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No: 201801830/C4

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Wednesday, 3 July 2019

B e f o r e:

LORD JUSTICE DAVIS

MR JUSTICE LEWIS

MR JUSTICE JULIAN KNOWLES

R E G I N A

v

ROSS ELLIOTT

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Mr C Rush appeared on behalf of the **Appellant**

Mr J McGuinness QC appeared on behalf of the **Crown**

J U D G M E N T

(As Approved by the Court)

1. LORD JUSTICE DAVIS: The appellant was convicted after trial, in the course of which he gave evidence, of a count of conspiracy to transfer or sell prohibited weapons.
2. He now appeals by leave of the single judge against his conviction.
3. There is just one ground of appeal. It is that that trial judge wrongly refused to permit him to put in certain evidence on the ground that such proposed evidence was speculative and of no sufficient relevance to the count of conspiracy with which he was charged.
4. The position is this. There had been a lengthy trial in the Crown Court at Kingston upon Thames before His Honour Judge John and a jury. On 3 April 2018 the appellant was convicted of conspiracy to transfer or sell prohibited weapons (being count 2 on the indictment). It may be added that subsequently he was sentenced by the trial judge to a term of 18 years' imprisonment.
5. There had been a number of co-accused. Two men called Dacres and Sholanke were likewise convicted on count 2 and were sentenced to 14 years and 10 years' imprisonment respectively. Two other co-accused, men called Kirilov and Tsekov, were acquitted on count 1 of the indictment which was a count of conspiracy to import prohibited weapons. Previously men called Tanev and Ognjanov had pleaded guilty to the count of conspiracy to import firearms. They were subsequently sentenced to 22 years and 4 months' imprisonment and 21 years and 7 months' imprisonment respectively.

6. The background is that the co-accused, Ognjanov and Tanev, were Bulgarian nationals living in Germany. They were engaged in the unlawful importation of firearms and ammunition into the United Kingdom. As was the Crown's case, their initial supply of firearms was to individuals in Sheffield. However, they then expanded their enterprise to supply firearms to individuals based in the southeast of England. It was the Crown case that that latter part of the enterprise was to a group closely connected with the appellant.

7. It was further alleged that Ognjanov and Tanev had recruited the co-accused Kirilov and Tsekov as well others to bring the firearms variously into the United Kingdom. There were during the relevant indictment period six connected seizures of weapons and ammunition from locations ranging from Leicester to St Albans, Dover, Abbots Langley, Watford and Sheffield. We will come on to give a little more detail about these seizures in due course.

8. When Tanev was arrested in Germany he was found to be in possession of a price list of guns and also a quantity of drugs including a kilogram of packed cannabis. Text messages and intercepted phone calls indicated that multiple commodities were being discussed, at least one of which was drugs. The appellant himself was based in the South East of England. He had met Ognjanov in March 2016 and had introduced Ognjanov to Dacres and later Sholanke.

9. Between March 2016 and May 2016 Ognjanov had made five trips to the United Kingdom. During these visits, as mobile telephone data and cell site evidence demonstrated, there was a link between Ognjanov and the appellant. Three particular journeys were linked to the appellant when consignments were transferred from Ognjanov to the appellant.

10. More latterly, on 22 May 2016, a Nissan Patrol car driven by a man called Koteterov who was, as we understand, never subsequently charged, was stopped and searched at Dover as it entered the United Kingdom. It contained a considerable quantity of firearms and ammunition.

11. Viewed in overall summary, the prosecution case was that the appellant was the main contact in the southeast of England for Tanev and Ognjanov and that that they had supplied him with firearms which they had smuggled into the United Kingdom. It was not suggested that the appellant had been connected with the importation or transfer of arms so far as the Sheffield area was concerned. But so far as the appellant was concerned, it was the prosecution case that he had entered into an agreement to transfer or sell the firearms on to others. Dacres was said to be his right-hand man who subsequently, after Dacres had been arrested, was replaced by Sholanke. It was said that the journeys after 11 March 2016, up to the interrupted Koteterov journey of 22 May, had involved guns.

