Neutral Citation Number: [2023] EWCA Crim 316

Case No: 202200988 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT CANTERBURY
HIS HONOUR JUDGE JAMES
T20117349

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 March 2023

Before:

LORD JUSTICE STUART-SMITH
MRS JUSTICE LAMBERT
and
SIR NIGEL DAVIS

- -

Between:

REX	**Respondent**
- and –	
PHILIP ROE	**Applicant**

- -
- -

Mark Summers KC and **Rachel Darby** (instructed by **Lound Mulrenan Jefferies Solicitors**) for the **Applicant**
Edmund Burge KC (instructed by **CPS Appeals and Review Unit**) for the **Respondent**

Hearing date: 21 February 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 24 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Stuart-Smith:

Introduction

1. On 11 December 2013 in the Crown Court at Canterbury the Applicant was convicted after a re-trial on an indictment containing six counts of the offences we detail below. On 12 December 2013 he was sentenced by the trial judge, His Honour Judge James, as follows:

   i) On Counts 1 and 2, which were offences of being knowingly concerned in a fraudulent evasion of the prohibition on the importation of goods (namely class A drugs) contrary to Section 170(2)(b) of the Customs and Excise Management Act 1979, he was sentenced to 13 years imprisonment concurrent;

   ii) On Counts 3 and 4, which were offences of being knowingly concerned in a fraudulent evasion of the prohibition on the importation of goods (namely class B drugs) contrary to Section 170(2)(b) of the Customs and Excise Management Act 1979, he was sentenced to 3 years (count 3) and 4 years (count 4) imprisonment concurrent;

   iii) On Count 5, which was an offence of possessing a prohibited firearm contrary to section 5(1)(aba) of the Firearms Act 1968, he was sentenced to 5 years imprisonment consecutive; and

   iv) On Count 6, which was an offence of possessing ammunition without a firearm authority contrary to section 1(1)(b) of the Firearms Act 1968, he was sentenced to 1 year imprisonment, concurrent.

   The total sentence was therefore one of 18 years imprisonment.

2. The Applicant now applies for permission to appeal against his conviction some 3003 days out of time. His application was referred to the full Court by the Single Judge.

The factual background

3. In 2011 the Applicant worked as a lorry driver and mechanic for the Kawasaki Motorcycling team. The team was based in Penrith and was owned by Paul Bird Motorsports. The Kawasaki Motorcycling team sent two lorries to attend a race meeting in Assen, Holland. On 18 April 2011 the lorries were returning to the UK through the port of Dover. One lorry registered “3MX” was driven by the Applicant. The other lorry registration “B9RDY” was driven by Mr Gary Matthews.

4. At about 7.30pm on 18 April 2011 both vehicles were stopped by the UK Border Force Agency and were searched. Nothing untoward was found during the search of the “3MX” lorry driven by the Applicant. The other lorry “B9RDY” contained an area converted into an office. During the search of the office area of “B9RDY” UK Border Force Agents discovered a significant amount of controlled drugs: approximately 7kgs of cocaine (count 1), MDMA in the form of 250,000 ecstasy tablets (count 2), 19kgs of skunk cannabis (count 3) and 78kgs of cannabis resin (count 4). The drugs had a street value of between £2 million to £2.5 million. A handgun was also discovered in Mr Matthews’ lorry (count 5). It was analysed and found to be a

weapon that had been modified to fire live ammunition. The firearm was found with 35 live bullets (count 6).

The Prosecution case

5. The Prosecution case was that the Applicant was part of a criminal enterprise that was involved in smuggling the contraband items found in "B9RDY" into the UK. The prosecution alleged that the criminal enterprise was based in Ireland and that someone variously identified as "R-man" or "R-fella" was integral to the enterprise.

6. To prove the case against the Applicant, the Prosecution relied on various strands of evidence:

   i) During the search of the two vehicles and before the discovery of the drugs, the Applicant was using his mobile telephone to send and receive texts. The prosecution suggested that an exchange between the Applicant and his partner was significant as it showed he was aware that the problem was with the "3MX" lorry before any drugs had been found. The first discovery of drugs was made by Officer Bodger at 20:51; but between 20.14 and 20.30 he sent a series of texts to his girlfriend stating "… we have a bit of a problem not good in customs in Dover" and that the problem was in "the other lorry.";

