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IN THE COURT OF APPEAL
CRIMINAL DIVISION
NCN: [2020] EWCA Crim 998

Royal Courts of Justice

The Strand
London
WC2A 2LL

Thursday 23rd July 2020

B e f o r e:

LORD JUSTICE DAVIS

MRS JUSTICE ANDREWS DBE

and

THE RECORDER OF NOTTINGHAM
(His Honour Judge Dickinson QC)
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

RALSTON TERRANCE GABRIEL
RICKY CLINT GABRIEL
REISS LIAM GABRIEL

Computer Aided Transcript of Epiq Europe Ltd,
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Mr P Lazarus appeared on behalf of the Appellant Ralston Gabriel
Miss E Goodall appeared on behalf of the Appellant Ricky Gabriel
Mr C Meredith appeared on behalf of the Appellant Reiss Liam Gabriel

Miss K Broome appeared on behalf of the Crown

J U D G M E N T

Thursday 23rd July 2020

LORD JUSTICE DAVIS:

Introduction

1. On 2nd July 2019, following a trial in the Crown Court at Blackfriars before His Honour Judge Hillen and a jury, the three appellants were convicted of conspiracy to possess a firearm with intent to endanger life (count 1) and conspiracy to possess ammunition with intent to endanger life (count 2).

2. They now appeal against their convictions on three grounds for which the single judge has granted leave. The first relates to the judge's ruling during the course of the trial that the prosecution should be permitted to adduce evidence as to the presence of DNA found on the muzzle of one of the guns in question, which was attributable to at least one of the appellants. This was in circumstances whereby, quite remarkably, the appellants are monozygotic triplets whose DNA is indistinguishable as between each other. The second, linked, ground relates to the instruction which the judge gave to the jury in the course of his summing-up as to what use they might make of the DNA for the purposes of their deliberation of the case. The third ground for which leave to appeal was granted by the single judge is entirely discrete. It is said that the judge should have discharged the entire jury once it was ascertained that one of their number had made internet searches against the names of two of the counsel involved in the trial, and in particular counsel for the prosecution, Miss Broome, and had then told a number of his fellow jurors what he had gleaned from his searches with regard to Miss Broome.

3. In addition, however, the appellants variously seek to renew their applications for leave to appeal against conviction on grounds for which the single judge refused leave. Ralston and Ricky Gabriel also renew their applications for leave to appeal against sentence following refusal by the single judge.

4. The trial involved an amount of complex evidence relating to the use of mobile phones, cell-site analysis and so on. For present purposes, we make clear that we set out only a broad outline of that evidence, without going into great detail.

Background Facts

5. By way of overview, the appellants (identical triplets, as we have said) were alleged by the prosecution to be in effect on the selling side in conspiring together with Aaron Thomas, Elyace Hamchaoui and Hamza Ahmed on the buying side, as well as others unknown, to enable two firearms and ammunition to be possessed with intent to endanger life.

5. In the early hours of 10th April 2017, Hamza Ahmed, under a false name, had booked a taxi to travel to an address in Durban Road, London N17. Shortly after 12.30am he was picked up by a taxi driver. During the journey he was talking to someone on his phone. When they arrived at the address in London N17, he asked the driver to put his hazard light on so that the person he was meeting could find them. Ahmed then got out of the taxi. He was observed at 12.50am to meet an unknown black male from whom he took possession of a large, heavy holdall. He placed that on the back seat of the taxi and then walked a short distance with the unknown man. Both of them looked into a rucksack. Ahmed took the rucksack, got back into the taxi and asked to be taken to an address in London N19. The taxi set off, but was stopped by armed police a few minutes later. The holdall was seized. Inside the holdall was a rucksack. It contained an Uzi submachine gun with a sound moderator, ammunition for that submachine gun and a loaded 9mm automatic self-loading pistol.

6. Thomas, Hamchaoui and Ahmed were convicted following trial on the like conspiracy counts on 3rd July 2018. There was a great deal of telephonic evidence to show that they had been in

regular contact with each other on the night in question.