12. The prosecution case was based upon the cumulation of circumstantial evidence. That comprised the use of mobile telephones, call data and cell site evidence, text messages which had been recovered, intercepted phone calls, automated number plate recognition hits on vehicles, details of travel from SatNav devices, CCTV, surveillance, travel details, seizure of items and financial evidence.

13. The appellant was barely in a position to deny that he had been involved in some kind of criminality. The defence case, in essence, was that the appellant had indeed been conspiring with Ognjanov. But his case was that it was nothing to do with the importation and subsequent transfer and selling of guns but instead involved

illegally imported tobacco and cannabis.

14. It was also part of the defence case that the weapons and ammunition found in the car driven by Koteterov on 22 May were nothing to do with him and were not destined for him.

15. Aspects of the prosecution evidence involved a lengthy analysis of the telephone and other contact between Ognjanov and the appellant. Further, in April 2016 the appellant and Dacres had flown to Hamburg, returning three days later, that trip being preceded by contact between the appellant and Ognjanov. On 22 April 2016, for example, both Tanev and Ognjanov were in the United Kingdom. Cell site evidence placed them in the Greenwich area with the appellant and Dacres. That same evening Tsekov entered the United Kingdom in the Nissan Patrol car; the following day he drove to Lovelinch Close, an address in London connected to the appellant, and then onto an address in Kennington where cell site evidence placed the appellant, Dacres, Sholanke and Tanev. Then again on 29 April 2016, Kirilov drove the Nissan Patrol into the United Kingdom and it was driven directly to Lovelinch Close. That same morning Ognjanov arrived in the United Kingdom and the appellant's car was later seen in convoy with the Nissan. Further cell site evidence placed the appellant along with Dacres, Ognjanov and another person in the Watford area.

16. Then, on 14 May 2016 Kirilov arrived in Dover driving the Nissan Patrol car and Ognjanov flew into Heathrow where he was collected by the appellant. The mobile phones of the appellant Kirilov, Ognjanov and Dacres were cell sited to Watford. It transpired that on 9 May Dacres had made a cash withdrawal of £8,000 and Dacres' cousin (Alex Dacres) lived in Watford and was subsequently convicted of possession of a Makarov pistol found at his home address.

17. As to the stopping of Koteterov on 22 May, when his vehicle was searched, six Tokarev pistols, two Scorpion sub-machine guns and 1000 rounds of ammunition were seized. That same evening Ognjanov had flown to Heathrow having made contact with Tanev and the appellant.

18. It is not necessary to set out further details, the picture sufficiently emerges from that brief summary. It in all events explains why the appellant necessarily had to concede he had close contact with Ognjanov, his case being, as we have said, that he denied it had anything to do with guns.

19. The Crown's case, as we have said, had involved that initially the guns were destined for the Sheffield area. Indeed, certain individuals based there were in due course convicted of relevant firearms offences. The dates of the Sheffield importations had been on addresses between 29 February and 3 March (the first journey), then 16 to 17 March, 24 to 27 March, 8 to 10 April and then 11 to 13 May (five in all).

20. So far as the importations to the southeast area were concerned, on the Crown case, these were destined for the appellant and his associates. The asserted dates of the relevant importations were fourfold: the first being between 22 and 24 April; the second being 29 April; the third being 14 to 15 May and the final one being the unsuccessful journey of Koteterov on 22 May 2016. It is also said that following that unsuccessful journey a further dummy run, as it were, took place to assess what it was that the UK authorities might know.