   ii) The cannabis had been found in three large cardboard boxes placed inside a cabinet of the office space. One of the boxes was found to have the Applicant's palm print on it. The position of the palm print was consistent with the Applicant having carried or at least picked up that box;

   iii) When the drugs were discovered all of the people travelling in the two vehicles were arrested and the Applicant had his mobile phone seized. The Applicant was interviewed the following day, at which time there had been no forensic analysis of telephones or the drugs. The Applicant denied any knowledge of the drugs, firearm or ammunition. He said that all he had loaded onto "B9RDY" were three bikes and a wheel tyre. He said he had not been in the office of "B9RDY" because there was no reason for him to go into that area and he said he had never put anything into the cupboards. The only cardboard box he recalled picking up was a large box which was open and contained racing leathers. That box, he said, was put onto his truck, "3MX". He denied that his fingerprints or DNA would be found on any of the drugs packaging;

   iv) Once the Applicant's mobile phone was analysed it showed evidence of the Applicant's contacts and communications. This led to a second interview. The mobile phone showed a number of calls to and from Ireland on 18 April 2011, the day of arrest, including that the Applicant had deleted a phone call made to a public telephone box in Ireland shortly before he was arrested. At trial an events schedule was prepared that contained details of text messages and phone calls that were said to be relevant. The attribution of some of the numbers with whom the Applicant was in contact was not contentious; but, as we shall detail later, there were others where attribution was contentious, not least because the Applicant changed his account between the time of his initial interview, his second interview and his re-trial. The prosecution asserted that a number of the texts and the fact of a number of the phone calls being made

as and when they were provided evidence of the Applicant's guilt. They are at the heart of the present application and it is therefore necessary to refer to them in some detail: see [7.] ff below;

v) There was evidence that the Applicant was involved in a previous smuggling operation of tobacco. In 2010 the Applicant had been stopped by customs agents while driving a lorry for the Honda Racing team. The lorry was returning to Hull from the Assen racetrack in Holland and was found to have 250kg of tobacco on board. There was no criminal prosecution of the Applicant who denied knowledge of the tobacco and said he was an innocent mule. Evidence was heard from Simon Buckmaster, the principal of the Honda team, who said that the Applicant had made a confession to him that he was involved in smuggling the tobacco. During the re-trial the Applicant accepted that he had previously been happy to engage in smuggling tobacco and sought to deflect suggestions that his conduct and conversations were to do with drugs by asserting that they were in fact to do with smuggling tobacco products;

vi) The Applicant had an Irish bank account that had received a 3000 euro payment from a person named as Ashleigh [blank]. In evidence the Applicant said the payment was made by "R-man's partner", though he also said that he didn't know her name. He said it was payment for motorcycle parts that he had sold to "a friend of the R-man" - not to the R-man's partner. He said that he had got the parts from a Mr Ken Summerton who, he said, had a big suspension company in England called K-Tech.

The phone calls and text messages

7. The phone records and text messages revealed contact between the Applicant and the "R-man" or "R-fella". The R-man assumed a central role at the trial and on this application, as we shall explain below.

8. The phone records also revealed contact between the Applicant and a man called Guy Mitchell who, like the Applicant and Mr Matthews, was an HGV driver. Mr Mitchell was employed by an Irish firm called McGill's. At the heart of this present application lies the fact that Mr Mitchell was arrested in Ireland on 10 March 2011 and charged with serious drug offences, namely possession of substantial quantities of drugs for the purpose of selling or otherwise supplying them to another. At the time of the Applicant's trial, Mr Mitchell had not been tried. When eventually he was tried, he was acquitted by the jury on 9 March 2015.

9. The first relevant sequence of text messages was between 12 and 14 January 2011. The Applicant (who was then in Malaysia) and Mr Mitchell exchanged messages which were at least consistent with planning the illegal transport of contraband and indicated that the R-man was involved in the plan:

Date	Time	Sender	Message
13.01.11	13.44.32	Mitchell	Ok the r fella is over here now to sort it. Rough amount of room
13.01.11	13.51.36	Applicant	As much as you want how much room

			do you need
13.01.11	13.55.09	Mitchell	Whats best. 4 bags
13.01.11	13.56.19	Applicant	Yeah perfect 4 or 5 I'm easy the lorry will have a load of bags in it anyway so they will just blend in
13.01.11	15.35.09	Applicant	Is he getting it sorted it's a great chance don't let in go dowg

10. On 17 February 2011 there was an exchange of texts between the Applicant and an Australian (+61) number. During the exchange the Applicant said that he wished he were in Australia too. The exchange included:

