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2019/01896/C2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 15th May 2020

B e f o r e:

LADY JUSTICE SIMLER DBE

MR JUSTICE PICKEN

and

MR JUSTICE HILLIARD

R E G I N A

- v -

TRACEY BONSU

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Mr S Z Khan appeared on behalf of the Applicant

J U D G M E N T
(For Approval)

Friday 15th April 2020

LADY JUSTICE SIMLER: I shall ask Mr Justice Picken to give the judgment of the court.

MR JUSTICE PICKEN:

1. This is a renewed application for an extension of time (69 days) in which to apply for leave to appeal against conviction following refusal by the single judge.

2. On 13th February 2019, following a trial in the Crown Court at Chester, the applicant was convicted by a majority of conspiracy to supply a psychoactive substance, namely, nitrous oxide. On the same date, the applicant was sentenced by Miss Recorder Brandon to a community order for 12 months, with one requirement: an electronically monitored curfew lasting for three months.

3. The facts may be briefly stated. On 27th August 2016, the applicant and four other co-accused travelled in a Volkswagen Golf to the "Creamfields" music festival. On arrival, the vehicle was searched by security officers and a large number of canisters containing nitrous oxide was found.

4. The police attended and further searched the vehicle. In total, they seized 1,084 canisters of nitrous oxide split into various bags, in addition to dispensers, balloons (used to inhale the substance) and a large amount of cash.

5. All five occupants of the vehicle were arrested, interviewed and charged. The applicant made no comment to all questions asked.

6. The prosecution at trial relied on a number of matters, including the applicant's change of vehicle prior to getting into the Volkswagen Golf, the sheer number of canisters, and other related

other equipment as indicating that the applicant and the co-accused had the intention to supply the nitrous oxide to other festival goers.

7. The defence case was that the applicant had no knowledge of the nitrous oxide in the vehicle, or of any intention to supply it to others. The applicant gave evidence that she, with her co-accused and then partner, had simply taken a lift to the festival in the Golf and that they were unaware of the large amount of nitrous oxide in the boot of that vehicle.

8. The issue for the jury in the circumstances was whether the applicant had entered into an agreement with one or more of the co-accused with the intention to supply nitrous oxide to others.

9. The applicant sought leave to appeal against conviction on a number of grounds. Her contention on the papers was that there was insufficient evidence to establish that she did what was alleged.

10. The prosecution have lodged a Respondent's Notice and Grounds of Opposition in which they dispute that proposition.

11. Refusing the application for leave, the single judge gave the following reasons:

> "… I do not consider that your appeal has any merit. You were one of the passengers in a vehicle, driven by your co-defendant Mr Appiah, which contained a large quantity of nitrous oxide canisters and associated equipment. Mr Appiah and one of the other passengers pleaded guilty to conspiracy to supply a psychoactive substance. The issue for the jury was whether you were a party to that conspiracy. There was sufficient evidence for the jury safely to decide that issue in favour of the prosecution, in particular bearing in mind that: (i) you were in the vehicle where the nitrous oxide was found; (ii) you had travelled to the Creamfields festival in the same vehicle as all the other defendants, instead of going in the van (driven by your co-defendant, Mr Boansi) in which you

> travelled from London; (iii) you gave a 'no comment' interview to the police, in circumstances where you could have put forward the defence on which you relied at trial; (iv) your defence case statement referred to Mr Boansi driving to a hotel near the festival, 'in order to meet his three friends' – but you subsequently gave a different account as to how and Mr Boansi came to be in the vehicle with the nitrous oxide. The jury would have been entitled to conclude that this change from your defence case statement was an attempt to distance yourself from the other three 'friends', two of whom pleaded guilty to conspiracy.
>
> No error in the Recorder's summing-up has been identified, and it was for the jury to decide whether or not they were sure that you were party to the conspiracy. It is not arguable that your conviction is unsafe."

12. We agree with the single judge about this, who was plainly right to refuse the leave application accordingly. Indeed, the matters considered by the single judge have not been pursued before us today.

13. Just yesterday a skeleton argument was submitted on the applicant's behalf by Mr Khan who has appeared before us today, in which a new contention was raised for the first time, namely that the Recorder erred in failing to direct the jury properly concerning the fact that the applicant gave a "no comment" interview.

14. We deprecate the lateness with which this new point is being raised. To seek to advance a new argument after refusal by the single judge is wholly at odds with the well-established leave procedure. In any event, however, we consider that the point is wholly without merit.

15. The submission which is made is that the Recorder was wrong only to direct the jury in the context of the applicant's "no comment" interview that "You must not convict her wholly or mainly on the strength of it". This, it is suggested, was insufficient, since it is a direction which was not repeated. This suggestion, we would observe, is made notwithstanding the fact that the

Recorder provided the jury with written legal directions in which the self-same point was made. Indeed, the Recorder, in the usual way, read out those legal directions to the jury in the course of her summing-up. The suggestion, therefore, that the point was not sufficiently highlighted is not one which we can accept.