7. The prosecution case was that on the evening of 9th April 2017 and on into the early hours of 10th April 2017, Thomas (who had three phones, one of which was an unregistered "dirty" phone) was in contact with a network of telephone numbers in order to orchestrate the transfer of the guns and ammunition. It was said that he was the broker for the intended recipient of the weapons. Hamchaoui was described as the "middle man" on the buying side; he acted on behalf of Thomas and directed Ahmed, who was the courier, to collect the guns. Hamchaoui would relay information back to Thomas. At the same time, on the prosecution case, the appellants, on the selling side, arranged the delivery of the firearms for collection.

8. In a nutshell, the prosecution case against the appellant Ralston Gabriel was based on the attribution to him of the telephone number ending 0574. Attribution was strongly disputed at trial. The user of this number was said by the prosecution to be party to the arrangements to deliver the firearms and ammunition to the area where they were passed to Ahmed by the unidentified man. On cell-site evidence, the user of this number had entered the vicinity where the transfer took place a few minutes before the transfer occurred and then left again. There was evidence of contact between the 0574 number and Thomas' phones, both before and after the interception. It was also said that Ralston was in contact with his brother Reiss's phone that night.

9. The prosecution case against Ricky Gabriel was based on the, again contested, attribution to him of the number ending 3039. Ricky Gabriel was stopped by police subsequently on 13th May 2017. He was in possession of an iPhone containing the 3039 SIM. He confirmed that it was his phone, and he provided his PIN to enable it to be interrogated. One of the contacts in his phone was one of Thomas' numbers – a "clean" number. The phone 3039 was also found to have as a contact under the name "R1" the phone of his brother Reiss. The prosecution relied on the fact, as they said, that there had been contact between this number and Thomas prior to the transaction, and there had been further contact on two separate occasions following the interception by the police with Thomas' phone.

10. The prosecution case against Reiss Gabriel, again in a nutshell, was based on the fact that in April 2017 he had been in a relationship with Sasha Robinson-King. It was said that in April 2017 she had a phone ending 6503, and that he had a phone ending 4233. Both phones were cell-sited in the same general area of East London on 9th and 10th April. In the early hours of 10th April, Robinson-King's 6503 phone called Thomas on three occasions before Ahmed arrived at the location of the handover. Prior to 12.09am on 10th April, there had been no contact between 6503 and Thomas' phone. It was the prosecution case that it was Reiss who was making the phone calls, using his girlfriend's phone. In addition, there had been contact between this phone and the phone ending 0574.

11. Further, detailed evidence was given as to the various entries of names and numbers found as contacts in the various phones that were taken. It appears that on Ricky's phone there was found a photograph of Thomas with two of the triplets. There was also an amount of cell-site evidence adduced before the jury.

12. Robinson-King was arrested on 11th May 2018 (almost a year later) on suspicion of involvement in the conspiracy. When interviewed, for the most part she answered "No comment" to all questions asked. However, reliance is now placed on what is said to have been an answer by her at one stage of that interview.

13. In addition, however, the prosecution sought to adduce DNA evidence. There was expert

evidence that found on the muzzle of the pistol which had been intercepted was DNA evidence which was, to the probability of one billion to one, attributable to at least one of the three appellants. However, just because they were monozygotic identical triplets, it could not be said which one (or more) that would be. It is also the case that other profiles relating to other people were found on that gun and, indeed, on the submachine gun. One of the main issues in this appeal is whether that DNA evidence, which was the subject of expert evidence, was properly placed before the jury.

14. Overall, it can be seen that the Crown's case was essentially circumstantial. Critical to it was the attribution and use of the identified mobile phones to and by each of the various appellants, coupled with the cell-site evidence as to the location of those phones at various times, not least on the night of 9th/10th April.

Renewed Grounds

15. None of the appellants gave any comment when they were interviewed by the police and none gave evidence at trial.

16. It is convenient to deal first with the renewed grounds of appeal against conviction in respect of which the single judge refused leave. We will do so shortly, as we are entirely satisfied that there is no substance in any of them.

