committed no drugs offences. Esqulant also had no drug offences. The judge referred to the fact that this was a massive operation. The 299 kilograms of drugs were between 60 and 70 per cent purity and would yield a street value after dilution of some £80 million. He was satisfied that Esqulant and Hurtado were key organisers in what he described as a sophisticated drugs gang. He described Esqulant as being at heart of the operation, and said he was a focal meeting point for those involved in negotiations, and it was the place where some or all of the £300,000-odd in cash was assembled.

25. Hurtado too, in the judge's view, was a central part of this conspiracy. It was clear, thought the judge, from the transcript of the meeting between Hurtado and the undercover officers on 31 March that he was going to take possession of the cocaine. He had conducted the initial negotiations and had maintained active communication and transport for his fellow conspirators. The judge thought there was no justification in differentiating between the two. He thought that a sentence of 28 years' imprisonment was appropriate and would serve as a deterrent to others.

26. He considered Stedman to be sufficiently senior in the organisation to be trusted to transport a large sum of cash, and so he rejected the submission that he was no more than a courier. Nonetheless, he did not consider him a pivotal figure. He indicated he would have imposed a sentence of 12 years, but because of the guilty plea, that was discounted and he received a sentence of nine years.

27. *Hurtado's application for appeal against conviction*.

28. We will first consider Hurtado's application for permission to appeal against his conviction. The principal ground originally advanced was that the undercover officers may have acted as agent provocateur and the judge had failed to consider properly that issue and to assess whether the tactics and mode of operation of the officers was such as to incite the applicant to commit the offence. The applicant, along with the other defendants, had sought disclosure of material relating to the period prior to 31 March,

and also for a stay of the proceedings unless and until they received proper disclosure.

29. The judge rejected the application. He held that before requiring disclosure on the premise that there may have been entrapment, there must be a particularised case and some evidential basis for it. He did not accept that that was the case here. He concluded that, in effect, he was being asked to assess the material available to the Crown to determine whether it should be disclosed to further the case for the applicant. It was contrary to the statutory regime for the judge to do that. He stated in terms that no PII application had been made, and that he had not seen any material in the possession of the Crown which had not been made available to the defence. He acted, in our view, entirely in accordance with the observations of Lord Bingham in R v H [2004] 2 AC at para 133.

30. Mr Mulgrew no longer pursues this ground, rightly in our view. However, in response to the original ground, the Crown did in fact disclose the material which it had concerning the period pre 31 March. The Crown had not wanted to disclose it originally because of the risk that it would have compromised another ongoing investigation, but nor did the Crown think that it ought to be disclosed. It was not in the Crown's view necessary for it to be disclosed because it neither assisted the applicant nor was it capable of undermining the Crown's case. Ideed, the Crown considered that in fact it was positively damaging to the applicant. They made no PII application with respect to it.

31. As we have said, the Crown in the course of this application has volunteered the information so that the court could see what was in fact available. This has allowed Mr Mulgrew to submit that the Crown was wrong in its assessment that it was under no duty to disclose the information. He contends that it should have been disclosed and that it positively assists the applicant. He says that the Crown is in breach of its statutory obligations under section 3 of the Criminal Procedure and Investigations Act 1996, although he no longer seeks to suggest that it supports the defence of entrapment. His submission is that the material, had it been disclosed, may have assisted the case for the applicant, and it was highly relevant material because it was contemporaneous material where the applicant was himself speaking and one could infer his own knowledge of the conspiracy to some extent from the terms of the conversations.

32. The applicant relies principally on two transcripts. The first is in a telephone call between himself and an undercover officer, "George", with whom those involved in this conspiracy had dealings prior to 31 March. The second piece of evidence on which he principally relies is from the transcript of a separate conversation between the co-conspirator Pineda and George.

33. In the first transcript there is what can only be described as a somewhat cryptic conversation between George and the applicant, where George was indicating that, in substance, the suppliers were not yet ready to complete the deal. George said this at

one point:

> "Yeah the babies aren't in the cots yet they'll be put in bed tomorrow if you know what I mean."

Hurtado replies "ok", and then later George says this:

> "Yeah, yeah its no problems just a lot of what we are going to talk about I'm putting to bed tomorrow if you know what I mean if you understand."

Hurtado says "erm".