21. Although only one consignment of firearms had been intercepted on entry into the United Kingdom, that is to say the journey of Koteterov on 22 May 2016, there was other evidence of seizure and recovery of firearms in

various places involving firearms which the prosecution said had been organised to be imported by Tanev and Ognjanov. Those were the subject of agreed facts. There were a number of places where various weapons had been seized, as we have said - Sheffield, Leicester, St Albans, Watford, Vauxhall and other places. A number of firearms had been involved including significant number of Makarov pistols with silencers. There was evidence, which was not challenged, that Makarov pistols were not infrequently found in the United Kingdom.

22. The trial proceeded and the prosecution case closed. Subsequently, while the defence cases were being presented, counsel for the appellant at trial, as he is today, Mr Rush, conducted, as we were told, an Internet search into gun seizures in Luton. These revealed that there had been a seizure of a Makarov pistol and silencer at an address at 161 Dewsbury Road, Luton. That particular address, on the face of it, had no connection with the matters alleged by the prosecution. But, as it happened, and this was the prompt for Mr Rush's search, Dewsbury Road, Luton, had featured in the prosecution case and evidence: in that on one occasion Kirilov and on four occasions Tsekov had, as was evidenced, stopped at an address at 45 Dewsbury Road, Luton. That, it had been identified, was an address where Tsekov's mother lived; she apparently being a nanny to a Bulgarian family who lived there. Indeed, the mother's evidence had been read out to the jury during the trial, she saying that the one visit of Kirilov and the other visits of Tsekov, her son, had simply been social visits. That evidence had not been challenged in any way.

23. It appears that Koteterov himself had made a witness statement indicating that he had himself been instructed to collect a trailer from Luton. However, that was not put in evidence before the jury and when one co-accused sought to cross-examine it in the judge declined to permit that to happen. However, what was in evidence before the jury was a text message received by Koteterov's phone, the text being from Tsekov. That was recorded in the text message the address and postcode of 45 Dewsbury Road, it being stated in the text, quite correctly, that that was Tsekov's mother's address. Further, it appears that it was in evidence that Koteterov had then put that address, namely 45 Dewsbury Road, into his SatNav.

24. What Mr Rush was seeking was that further evidence be put in relating to the seizure of the Makarov pistol and silencer found at 161 Dewsbury Road, Luton. The Crown were neutral on his application but, understandably, Tsekov and Kirilov opposed the application.

25. The point that was sought to be based on the finding of that Makarov pistol and silencer at 161 Dewsbury Road was that, so it was suggested, such evidence would tend to indicate a potential conspiracy to supply firearms to Luton. There was no suggestion that Elliott himself had any connection for this purpose with Luton or any Luton group. The Crown case was that the importations variously had been either to Sheffield or to the Elliott group based in London and related area. Accordingly what was submitted was that this evidence relating to the finding of the Makarov pistol and revolver at 161 Dewsbury Road would tend to undermine what Mr Rush asserted was a "central hook" on which the prosecution case was hung.

26. At all events this point having been raised, there was then an examination by the expert firearms witness of the photographs of the Makarov pistol and silencer which had been seized at 161 Dewsbury Road. This evidence was not sought to be disputed in any way. The analysis indicated that there were in fact pronounced differences between the gun seized at 161 Dewsbury Road and the various other Makarovs which had been seized at the various other places as we have briefly outlined. As we have also said, the evidence in fact was that Makarov pistols were not uncommon in the United Kingdom.

27. These differences between the other Makarov pistols seized and the one seized at 161 Dewsbury Road, included the following. First, the Makarov recovered at 161 Dewsbury Road was a 9 mm short calibre pistol: the others were not of that particular kind albeit being Makarov 9 mm pistols. Second, the bore of that pistol was rifled

to its muzzle, the others had not been. Third, there was no smooth bore barrel extension to that pistol there was for the others. Fourth, the barrel of that pistol was not "sleeved" unlike almost all of the others. Fifthly, the sound moderator of the pistol at 161 Dewsbury Road differed from the others. Sixth, the serial number of that particular pistol had been removed using a technique different from the others.