17. The first point raised is that all three appellants say that the trial judge erred in rejecting a submission of no case to answer at the conclusion of the prosecution case. Each said at the time, and says now, that there was insufficient evidence to enable a jury safely to infer that each had knowingly participated in the alleged conspiracies. It is stressed that the Crown's case was, essentially, entirely circumstantial.

18. A number of individual points were made in support of those submissions: for example – and it is only by way of example – the use of 0574 (said to be Ralston's phone) had on other occasions taken place when Ralston himself could not have been using it as he was on the football pitch. Other such points were also made.

19. The judge gave a full and detailed ruling on the matter. He directed himself in accordance with the well-known *Galbraith* principles, and also directed himself by reference to relevant authorities relating to the drawing of inferences. He approached the matter on the footing that the prosecution case fundamentally depended on the attribution of the phones in question to each of the appellants respectively. He thoroughly and separately analysed that evidence in the case of each appellant. He noted in particular the relatively limited phone material relating to the appellant Ricky Gabriel. In each case, however, he concluded, and gave full reasons, that there was a case to answer. Part of his reasoning included reference to the DNA point, to which we will come later. Subject to that point, it is sufficient for us, for present purposes, to say that, in entire agreement with the single judge on this issue, we see no arguable basis for interfering with the reasoning of the judge or with his conclusion on the evidence then adduced that there was a case properly to be left to the jury. That renewed ground, therefore, fails.

20. Then it is said by each appellant that in his summing-up the judge gave insufficient directions to the jury as to the necessary ingredients of conspiracy and participation in the conspiracy as alleged. It is said that this was particularly so after the jury had sent a note on 1st July 2019 and after they had been in retirement for some time. In the relevant respects, the jury note, as recounted by the judge, said this:

> '"We have a question in law regarding conspiracy'. So, I will read the whole of this out and then we will go back to the two bullet

> points. 'We have a question in law regarding conspiracy' … – the first bullet point is: 'Does knowing of a conspiracy and helping a conspirator imply being part of that conspiracy?' Bullet point 2 is: 'A counsel indicated that participation had to be active in the conspiracy, but does passive participation with partial knowledge of the said conspiracy signify taking part in the latter?'"

It is submitted that the very fact that this question was asked illustrated that the judge's prior directions on conspiracy in his summing-up had been inadequate. Complaint is further made that the judge's answer to that question, which is set out at page 124 of the transcript, was insufficient.

21. We have carefully considered the directions that the judge gave as to the elements of conspiracy. We are entirely satisfied that those directions were adequate for this case. Furthermore, his answer to the jury note was again sufficient. Indeed, he was positively correct not to over-elaborate his answer, which answer was legally correct. We consider, overall, that there is no substance in this complaint concerning the directions given to the jury on conspiracy.

22. It is also said that the judge's summary of the evidence with regard to this was unbalanced. But again, having reviewed the summing-up, we are entirely satisfied that that is not a sustainable criticism.

23. Next, a ground is pursued that the judge's direction as to circumstantial evidence was insufficient and did not give the necessary guidance to the jury as to their correct approach to a case which essentially was founded on a circumstantial basis. In particular, it is said that the judge failed properly to point to factors which would lead away from attribution of the phones in question to the individual appellants.

24. Here, too, we think that there is no basis for this criticism. The judge gave a split summing-up. When he gave his initial directions concerning circumstantial evidence, he did not know just how counsel would put their arguments in closing speeches in circumstances where the appellants had all elected not to give evidence. The judge had given an entirely sufficient outline of the law on circumstantial evidence, abridged from the Crown Court Compendium, which he had also reduced to writing. Following counsel's speeches, when he summed up the evidence, he again reverted to the necessary points. Amongst other things, he reiterated that speculation had no part to play in the jury's considerations. He also made it absolutely clear that the burden of proof rested throughout on the Crown. He sufficiently reviewed, in our judgment, the respective defence cases. The various criticisms made of him in this respect are, in our view, of no real substance.