34. Mr Mulgrew contends that these are somewhat non-committal responses from the applicant, and they suggest that he did not in truth know what was going on. That was always his case: that he was involved in these negotiations on behalf of Hurtado believing them to be legitimate.

35. The second conversation, as we have indicated, does not involve the applicant himself, but in the course of a discussion between George and Pineda, Pineda says this:

> "I've got this guy called Jay to come and sort it out with you, which is from here and he's phoned Eddie to be ready to sort it out but he's from, he's from my group (inaudible)."

36. Mr Mulgrew contends that what is being said here is that there are now dealings between George and those who are properly parties to the conspiracy, and that by inference Hurtado, who had been involved in the discussions at the earlier stage, were not part of his group, as he put it. That, says Mr Mulgrew, is consistent again with his case.

37. I should add that Mr Mulgrew submits that had this evidence been available, then not only would it have assisted potentially the applicant's case, but it might have affected the way in which he cross-examined Eddie and, in addition, it may even have affected Hurtado's decision whether or not to give evidence.

38. In our judgment, this is, with respect, quite fanciful. Even read independently of the wider context, we do not accept that these observations made by Hurtado in the first transcript or the inference Mr Mulgrew seeks to infer from the second can properly be made. What this information does indicate is that the first contact with the officer was in fact made by Hurtado rather than vice versa, and indeed the nature of these conversations -- the cryptic and elliptical language in which they are cast -- without the applicant ever seeking greater clarity or explanation, in our judgment fully supports the Crown's case that he was involved in all this from the start. It does not, we think, begin to support his contention that he was an innocent caught up in this operation.

39. Mr Wigglesworth QC for the prosecution in any event submits, and we accept, that

one has to look at this evidence in the wider context. The case against Hurtado is, in truth, overwhelming. The telephone traffic itself is very powerful evidence against him, as is the fact that he obtained transport, namely one of the vans he used, by deception. There is an issue as to whether he directly presented the documents to the lenders, we are told. Nonetheless, overall there is plenty of evidence here to demonstrate that he was actively involved in this conspiracy and we do not accept that the information now provided by the Crown begins to assist him in seeking to demonstrate otherwise.

40. The second ground advanced by Mr Mulgrew is that the judge should not have admitted the guilty plea of Stedman to be adduced before the jury. The basis of the contention appeared to be this: it was submitted that Hurtado played much the same kind of courier role, perhaps slightly enhanced, as Stedman. In these circumstances, the jury might have reasoned that since Stedman had pleaded guilty, then Hurtado must be guilty too. In addition, it was said that the judge, when he referred to the fact that Stedman had pleaded guilty at page 23 of the summing-up, had failed in terms to tell the jury that they should not infer that the other accused must therefore be guilty as well.

41. We entirely reject this submission. It is quite fanciful to believe that the jury would assume that Hurtado was guilty merely because Stedman had pleaded guilty, and indeed what the judge said at page 22 of the summing-up was this:

> "It is conceded that there was such a conspiracy and you know that Mr Stedman pleaded guilty to it. So the conspiracy exists. The question is: have the Crown proved in the case of each of these defendants that they were a party to it?"

Nothing could be clearer. The jury were told not to infer guilt unless they were satisfied so they were sure that each of these defendants was a party to the conspiracy.

42. Accordingly, we reject that ground too.

43. We turn to Esqulant's case. There are two inter-related grounds of appeal. The first is that the judge's section 34 direction was defective, and the second was that, looking at the summing-up as a whole, the judge did not fairly or cogently summarise the appellant's case. We will take the second ground first, namely the complaint the judge did not fairly present the case of this appellant. The objections fell into two broad categories. First, it is said that the judge did not at any stage bring the thread of the appellant's defence together. He dealt with it, it is submitted, in a fragmented and confusing form to the jury. By going through matters chronologically and dealing with the appellant's response to particular incidents as they arose chronologically, the jury would not have had a clear and cogent understanding of precisely what the defence was.

44. It is also submitted that the judge was in effect too partial in the way in which he presented the facts to the jury. For example, complaint is made that on a number of occasions he referred to evidence which might support the conclusion that the phones which Esqulant claimed were in fact Dempsey's phones could not have been Dempsey's phones. It is also submitted the judge did not simply present the evidence in an objective way, perhaps inviting the jury to make inferences where they thought them appropriate; rather he did so from the perspective of one seeking to steer the jury towards a guilty verdict.

