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No: 202000982/A3 & 202001018/A3  
**IN THE COURT OF APPEAL**  
**CRIMINAL DIVISION**

Royal Courts of Justice  
Strand  
London, WC2A 2LL

Thursday 2 April 2020

**VIRTUAL HEARING**

B e f o r e:

**THE VICE PRESIDENT OF THE CACD**  
**LORD JUSTICE FULFORD**

**MRS JUSTICE McGOWAN DBE**

**MRS JUSTICE CHEEMA-GRUBB DBE**

**R E G I N A**

v

**AMANG WAHAB SALIH**  
**AWAT WAHAB HAMASALIH**

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(Official Shorthand Writers to the Court)

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**Miss V Trigilio** appeared on behalf of the **Applicants**

**Mr M Brook** appeared on behalf of the **Crown**

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

1. **THE VICE PRESIDENT:** The point of principle in issue on this sentence application is whether a micro SD card smuggled into prison should be categorised as a class B or class C article when it meets the definition for both class B and class C. The difference between the two is of significance because for class B the maximum sentence is 24 months' imprisonment, whereas for class C the maximum sentence is a fine of Level 3.
2. On 3 October 2019 in the Crown Court at Stafford Amang Salih pleaded guilty to the offence of conspiracy to convey class B articles into prison, contrary to section 1(1) of the Criminal Law Act 1977. On 10 February 2020, at the same court, Awat Hamasalih was convicted of the same offence. On 19 February 2020, Amang Salih was sentenced to 24 weeks' imprisonment and Awat Hamasalih to 40 weeks' imprisonment. Their applications for leave to appeal against sentence have been referred to the full court by the Registrar.
3. Awat Hamasalih was a serving prisoner, having been convicted before the Central Criminal Court in August 2017 of belonging to a proscribed organisation and possessing articles for the purposes of terrorism. Whilst serving his sentence in Dovegate Prison, he entered into a conspiracy with his brother Amang Salih whereby the latter was to smuggle various items into prison for his use, namely a micro SD card hidden in the front cover of a hardback book and the working components of a USB stick that was similarly concealed in another book. Amang Salih posted the parcel containing these two books together with a third book on 1 September 2018 and it arrived in the prison on 4 September 2018.
4. The conspiracy had been organised over a period of time and there had been coded exchanges between the applicants. These revealed that other items would be smuggled into prison in the future if this attempt was successful.
5. On 26 August 2018 a conversation between them included the remark "that is fine, but is it for the phone or for the thing?" During a further conversation on 31 August 2018 it was observed: "No by God, I don't know by God... I knew before that. It is a thin one like similar to the one for the telephone and you insert it into the Samsung and you could just take it off."
6. The parcel was intercepted at the prison on arrival. A copy of the Koran, other religious texts and photographs of Awat Hamasalih's wife and child were found on the deconstructed USB stick. The micro SD card was either blank or encrypted in a way that prevented the authorities from gaining access to it.
7. The uncontested evidence of DC Edwards, a suitably qualified digital examiner, is that the micro SD card could be used within a number of different mobile telephone handsets (including the Samsung Galaxy S9 and S10). It can also form part of a digital camera. Cards of this kind enable the storage of media files such as video and audio recordings, documents and photographs. If used with a mobile telephone, they become a constituent part of it, allowing either data to be recorded by the telephone onto the card or data stored on the card can be shown, played or otherwise used on the telephone.

8. As the judge observed in his judgment, a micro SD card was rewritable in the sense that data could be taken off it and he underlined the fact, as just set out, that these cards are often used in mobile telephones and in particular in smart mobile telephones. The micro SD card be inserted into a slot in a mobile telephone which increases the telephone's memory capacity. The judge had in mind that micro SD cards are capable of storing digital materials in many formats, including pictures, videos, audio files and compressed zip files.