25. Finally as to the renewed grounds, a point is pursued on behalf of Reiss Gabriel alone. The point is as hard to fathom now as it must have been in the court below. The Crown had adduced evidence to show that the phone ending 6053 was indeed linked to Sasha Robinson-King (Reiss' then girlfriend). Contrary to a suggestion that had been made at least below, that attribution in no way depended upon hearsay evidence.

26. As we have said, Sasha Robinson-King had been arrested and interviewed a year subsequent to these events. For the most part, she had answered "No comment" to all questions asked. But one possible answer, according to the transcript of her interview, indicates that she said "No" to the question (if it was a question) of a police officer who said: "If that person

wasn't, you then was, unless you tell me somebody else was". It is completely unclear what question, if any, was being put by the police officer. Moreover, the statement "No" is totally ambiguous as to what it actually meant. Indeed, further to complicate matters, Miss Broome has suggested that as Sasha Robinson-King was saying "No", the police officer spoke over her; and that she may well have intended to say "No comment", as she had done for the most part of the interview. Nevertheless, Mr Meredith sought to say that somehow this answer "No" should be put in as hearsay evidence. When asked "Hearsay evidence of what?", he rather struggled to say. Certainly, one cannot spell out any clear question or any clear answer from the transcript of interview. That of itself is fatal to the point made. But it is further completely demolished, both by the context of the general "no comment" answers in which this statement "No" was made, and furthermore in the context of the fact that Mr Meredith could point to no proper basis for such evidence being put in as hearsay under section 114(1)(d) of the Criminal Justice Act 2003, in any event. If the defence wanted to adduce evidence from Robinson-King to rebut the suggestion that she had let her phone be used by her then boyfriend, then it was open to them to seek to call her: although perhaps it is easy to understand why they did not. At all events, this ground was entirely misconceived.

Grounds of Appeal

27. We turn to the grounds of appeal in respect of which the single judge granted leave.

28. It is convenient to take the jury point first. What happened – and again we put it shortly – was this. On the second day of their deliberations, 26th June 2019, the jury were released during the morning as one of their number was unwell. Later that day, the judge was informed by a court usher that the usher had overheard one of the jurors, in the presence of around six other jurors, mention that morning that he had looked up the name of Miss Broome (counsel for the prosecution) on the internet and found that she had been involved as counsel in a high profile case relating to the Shoreham Air Show plane crash. Perhaps needless to say, the jury had been told at the outset of the trial, and on subsequent occasions, not to engage in any internet or other research on their own account. It had been made clear to them that this also extended to research relating to judge and counsel. They also had been told, as is conventional, that they should report anything untoward to the judge. At all events, having been so informed by the court usher, the judge notified counsel by email at 4.27pm that afternoon.

29. When the jury reassembled on the morning of the following day, 27th June 2019, the juror in question was not initially separated from the others. Having had some discussion with counsel, the judge had that juror called into court. When questioned, that juror readily accepted that he had indeed Googled Miss Broome's name. He also volunteered that he had researched the name of Mr Lazarus (counsel then, as now, appearing for Ralston Gabriel). He said that he had done so out of curiosity. He said that he had told other jurors that it seemed that Miss Broome was a "high flyer" and had been involved in the Shoreham air crash case. The judge discussed matters with counsel, following which the juror in question was discharged. The remaining 11 jurors were then brought together into court. The judge told them that the other juror had been discharged and told them the reason why he had been discharged, including the fact that that juror had described to other jurors that Miss Broome was a "high flyer". The judge expressly reminded the remaining jurors of his direction that they should not conduct their own researches and should report anything untoward to him. He also made it absolutely clear in his instructions to them at the time that the case was to be decided on the evidence, not on counsel's performance. He asked them to consider if any of them had conducted their own researches with regard to Miss Broome or otherwise, or if they felt that they had been influenced in such a way that they could no longer try the case fairly. The jury retired for a few minutes and then returned together. One of their number, as spokesperson, said that they had not conducted any internet enquiries themselves and that they considered that they could continue to try the case fairly. The judge then permitted the remaining 11 jurors to continue their deliberations with

regard to each of the appellants.