45. We do not accept these points. It is true that the judge did not deal with the defence in detail in one place. He did, however, summarise the essence of the defence succinctly, but in our view fairly, at page 10 when he was giving the section 34 direction, and he did so in a little greater detail at pages 34 to 36. He did not sum up in the usual way, perhaps, of dealing with the prosecution and then the defence case in one go. As we have said, he summed up taking matters chronologically, and in that context at various points he dealt with the appellant's explanation for or comments about matters that arose involving him. However, as the Crown Court Bench Book points out, it is not essential for the defendant's evidence to be considered in a space reserved to itself. The only issue is whether the jury has been directed to consider the relevant evidence in a fair and sufficiently comprehensive manner. We have read the summing-up as a whole, as Mr Pardoe submits we should, and in our judgment it has fairly represented the appellant's case. It was not after all a sophisticated defence; it was simply "I am innocent, I know these people socially, but I have nothing to do with this conspiracy".

46. As to the alleged unfairness in the tone of the summing-up, we reject that submission too. The observation made by the judge on such matters as whether the appellant could have owned the phones found in his car were, in our view, highly pertinent observations and it was fully appropriate for the judge to make them. The reason why it may sometimes appear to be hostile to the appellant's case is simply because the natural inference to be drawn from the relevant evidence is indeed hostile to the case. To take an example of which Mr Pardoe complains, the judge asked the jury to consider how likely it is that those involved in a drugs conspiracy would go to the house of an innocent third party after having been on a long trip as part of the conspiracy, and then openly make a whole series of telephone calls in his presence. That was powerful evidence to which the jury's attention was quite properly directed, and in truth there was only one obvious answer to the question posed. That does not make it unfair for the judge to pose the question.

47. In addition, the judge directed the jury very fully that whilst he might express views about the evidence, his views have no special status and they must only have regard to those views if they found them helpful.

48. We are not therefore persuaded that this ground of appeal has any merit.

49. We turn to the related section 34 point, and that of course entitles the jury in some

circumstances to draw such adverse inferences against a defendant as they consider proper, where the defendant fails to mention in interview something he later relies on in trial. The object of the section is, at least in part, to prevent a defendant fabricating a defence once he has seen the prosecution case, and to encourage the early disclosure of a genuine defence.

50. It is well-established that where a defendant provides a written statement or statements in lieu of answers to questions posed in an interview, an adverse inference can only be drawn if the defendant later relies on something at trial not disclosed in that statement or statements: see R v Knight [2004] 1 Cr App R 27 at page 32.

51. As we have said, in this case the appellant had produced two statements which indicated that he did know some of the parties in the conspiracy socially, although he did not name them; that he had not at any stage knowingly become involved in an unlawful scheme; that he was not a party to the transfer of any funds for the purchase drugs; and was not aware that money had been taken from his house and put into Dempsey's car.

52. Mr Pardoe submits that while it is true that the statement was not entirely accurate - and the judge referred in his summing-up to various points on which the appellant admitted it was inaccurate - nonetheless the judge had wrongly stated that the defendant had failed to mention these basic features of the defence when in fact he had done so. The judge in fact said this in the summing-up:

> "As Part of his defence in this trial, he has, in fact, relied upon a number of matters. He produced a prepared statement at the police station at the time of his interviews on 23 April of last year although he now says that that is wrong in a number of respects but he has put forward in the course of his case, has he not, a detailed defence and I hope I can fairly summarise it by saying that he accepts his knowledge of and contacts with Messrs Pineda, Hurtado and Dempsey but says that in each case the contact with them and knowledge of them was innocent. He says that he had no idea that cash was being taken out of his house on 16 April, the hessian bag incident, and all that he did on that day was to offer hospitality to Mr Heathrow and he denies any knowledge in the conspiracy.
>
> He accepts, however, that he failed to mention any of those matters when he was interviewed about the offence and that failure by him to mention those matters to the police may count against him."

Then the judge carries on with a relatively standard section 34 direction.

53. Mr Pardoe submits that the judge is quite simply wrong. He says the appellant had mentioned some of the matters to which the judge referred. He had said he had contact

with Pineda, Hurtado and Dempsey whilst admittedly not mentioning their names. He had said all along in his statement that he had no knowledge of any conspiracy and that he was innocent, and he had also said that he had offered hospitality to Mr Heathrow, as he was known, in the statement and that was accurate.