28. It is quite right to say, as Mr Rush says, that so far as the other Makarov pistols that had been seized were concerned, there were a number of differences between those as well, albeit there were also a significant number of similarities with regard to them. But even with regard to the one or ones which were different between each other, there was other independent evidence linking those pistols to the relevant conspiracy to import or to transfer. Moreover, 161 Dewsbury Road in Luton had been occupied by a man called Cooper who had, as we understand, in due course pleaded guilty to possession of a prohibited firearm. Cooper had no known connection to any of the alleged conspirators. It appears that the gun had in fact been found at 161 Dewsbury Road by a gas fitter on a boiler at the address, the gun and silencer being contained in a bag or holdall.

29. Mr Rush submitted that even if there were those differences, as compared to most of the other Makarov pistols that had been seized, nevertheless the evidence concerning this seizure should have been put before the jury. When we asked him he told us that he would have made such a submission even if the seizure had not been in Dewsbury Road but in a street some two streets or so away. Indeed he went further and said that such evidence should have been admitted of such a seizure if it had been found anywhere in Luton or perhaps even some other town or city in the vicinity altogether. The point was, he said, that this was indicative of a separate group operating from the Luton or surrounding area and not the Elliott group operating in the London or Watford area.

30. The judge in his ruling did not accept that this evidence was relevant and therefore did not accept that it was admissible. He set out, in considerable detail, the differences between the Makarov pistol recovered in March from 161 Dewsbury Road and the various other Makarov pistols that had been seized. He took the view that to include such evidence would simply have been such as to encourage the jury to engage in impermissible speculation and that no reasonable inference, adverse to the prosecution case, could be drawn from such evidence. Indeed, had there been close similarities between the gun seized and the other guns, then the position might have been very two edged for the defence as Mr McGuinness pointed out; but we need not pursue that point further. What we have to assess is whether the judge was justified in concluding that the evidence of the seizure of this pistol in March from 161 Dewsbury Road was irrelevant. That, we accept, was not a matter of discretion; that was a matter of evidential evaluation on the part of the judge. At the same time, whilst we have to consider whether that evidential evaluation of the judge was justified, we have to bear in mind that he had the conduct of the whole trial and was well positioned to assess the overall picture as it appeared on the evidence thus far.

31. Having considered the judge's careful and thorough ruling, we can see no proper basis for interfering with his conclusion. We reject Mr Rush's submission that in drawing the conclusion he did the judge had impermissibly entered into the role of the jury. We do have some reservations in fact as to whether this particular point went to a "central hook" of the prosecution case, as Mr Rush was asserting. If there was a possible point about there being a possible group based in Luton, that point indeed was already available to the defence because of the SatNav entry found in Koteterov's car on 22 May 2016. But that said, there simply was no sufficient evidential basis to link the seizure of the Makarov pistol at 161 Dewsbury Road to the conspiracy alleged by the prosecution. The gun was very, very different and furthermore Cooper had no known connection whatsoever with the conspirators. It is true that Tsekov's mother lived in the road and it is true that there was evidence that Tsekov and Kirilov had visited that particular road; but it had been entire speculation to say that in some way there had been a delivery of that pistol to 161 Dewsbury Road. Indeed, as we have said, Mr Rush made clear he would have mounted the same argument even had such a pistol been found elsewhere in Luton or indeed in some other town altogether in the vicinity.

32. Quite simply there was no sufficient evidential nexus between the gun found at 161 Dewsbury Road and the other Makarov guns which had been the subject of seizure by the prosecution. In our judgment, the judge's overall evaluation of the position was wholly justified. He was quite right in such circumstances to rule the evidence inadmissible. It was not sufficiently relevant to the matters which had arisen at trial and, on the contrary, to have allowed such evidence in would simply have been in effect an invitation to the jury to engage in illegitimate speculation. In such circumstances we also reject the submission of Mr Rush that the defence had been deprived of the chance of putting its case in the best possible light.

33. We accordingly dismiss this appeal.

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