30. After the jury had withdrawn, Mr Meredith (counsel for Reiss Gabriel) again raised concerns that the six other jurors had not reported the internet research of a fellow juror to the judge. The judge shortly indicated that in circumstances where the research had not been as to the facts, and given the timing of all that had happened, this was not a case for the discharge of the entire jury. It may be noted that counsel for the other two appellants did not seek the discharge of the entire jury; they were content simply with the discharge of the individual juror in question.

31. What Mr Meredith says – and his arguments are adopted by Mr Lazarus and Miss Goodall, to the extent that it is now open to them to do so – is that the jury had been contaminated, and irredeemably so. He says that the only proper course was to discharge all of them: the jury, objectively, could not be trusted. He further pointed out that there had been no explanation to the judge by any of the six or so jurors of what the twelfth juror had said to them. Indeed, the transcript might indicate that they had briefly asked that juror to elaborate on what he was saying.

32. The judge was, of course, required to take account of Criminal Practice Direction Part 6 26M. But as the Practice Direction itself makes clear, a judge has to decide what best to do where a jury irregularity occurs, and has to do so by reference to the context and to circumstances which arise in the particular case. That is a point stressed in, for example, *R v KK and Others* [2020] 1 Cr App R 29 at [80] to [81].

33. Here, given that the jury had separated the previous day, there was no obvious reason for separating the individual juror when he arrived at court the following morning: especially when he had already told six (or thereabouts) of the other jurors of what he had done. Further, given the circumstances, it was well within the range of a reasonable exercise of discretion for the judge then to question the remaining jurors collectively, rather than individually. In addition, it was understandable, notwithstanding Mr Meredith's complaints, that the judge explained to the remaining jurors why the other juror had been discharged, including reference to the fact that he had discovered that Miss Broome was considered to be a "high flyer". It was legitimate for the judge to put the remaining jurors on the same equivalence of knowledge as the six jurors who had already been told that by the errant juror. Indeed, the judge's questioning of the remaining jurors was geared to that. That, again, in our judgment, was an entirely reasonable exercise of his discretion on the part of the judge. Furthermore, he proceeded on the footing of making it clear to the jury that it was not the background or the performance of counsel which counted, it was the jury's assessment of the evidence in the case. He directed them in appropriate and forthright terms.

34. Mr Meredith, nevertheless, maintained that the jury as a whole could not, viewing matters objectively, be trusted, just because not one of the six or so jurors had reported this breach to the judge. But such a failure to report an irregularity by a jury does not of itself necessarily require the discharge of the whole jury: see the discussion in *KK*. The reality here was that the information imparted by the errant juror was anodyne. Besides, given the course of events, the judge had indicated – and he, as the trial judge, was well-placed to assess this – that the way things had proceeded had meant that there had been no real opportunity for the other six or so jurors to tell the judge of what had happened if they had concerns. Overall, therefore, we are entirely satisfied that the steps which the judge took were proper ones. No unfairness arose by reason of his refusal to discharge the entire jury. In our judgment, this ground of appeal is not made out. The judge acted entirely properly and he gave appropriate directions to the jury at the time with regard to what had happened.

35. We turn finally to what perhaps is the main point raised on this appeal concerning the admission and treatment of the DNA evidence. The Crown throughout had conceded that the DNA found on the muzzle of the loaded gun, which had a match probability of one billion to one to the appellants, could not, just because they were monozygotic triplets, be attributed to any particular one of them. The Crown had made it clear that their case rested in its fundamentals on the telephone evidence.

36. In such circumstances, the appellants at trial had invited the judge to exclude such evidence under section 78 of the Police and Criminal Evidence Act 1984. It was (and we put it shortly) said that because the DNA could not be linked to any one of the appellants individually, it was of minimal probative value as against each of them individually. But on the other hand, it was said, to admit such evidence might well be highly prejudicial to the appellants collectively and might well, in effect, encourage the jury to think in terms of guilt by association.