54. Mr Pardoe further submitted that these problems were compounded because the jury were then told, in common form in a direction of this kind, that they might be entitled to draw the inference that the appellant was making up his defence to fit with the facts advanced by the prosecution. That, says Mr Pardoe, is a false and highly prejudicial statement and it rendered the whole of the section 34 direction unfair.

55. Mr Wigglesworth, for the prosecution, accepted that the judge did not in terms identify the matters which were relied on at trial but not mentioned in the statements. He also accepts that, read literally, it is right to say that the appellant had in fact made reference to some of these matters in the statement and the judge was wrong to indicate otherwise. However, he submitted, and Mr Pardoe fairly accepted as he was bound to do, that there were in fact a whole series of matters which were relied on at trial by the appellant and were not referred to in the statement. These included, for example, the names of three men, the explanation as to the telephones, and in particular his contention that two of the telephones belonged to Dempsey, the failure to mention the hessian sacks or the fact that they were taken from his house and put in the car. There was no mention of the Costa Rica fax and how it had come into his possession, and he had said nothing about being asked to take Dempsey and Pineda in his taxi up to Yorkshire. No doubt, there were a number of other matters also.

56. Mr Wigglesworth submits that the judge's comment was, in effect, shorthand. What he was in substance saying, and this would have been obvious to the jury in any event, is that there were a whole series of ways in which the appellant relied on matters given in evidence of which no advance notice had been given. It was unfortunate that these were not identified, but the jury had the statements before them and it would have been obvious what these matters were. Thereafter the direction itself was impeccable. The jury were told that they must be careful before drawing any adverse inference, and they were told in the time honoured way that they must not convict mainly or wholly on the strength of any such inferences.

57. It is, in our view, a matter of real concern that there appears to have been no discussion between counsel and the judge before closing speeches to consider how the section 34 direction might be framed, and in particular which facts were relied on at the trial and not mentioned in the statements, and what inferences, if any, it might be legitimate for a jury to draw from the failure to disclose those facts earlier. It is also unsatisfactory that the facts themselves should have been left to the jury to discern, rather than from being specifically identified, if only briefly, by the judge in his summing-up.

58. Apart from the failure to set out these differences, we agree that the section 34

direction is, on its face, misleading insofar as it suggests that the fundamental case advanced by the appellant was not foreshadowed in the statements. We do not, however, accept that this is a material error in the context of this case. There were many facts which the judge could have identified, and the graveman of the point which he was making would have been just the same. In addition, the defence identified in the statement is a general denial of guilt and the jury would no doubt have appreciated that the thrust of it at least could be advanced whatever the information provided by the prosecution. So whilst we accept that the direction was unsatisfactory, no doubt because of the failure to have proper consultation with counsel before the summing-up and before closing speeches, and did not adequately or accurately identify what facts could properly be the subject of a section 34 direction, we do not think this was a significant blemish in the circumstances of this case.

59. We would only add that we have no doubt at all that, in any event, this conviction was safe for a number of reasons. First, there is the inherent improbability of the telephones found in the car belonging to Dempsey. There was also further evidence supporting the contention that that was most unlikely, including the fact that Dempsey's telephone was ringing on one occasion at the same time as the phone which the appellant said also belonged to Dempsey, and that there had been a telephone call from that same telephone to Pineda when Dempsey and Pineda were apparently travelling together. The volume of telephone calls that the appellant made to other conspirators is also extremely high (although of course, he sought to explain this by saying that two of the phones were not his). The explanation for how he received the phone from Smith was rather curious. It was also inherently improbable that Dempsey and Pineda would return to his house on 16 April after the abortive trip to Yorkshire and then engage in conversations relevant to the conspiracy in his presence. In addition, there is the fact that money was taken from the house into Dempsey's car. Furthermore, there was the Costa Rica letter that was found in his possession which he said Heathrow must have dropped at his home and which he had meant to give it to Dempsey. The telephone which he admitted was his had on it one of the numbers identified in that letter.