9. Section 40A of the Prison Act 1952 ("the 1952 Act") deals with the classification criteria for List A, List B and List C items. List A is irrelevant for the purposes of this application. Taking List B first, therefore, it is provided in section 40A:

i. " ... A List B article is any article or substance in the following list ('List B')-

(b) alcohol (as defined for the purposes of the Licensing Act 2003);

(c) a mobile telephone;

(d) a camera;

(e) a sound-recording device.

i. (4) In List B-

ii. 'camera' includes any device by means of which a photograph (as defined in section 40E) can be produced;

iii. 'sound-recording device' includes any device by means of which a sound-recording (as defined in section 40E) can be made."

iv. (5) The reference in paragraph (b), (c) or (d) of List B to a device of any description includes a reference to —

(a) a component part of a device of that description; or

(b) an article designed or adapted for use with a device of that description (including any disk, film or other separate article on which images, sounds or information may be recorded)." (Emphasis added)

10. Rule 70A of the Prison Rules 1999 (SI 1999/728) (amended by the Prison (Amendment) Rules 2008 (SI 2008/597)) sets out the List C articles which include (a) tobacco, (b) money, (c) clothing, (d) food, (e) drink, (f) letters, (g) paper, (h) books, (i) tools, (j) information technology equipment, (k) electronic cigarettes, (l) matches and (m) lighters.

11. By Rule 2 "'information technology equipment' includes any laptop or notebook computer, desktop computer, gaming console, handheld computing device, personal organiser, or any electronic device containing a computer processor and capable of connecting to the internet and any reference to information technology equipment includes a reference to (a) a component part of the device of that description or (b) any

article designed or adapted for use with any information technology equipment (including any disk, film or other separate article on which images, sounds, computer code or other information may be stored or recorded.." (Emphasis added).

12. The judge came to the view that a micro SD card falls within List B and the fact that it also comes within the definition of List C did not operate to limit the maximum sentence available to the court. He particularly referred to the fact that the Act itself defines List B as including "any disk, film or other separate article on which images, sounds or information may be recorded".
13. Miss Trigilio on behalf of the appellants, for whose submissions we are grateful, submits that because the present article is an item that meets the definition of List B and List C (as emphasised above, the provisions relevant to the present appeal are in broadly similar terms) it should have been treated as coming within List C. The Prison Act 1952 and the Rules provide no guidance as to how items that fall into both lists should be categorised. It is suggested that in light of the lack of clarity in the provisions, any uncertainty or confusion should be resolved in favour of the appellants. The uncertainty, therefore, relating to hybrid articles should not operate in Miss Trigilio's submission to the disadvantage of either of these appellants.
14. Mr Brook for the respondent, for whose submissions we are equally indebted, submits that the determining factor is whether the item comes within List B, regardless of whether it also comes within List C. He argues that when approached in this way there is no lack of clarity, nor is there any confusion.
15. In our judgment, given the similarity in the formulation of these provisions and the complexity of modern technology, some List B items will inevitably also come within the definition of List C items. Mr Brook makes a telling point in this regard on the diverse and sophisticated nature of "smart" mobile telephones. They fall within List B as a mobile telephone and they fall within List C as an electronic device containing a computer processor which is capable of connecting to the internet. As Mr Brook correctly observes, the logic of Miss Trigilio's submission is that an offence involving a smart mobile telephone must come within List C, whereas a mobile telephone which is not "smart" would be within List B. Mr Brook contends that result cannot reflect the true legislative purpose and it would be perverse.
16. The force of that submission is not substantively undermined by the fact that micro SD cards, as Miss Trigilio points out, are not specifically identified in the provisions in the way that applies to telephones. Instead, they can become a constituent part of a smart phone, and in the present case the judge found that the micro SD card was to be used in this way.
17. We have no doubt that the court in these circumstances should inquire first whether the item comes within the ambit of the more serious category, thereafter considering the lesser category (List C) if it is not within the definition of the former. This is not a situation where there is uncertainty or confusion that should be resolved in favour of the

accused. If the object comes within List B, absent good reason to conclude otherwise, it should be treated as a List B item. The use to which it is to be put will be relevant, as Mr Brook observed, to the level of sentence.

18. Having failed on this issue of principle, which is the sole live issue, these applications for leave to appeal against sentence are refused.

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

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