37. In a detailed ruling, the judge rejected the arguments advanced to him. He agreed that the jury could not place any reliance on the DNA evidence unless they were first sure that the DNA had not got on to the muzzle by, for example, innocent secondary transfer. The essence of the judge's ruling can be found at paragraph 15, where he said:

> "In this conspiracy, if the DNA evidence is accepted by the jury, and if other 'innocent' methods of secondary transfer are excluded by the jury, then one of the three [appellants] came into contact with the firearm. Each of the three is linked by close relationship. Each of the three has made telephone contact, if that evidence is accepted, from which an agreement can be inferred. Knowledge that that agreement was a criminal agreement and that it was an agreement that a firearm or firearms be in the possession of a co-conspirator, can be inferred from the calls, the relationship and the contact one of the three had with the firearm. It is suggested that this is guilt by association. Association is more often than not an essential element in the circumstantial evidence proving conspiracy."

A little later he said:

> "The link of one of them with one of the firearms could lead the jury to be satisfied that as against the [appellant] whose case they were considering, that [appellant] knew it was in connection with at last one of the weapons mentioned in count 1, and so a criminal agreement as alleged."

The judge went on to say this at paragraph 17 of his ruling:

> "This is characterised by Miss Goodall as a circular argument. It is not. It is, as I hope I have demonstrated, a linear argument, which operates in an upward and [downward] chain of reasoning. It is, as with all circumstantial evidence, a strand, the strength or

> weakness of which depends upon other evidence. As it is summarised in Archbold '*the evidential significance of DNA evidence depends to a large extent upon the other evidence in the case; by itself, it may not take the mater far, but, in conjunction with other evidence, it may be of considerable significance'*. Whether it is of significance is a matter for the jury. As probative but circumstantial evidence it will always require a careful evaluation by the jury, but I cannot accept that any potential prejudice cannot be dealt with by a direction."

38. In our judgment, that was a ruling properly open to the judge. The Crown's case was not and could not be founded solely on the DNA evidence. As we have said, it was in its fundamentals founded on the mobile phone and cell-site evidence, with the DNA evidence being advanced as capable of supporting the case based on that. But in circumstances where that telephone evidence, if the jury accepted it, showed varying degrees of contact with Thomas and Thomas' associates on the part of the appellants, and with each other, on the night in question, the fact that the DNA evidence attributable to at least one of them was found on the pistol, which pistol was part of the conspiracy, was plainly relevant. It bore on the very issues in the case. Indeed, it would operate to rebut any suggestion that what had happened was all by way of coincidence. We thus think this evidence was clearly admissible. We reject Miss Goodall's arguments to the contrary. The only question then is whether, nevertheless, it should as a matter of discretion be excluded as being unfairly prejudicial. The evidence might, in a sense, be said to be prejudicial: but that is only because it was potentially relevant. There was no unfairness in allowing it to be put before the jury. Indeed, it might have been a very surprising outcome if the jury were deprived of all knowledge of the fact that the DNA of at least one of the appellants, as alleged conspirators, had been found on one of the firearms which were the subject of the conspiracy. Accordingly, we think that the judge's ruling was justified and his reasoning was sound.

39. That leads to the final point with regard to the safety of the conviction. The judge had made clear in his ruling that he contemplated that the entire matter could appropriately be dealt with by directions from him. But the complaint is that when he came to deal with the matter in his summing-up, his directions were inadequate, confused and circular; rather than making things clearer for the jury, they may only have served to encourage them to speculate or to give greater weight to the DNA evidence than it in truth deserved.

40. Throughout his summing-up the judge made it clear that the prosecution case depended on the mobile phone and cell-site analysis and on the correct attribution of the respective phones to each of the appellants. He further made clear that the case of each appellant had to be considered separately. He made it clear that the jury must consider the totality of the evidence, and he made it clear that the burden of proof was on the prosecution to the criminal standard. He made it clear throughout that the DNA evidence, if accepted by the jury, was, at best, only some evidence in support of the prosecution case. In giving his directions as to how the DNA evidence might be used by the jury, the judge said this:

> "Once again, it is important not to speculate or make up theories. But you are entitled to draw common sense conclusions from the evidence. If you are satisfied that the DNA of one or more of the [appellants] was transferred onto the pistol in circumstances where the [appellant] – that [appellant] whose case you are

considering – or [appellants] were aware of the pistol, then what use can be made and what use cannot be made of this evidence?