From	Date	Time	Content
Applicant	17.02.11	10.55.58	lol I need a lottery win
+61	17.02.11	10.57.24	Or some other work that pays well" This is the way forward!
Applicant	17.02.11	10.57.53	I'm onto that driver Assen is pay day

11. At the time of the Applicant's second interview, the +61 number had not been attributed. The Applicant said it was the number of an Australian called Mr Grant Covus (otherwise known as "Moose"). He said that "Assen is pay day" was a reference to a debt he owed Mr Covus for suspension work that Mr Covus had carried out and which had been paid while they were in Assen. By the second trial the +61 number had been attributed to Mr Matthews. The Prosecution unsurprisingly alleged that the reference to "work that pays well" and Assen being "pay day" were references to the Applicant being handsomely paid for smuggling Class A drugs after the forthcoming Assen race; and that his account of owing money to Mr Covus and paying him at Assen had been a lie and an attempt to put the interviewers and the prosecution off the scent. The Applicant's response to that during his second trial was that "Assen is pay day" referred to being paid for smuggling tobacco products. The Prosecution countered by referring to a further text, sent by the Applicant to Mr Matthews on 2 March 2011 which said: "No probs we have a defo on the fag job from Spain test :-) just waiting on a phone call about the other stuff x". The prosecution case, which the Applicant denied, was that "the other stuff" was not tobacco products but Class A drugs. At his re-trial, the Applicant said that he could not remember what "the other stuff" was intended to mean. No tobacco products were found on either of the two lorries at Dover. The Applicant's evidence was that the tobacco smuggling had been called off either when they were on the way to Assen or when they had arrived there. There was nothing on the downloads from the Applicant's phones or computer to support the suggestion that a tobacco smuggling operation had been called off at that late hour.

12. Mr Mitchell's partner was called Gillian Whalley. In the immediate aftermath of Mr Mitchell's arrest on 10 March 2011, Ms Whalley and the Applicant engaged in a three-way conversation by phone and text, the other participant in the conversation

being the “R-man” or “R-fella”. It was the Applicant’s evidence that “R-man” was McGill’s yard manager and therefore a work colleague of Mr Mitchell.

13. On 11 March, the day after Mr Mitchell’s arrest, the R-man telephoned the Applicant from an Irish number ending 1025, this being the first time that number had appeared. On 12 March there were telephone calls and messages between the Applicant, the R-man and Ms Walley in the course of which the Applicant asked the R-man to ring him “on the other one”. By one of the texts the R-man sent the Applicant his address in Duleek, Co. Meath, which is about 5 miles from Drogheda and which the Applicant promptly sent on to Ms Whalley. The exchanges continued between the Applicant and Ms Whalley on the following day, 13 March, the main topic being whether Mr Mitchell had telephoned Ms Whalley from custody, which he had not; and on 14 March the exchanges included a telephone conversation between the Applicant and the R-man which lasted 1 minute 27 seconds. The same pattern was repeated on 15 March with the Applicant and Ms Whalley discussing her intention to visit Mr Mitchell in custody in Ireland and the Applicant telephoning the R-man for 43 seconds. Within a minute of that telephone conversation, the Applicant texted Ms Whalley “I’ve spoken to R his woman is going to call you very soon.” In his last text to Ms Whalley that day, the Applicant said “Maybe when you go there it will all become a bit clearer, maybe just tell people he has been the mule unknown to him!!!” The presence of the three exclamation marks was suggested by the prosecution to mean that the Applicant knew the suggestion (that Mr Mitchell was an innocent mule) to be untrue. The prosecution also asserted that the Applicant was setting up an untrue explanation such as he had used the previous year: see [6.(v)] above.

14. On 16 March the R-man and the Applicant texted each other between 14.44 and 14.50:

From	Message
R-man	How far away from [Ms Whalley] do you live. Can I give her a new number when she is here for you to contact me on.
Applicant	I live about 2 hours from her. Give her the number and I’ll get her to post it to me. I need to keep in contact with you to see if we can sort something!!!!
R-man	Don’t worry. U are on for the flat. Say no more
Applicant	Good man.