60. For all these reasons, therefore, we think there is nothing in this point.

61. We should add that Mr Pardoe also ran a second and related point that the judge had acted unfairly in suggesting in some way to the jury that it may be that the appellant had not been given legal advice not to answer questions. He says it was plain that the solicitor had said that he had given legal advice and there was no reason to suggest otherwise. In our judgment, the judge was simply, in the time honoured way, telling the jury that of course it was a matter for them to accept whether or not the evidence showed that he had been given that legal advice. The judge went on to indicate that even if he had been given legal advice, it may not be reasonable for him to rely on it. At one stage we thought that Mr Pardoe's case was that it was improper for the judge to say that, but he accepts that it was a perfectly proper direction and in accordance with the judgment of Lord Woolf CJ (as he then was) in Beckles [2005] 1 Cr App R 23 at

paragraph 36.

62. For these reasons, therefore, we reject the grounds of appeal against conviction. We now turn to sentence.

63. As we have said, both appellants appeal against sentence with permission of the single judge. Essentially, both argue that the starting point was too high. They submit that 28 years was inappropriate in the light of the authorities and certain other matters. In particular, it was emphasised that these appellants were not involved in importing, but rather were involved in supply. Second, it was stressed that although the judge considered them to play a significant role in what he described as a sophisticated gang, nonetheless they were not at the pinnacle of the organisation and should not be treated as the most serious persons involved in drug dealing. Third, reference is made to certain authorities, including Richardson [1994] 15 Cr App R (S) 867, and Attorney General's Reference Nos 99, 100, 101 and 102 of 2004 [2005] 2 Cr App R (S) 82 for the proposition that whilst significant sentences can properly be meted out in cases of this kind, 28 years was too high.

64. An additional argument which both appellants advance is that there is an unacceptable disparity with the sentence meted out to Stedman, which, as we have indicated, the judge said would have been 12 years but for his guilty plea. Stedman was actively involved in various parts of the conspiracy and the judge himself said that he was more than a mere courier, although he put him further down the chain than either of these two appellants.

65. Counsel for Hurtado makes an additional point in the case of his client, namely that the judge had wrongly characterised him as somebody who was central to this conspiracy. He submitted that, in truth, Hurtado played no greater role than Stedman and should have received a similar sentence. He recognised that the judge was in many ways in the best position to address the role which these parties played, but nonetheless submitted that, bearing in mind for example the fact that Hurtado did not lead a sophisticated or expensive lifestyle, it was unreasonable to infer that he was a significant player in this conspiracy.

66. We have carefully considered these submissions. It must be emphasised that there was a massive amount of drugs involved in this case. It was almost 300 kilograms of class A drugs at a significant purity, 60 to 70 per cent, and of course these offenders did not have the benefit of a guilty plea. The misery caused by those who get hooked on these drugs is enormous and the sentences have to reflect that, and that is what the authorities demonstrate. Nonetheless, we do think that 28 years in this case was too high. We bear in mind in particular that, as counsel pointed out, these were not cases of importation, and the general tendency is to sentence a little lower for supply rather than for importation, as Rose LJ pointed out in an *Attorney General's Reference* case to which we made reference at page 82. No doubt that is in part because those importing are generally closer to the centre of the whole operation, and also because importation

involves in many cases the use of couriers whose health is often placed at risk as a result of importing. Furthermore, importation subverts the borders of the United Kingdom.

67. We also bear in mind that in Richardson reference was made to the case of Soares [2003] EWCA Crim 2488, where it was pointed out that sentences in excess of 30 years would have been regarded as properly representing the starting point following the trial for the prime mover in importing 2,000 to 3,000 kilograms of class A drugs. Here these appellants were not the prime movers and nor were they importing quantities of that amount.

68. Finally, whilst we would not put too much weight on this, we also see some force in the disparity argument. Stedman clearly did play more than a courier role, as the judge indicated, and the differential does strike one as surprisingly high.

69. We do not, however, accept that Hurtado should be sentenced in an equivalent way to Stedman, or indeed that the judge was not entitled to sentence him on the same basis as Esqulant. As we have said, the judge was in the best position to assess what role these parties played, and we do not think it would be right for us to seek to go behind his assessment.

70. Bearing in mind all these factors and having regard to the observation in Richardson that 25 years was appropriate in that case for importing significant quantities, and bearing in mind too the fact that this is the first time these appellants have been involved in any serious way in a drugs offence, we have come to the conclusion that the appropriate sentence in relation to each would have been 23 years' imprisonment.

71. To that extent this appeal succeeds, and we reduce the sentence from 28 years to 23 years.