Firstly and most importantly, the DNA evidence cannot prove as against any one or more of these three [appellants] that they came into contact with the pistol. If that were the only evidence, all three [appellants] would have to be acquitted. If you are sure of the reliability of the DNA evidence and if other innocent methods of secondary transfer are being excluded, then from the individual whose DNA was found on the pistol, that delimits are particular class of people, these [appellants], these triplets, one or more who came into contact with the pistol. Each of the three [appellants] is linked by close relationship. That again of itself – that association – their close relationship – is not evidence that any one or more of these three [appellants] have come into contact with the pistol or knew that their brother or brothers had done so.

The prosecution case rests upon the interpretation of the telephone contacts between the [appellants] themselves and the named co-conspirator and others unknown, such as Number B. Consider the case against and for each [appellant]. And if you conclude from the telephone and cell site evidence, the [appellant] whose case you are considering had entered into an agreement with others named and unnamed, then the DNA evidence is capable of being some evidence which, taken with all the circumstances in the case, can lead you to conclude that [appellant] had either himself come into contact directly or knowingly but indirectly with the firearm or knew that one or more of his brothers had done so.

It is important always to remember always that this – that is the DNA evidence – is only one part of the evidence. And important also when considering this evidence, you look again at the direction on your handouts about circumstantial evidence."

41. Miss Goodall objects that the judge's approach was circular and, in effect, double counts the value of the evidence. She maintains that where the evidence could not be attributed to any one of the appellants, the matter was left, in effect, up in the air. She says that there was a lack of specificity in the evidence, in that no individual one of the three appellants could be identified by reference to the DNA evidence. She also objects that the DNA evidence had weaknesses in terms that it could not necessarily explain whether there was direct transfer or indirect transfer, what the timing was and so on; although, as Miss Broome pointed out, that is almost always so in the case of DNA evidence. In many ways, indeed, Miss Goodall's arguments reflected her prior argument that the evidence should not have been allowed to be adduced at all.

42. We have to say, with respect, that at stages Miss Goodall's arguments reached the highest level of technicality. We consider, with all respect to Miss Goodall, that Miss Broome was justified in saying that Miss Goodall's arguments sought to find difficulty and complexity where, in truth, there was none. We consider, as we have said, that the judge had given amply sufficient

reasons for allowing this evidence as to DNA to be adduced at the trial. We accept that his directions to the jury were perhaps not as clear or as focused as his reasoning was in his prior ruling. Nevertheless, he did sufficiently direct them, in our judgment; and in particular he made clear to them the limitations as to the use to which they could put such evidence. The point of relevance remains obvious, and that, at least, was the subject of the judge's ruling. In our view, his directions to the jury adequately set out the position. Consequently, we do not think that there was any error or any material inadequacy in the summing-up. This ground of appeal therefore fails. Indeed, it might be said that when he came to deal with the DNA evidence in his summing-up, the judge had dealt with it in a very low-key way and in a way which could be said to have been favourable to the defence.

43. Reviewing all the grounds of appeal advanced with regard to the safety of these convictions, we are satisfied that there is no basis in them, whether taken individually or collectively. We are satisfied that these convictions are safe. The jury were properly directed and instructed. The judge's rulings were appropriate. There is no proper basis for this court to interfere. These appeals against conviction are dismissed.

Application Concerning Sentence

44. We now turn to the renewed applications of the applicants Ralston and Ricky Gabriel (both now aged 28) for leave to appeal against sentence following refusal by the single judge. Each had been sentenced by the judge to a determinate term of 14 years' imprisonment.