16. The further submission is made in reliance on section 38(3) of the Criminal Justice and Public Order Act 1994 together with *R v Cowan, Gayle and Riccardi* [1996] Cr App R 1, and *R v Condron and Condron* [1997] 1 Cr App R 185, that the Recorder erred in not directing the jury that they must be satisfied that there is a case to answer before they could draw an adverse inference, so as to mean, so it is submitted, that there is a risk that the applicant was convicted solely or mainly upon the inference drawn.

17. The difficulty with this submission, however, is twofold. First, inasmuch as the focus is on the position at the time that the interview took place, the Recorder's written directions, as both read to the jury and provided in written form, made it clear that the jury should only draw an inference against the applicant if they were satisfied, amongst other things, that "the prosecution case being presented at the time of his interview was such that it called for an answer". That is in line, we observe, with the standard directions contained in the Crown Court Compendium.

18. Secondly, although it is right that in *Condron* the Court of Appeal approved the observations which were made in *Cowan* concerning a defendant not giving evidence at trial, this did not apply to everything. Specifically, in *Cowan*, Lord Taylor CJ said this at page 7D-G:

> "We consider that the specimen direction is in general terms a sound guide. It may be necessary to adapt or add to it in the particular circumstances of an individual case. But there are certain essentials which we would highlight:
>
> 1. The judge will have told the jury that the burden of proof

> remains upon the prosecution throughout and what the required standard is.
>
> 2. It is necessary for the judge to make clear to the jury that the defendant is entitled to remain silent. That is his right and his choice …
>
> 3. An inference from failure to give evidence cannot on its own prove guilt. That is expressly stated in section 38(3) of the Act.
>
> 4. Therefore, the jury must be satisfied that the prosecution have established a case to answer before drawing any inferences from silence. Of course, the judge must have thought so or the question whether the defendant was to give evidence would not have arisen. But the jury may not believe the witnesses whose evidence the judge considered sufficient to raise a prima facie case. It must therefore be made clear to them that they must find there to be a case to answer on the prosecution evidence before drawing an adverse inference from the defendant's silence.
>
> 5. If, despite any evidence relied upon to explain his silence or in the absence of any such evidence, the jury conclude the silence can only sensibly be attributed to the defendant's having no answer or none that would stand up to cross-examination, they may draw an adverse inference."

In *Condron*, after citing this passage, Stuart-Smith LJ stated as follows (at page 194G):

> "The question of what adverse inference can be drawn from an accused's failure to give evidence is obviously similar to the questions which arise under section 34. Mr Shaw submits therefore that paragraphs 1 to 5 of the passage quoted apply with appropriate modifications to section 34. We consider, however, that the specimen direction on section 34, coupled with the usual direction on burden and standard of proof and the fact that the jury will inevitably understand from the form of caution itself that the accused was entitled to remain silent at interview, covers the matters dealt with in paragraphs 1 to 4. …"

Stuart-Smith LJ was here saying that there is, therefore, no need to go further and do as is suggested on this renewed application by Mr Khan, namely direct the jury that they need themselves to decide whether there is a case to answer before they can draw any adverse inference

from the defendant's failure to answer questions at interview.

19. The further passage in the judgment in *Condron* relied upon in the skeleton argument prepared by Mr Khan in support of the proposition that the direction which ought to have been given in this case should have gone further is a passage addressing paragraph 5 in *Cowan*, where (at page 195A-B) Stuart-Smith LJ said this:

> "Paragraph 5 goes somewhat further than the specimen direction and the direction given by the judge in this case. Having regard to the views of this court in *Cowan*, we consider that it is desirable that a direction on the lines indicated above should be given. There is as much a need to remind the jury of the circumstances in which a proper inference may be drawn under section 34 as under section 35. There is no basis for distinguishing between the sections in that respect. In fairness to the judge, it seems unlikely that a report of *Cowan* was available to him, and certainly no submission was made to him that he should add to the specimen direction."

20. This is reflected in the Compendium in relation to the direction to be given when a defendant chooses not to give evidence at trial. In that scenario the direction should include the requirement that the jury should be satisfied that there is a case to answer. This is not, however, an element of the direction recommended where a defendant has declined to answer questions at the earlier stage of a police interview.

21. We see no reason why in this case the judge should have included the further direction which on this renewed application Mr Khan suggests she should have done.

22. It follows that there is no merit in the new point raised. It further follows that the application for leave to appeal must fail and that the renewed application is refused.

23. We would add that, like the single judge, we also see no good reason for the delay in lodging

the application for leave to appeal. As he observed, there has been only "a very general reference to the need to seek further legal opinion and assistance, but nothing which identifies or explains such difficulties as may have existed". Although we were yesterday provided with a witness statement in which more detailed explanations are given, we remain unpersuaded that a good reason has been shown. Like the single judge, however, had we considered that there was merit in the proposed grounds of appeal, we would have granted the time extension sought.

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