45. In the course of his sentencing remarks, the judge found that there must have been access to organised crime groups. He found Reiss to be the co-ordinator of the whole operation on the sell side. Ralston, he found, had the responsibility for arranging delivery to Thomas' agent at the location in question. Ricky was also described by the judge as central. The judge noted that, after the guns had been intercepted, Ricky had been the last point of contact with Thomas, to whom he had spoken for nearly ten minutes on the phone. The judge found that the roles of Ralston and Ricky were not subordinate, but nor were they leading. Although criticism is made of that assessment, we can see no reason for interfering with it, especially given the advantage to the judge in conducting the trial.

46. Although the applicants had some previous convictions, the judge did not regard them to be of such a character as to amount to an aggravating factor. But, as the judge noted, the firearms here were genuine, the pistol was loaded, and the submachine gun had ammunition accompanying it. It is suggested that the judge should have sentenced solely by reference to the pistol. But, in our view, that would be unreal. The judge was clearly justified in proceeding on the footing that what had been involved here was both a submachine gun with ammunition and the loaded pistol. Moreover, it was an aggravating factor that this was a conspiracy in which a considerable number of people had been involved; and, as the judge inevitably held, these guns were intended for ultimate use by violent criminals.

47. It is well-known that the courts are required to adopt a severe approach in such a fire-arms context. Applying the criteria laid down in *Avis* and other relevant authorities, we can see no arguable error in a sentence of 14 years' imprisonment following a trial in each case. It may be that such a sentence can be described as severe; but it is by no means excessive or out of line with sentencing in broadly comparable cases. It is said that the judge failed to have regard to the mitigation available. It is true that there was some limited mitigation in the form of positive character references and the like, and it is also encouraging that there seem to be some signs of progress in the custodial environment during the current difficult circumstances. But those matters do not detract from the sentence imposed by the judge.

47. It is further said that there is an element of disparity with the sentence imposed on Reiss,

who received a total of 18 years' imprisonment in circumstances where he had been the co-ordinator and, moreover, fell to be sentenced for certain other serious matters involving a firearm and drugs offences. It may be, as we see it, that Reiss perhaps was fortunate to receive a sentence limited to 18 years' imprisonment. At all events, the argument as to disparity does not in any way lead us to conclude that, even arguably, sentences of 14 years' imprisonment imposed on these two applicants, given the gravity of their offending, was excessive.

48. Accordingly, we agree with the single judge that these applications should be refused. We endorse her reasoning and conclusion. We refuse these renewed applications.

49. **MR MEREDITH:** One final matter, if I may – and I note the time, as I am sure my Lord does as well. My Lord, given the unusual background to these three cases and the importance of scientific evidence in modern day trials, might I apply, on behalf of all counsel, for a short period of time in which to consider whether or not we will invite the court to certify a point of general public importance?

50. **LORD JUSTICE DAVIS:** Do the other two counsel associate themselves with this application?

51. **MISS GOODALL:** My Lord, no. In fact, I had indicated that it was not an application I would be pursuing.

52. **LORD JUSTICE DAVIS:** Mr Lazarus?

53. **MR LAZARUS:** My Lord, only to the extent that I would like to discuss it – so I would like some time to think.

54. **LORD JUSTICE DAVIS:** Well, given the time – we do not want to shut you out from the point, but you will need to consider very hard indeed what point of law of general public importance can possibly arise in the circumstances of this case.

55. **MR MEREDITH:** My Lord, I appreciate that.

56. **LORD JUSTICE DAVIS:** 24 hours.

57. **MR MEREDITH:** Thank you.

58. **LORD JUSTICE DAVIS:** And if you decide not to pursue the point, could you send a nil return to my clerk?

59. **MR MEREDITH:** Certainly, my Lord. Yes.

60. **LORD JUSTICE DAVIS:** Any other matters?

61. **MR MEREDITH:** No, thank you.

62. **LORD JUSTICE DAVIS:** Could we say to all counsel – and we include Miss Broome in this – clearly all of you have worked very hard indeed in preparing this case. So far as the three of you are concerned, each of your clients has failed, but it is through no want of effort on your part. So, thank you very much indeed.

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

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