15. Two points may be noted at this stage. The first is the apparently close involvement of the R-man in making provision for Mr Mitchell in the defence of the criminal charges against him: the prosecution suggested that this was closer than to be expected of a mere fellow-employee of McGills. In addition, the prosecution suggested that the reference to being “on for the flat” was a reference to the Applicant being on to do the Assen drug run across the flat terrain of that journey. The Applicant said that it was because he had made some enquiries about a flat in Ireland and the R-man was looking into the possibility of sorting that out for him.

16. There were further text exchanges between the Applicant and the R-man on 17 and 18 March 2011. The content of the messages is not available. On 19 March Ms Whalley reported that Mr Mitchell had been remanded in custody. There were then further exchanges of text messages between the Applicant and the R-man on 22, 23, 24, 27

(together with one short attributable phone call from the Applicant to the R-man), 28 and 29 March 2011, the content of which is not available.

17. It is apparent that Mr Mitchell's next hearing was on 1 April 2011, because the first of a series of texts that day between the Applicant and Ms Whalley was one from Ms Whalley saying (in an apparent reference to raising money for Mr Mitchell's bail) "Court starts at half ten but those fuckas haven't sorted money. Rang me yesterday and asked me to transfer 10,000 euro. Er hello not very suspicious to just make that money appear!" The texts referred to the next hearing being on 11 April 2011. On that date there was a further exchange of texts between the Applicant and Ms Whalley about money. The Applicant asked "Did they sort his money out yet what they owe him?" to which Ms Whalley replied "Not as far as I know. Think it might be getting sorted but not sure." The Applicant asked "Ok is the R man trying to sort it?" to which Ms Whalley replied "I think so. Has been to see him a couple of times, … ." The Applicant replied "Ok keep me informed and fingers crossed." There was no further explanation in the texts of what money was owed by whom to Mr Mitchell or of why the R man should be trying to "sort it".

18. On 31 March 2011 the Applicant had had an exchange of texts with Gerry Lloyd, with whom he was then in a relationship, about the possible purchase of a boat. The Applicant started by saying that "a 50 or 60 ft one is the way to go!". A little later, in answer to the question "How much?", he said "They vary anywhere from £15,000 up to £50,000 it all depends on how old and the state they are in!" Gerry Lloyd then asked "have you got that kinda dosh squirreled away in an Irish account?", to which the Applicant answered: "No I haven't got that much yet but come about august time I'm hoping to have it; … ask no questions I'll tell you no lies hee hee!!!" When asked about this last sentence (with its three exclamation marks), the Applicant said in evidence that he was hoping to make some money doing tobacco and cigarette jobs during the European part of the season. He said he was hoping to make enough money to think about buying the boat from the anticipated death of his grandmother, his wages from Paul Bird, money from cigarette and tobacco jobs and that Gerry Lloyd was interested in investing too. He was extensively cross-examined on his potential earnings if he were to smuggle tobacco and cigarettes, the prosecution's case being that tobacco and cigarettes would not yield enough cash and that what he was really texting about was smuggling drugs.

19. For present purposes the next significant occurrence of texts and phone calls occurred on the return journey from Assen on 18 April 2011. The two lorries caught the 17.53 crossing from Dunkirk to Dover. They were intercepted at Dover at approximately 19.25. The drugs were first found at approximately 20.51. While waiting at Dover the Applicant was seen by a number of officers to be on his phone. Subsequent analysis showed that he had deleted portions of his call history and texts, which he said was mere coincidence and should not be regarded as suspicious. Analysis of his phone and other sources revealed the following:

    i) Between 13.01 and 13.23 there were five texts to the Applicant from an Irish number ending 1286. The content is not available. The number was attributed through the Applicant's contact list as Billy Clarke.

    ii) Between 17.23 and 20.40 there were 10 calls from a number registered to Bryan Reynolds Car Sales, a Mazda dealership in Drogheda, to the Applicant

and one call from the Applicant to the Bryan Reynolds number, which the Applicant had deleted from his handset:

Time	Direction	Number	Type	Duration (seconds)
17.23.56	From	353419801351	Call	6.46
17.24.24	From	353419801351	Call	13.00
17.25.02	From	353419801351	Call	2.09
19.02.49	From	353419801351	Call	3.61
19.03.11	From	353419801351	Call	2.07
19.09.37	From	353419801351	Call	7.00
19.10.19	From	353419801351	Call	3.07
19.47.15	From	353419801351	Call	3.04
20.38.12	From	353419801351	Call	0.00
20.39.00	From	353419801351	Call	0.00
20.40.04	To	353419801351	Call	0.00

iii) During this period there was a text message to the Applicant's phone at 18.07 from an English number ending 6533 which simply said "Jake". The prosecution case was that this was connected to the drug smuggling. The Applicant said that "Jake" was his nickname and that the text would have been from a friend, probably notifying him of the friend's new number. He identified the sender as Scott Allison

iv) In and shortly after 20.51 the Applicant's phone received two calls from and made one call to a number which was traced to a public phone box in St Laurence Street, Drogheda:

Time	Direction	Number	Type	Duration (seconds)
20.51.48	From	353419839853	Call	0.00
20.52.45	From	353419839853	Call	9.00
20.52.46	To	353419839853	Call	10.02

In his second interview the Applicant said that he had no idea he had been in contact with a public phone box in Ireland. At the first trial he said he must have called back the number that was attempting to call him. By the second trial he had (according to his submissions to us) "realized the significance of the fact that he was arrested at around 20.51/20.52. He therefore did not believe that he would have made the call at this time." The suggested implication of this was that the call to the Irish number may have been made by a customs officer to try to investigate the last received number. Given the timings, it was suggested that the last of the three calls had resulted in a voicemail message. If it was, the content was not available.

v) There were then four further calls to the Applicant's phone from the Bryan Reynolds Car Sales number:

Time	Direction	Number	Type	Duration (seconds)

21.10.26	From	353419801351	Call	7.19
21.11.04	From	353419801351	Call	2.09
21.58.26	From	353419801351	Call	5.00
21.58.48	From	353419801351	Call	4.03

vi) There were then three calls from an Irish number ending 4302 (which had not been attributed):

Time	**Direction**	**Number**	**Type**	**Duration (seconds)**
22.36.44	From	353867334302	Call	3.00
22.48.49	From	353867334302	Call	2.00
23.07.14	From	353867334302	Call	2.02

There were further calls from this number on 19 and 22 April 2011. It appears that all these calls must have gone to voicemail. If there was any content it has not been identified.

The Defence case

20. The Defence case was that the Applicant was not part of any criminal organisation and he had no knowledge of the drugs found in the "3MX" lorry.

21. We have touched on some of his evidence at the re-trial already. It is not necessary to provide an exhaustive summary, but it included the following additional points. He said that he worked as a mechanic and lorry driver within the world of motorcycle racing. Once a race had finished it was a case of everybody helping out to get the vehicles packed up so that they could leave to travel back from wherever they were. He said he had no involvement in unloading the lorries once they were back in the UK.

22. The Applicant gave evidence that he became involved in tobacco smuggling after he had started working for Paul Bird. He said it was Gary Matthews who had suggested that he get involved. He said that he did help load "B9RDY" at Assen. At the end of the racing both trucks were packed up on the Sunday night so on Monday they would get an early start. He said he had no idea that there were drugs in "B9RDY". He accepted that the drugs must have been placed by someone connected with the team, and he believed that it was Gary Matthews and Paul Bird. When smuggling tobacco for Paul Bird, he said there would be five or six holdalls that would be put in the sleeping area of his truck and driven to Penrith. He said that there was a separate tobacco smuggling operation with Guy Mitchell and the R-man. They would source tobacco and he would simply be the transport. He denied having made a confession of smuggling in 2010 to Mr Buckmaster.

The Grounds of Appeal

23. In applying for permission to appeal, Mr Summers KC and Ms Darby, neither of whom represented the Applicant below, have left no possible stone unturned and have said all that could possibly be said on the Applicant's behalf. When reduced to its bare essentials, there are three main points. The first is that the Judge wrongly admitted the evidence that Mr Mitchell had been arrested and charged with drug

offences and that this caused the entire trial to go out of control or, in their words, become distorted. The second is that the legal team of solicitors and counsel failed to call evidence that they should have called, which, it is submitted, might have had an important impact on the outcome of the trial. Ancillary to this ground is an application under section 23 of the Criminal Appeal Act 1968 to adduce the evidence of 10 additional witnesses who were not called at trial. Third, it is submitted that an extension of time of something over 8 years and 2 months should be given to the Applicant within which to bring this application and proposed appeal.

24. We take as our starting point the criteria that have to be satisfied in order for an extension of time to be granted. We adopt as a convenient summary what was said by a different constitution of this court in *R v O* [2019] EWCA Crim 1389 at [45]:

> "This therefore brings us to the question of delay and the lengthy extension of time required. The delay in this case has been considerable. The extension of time is very long as we have observed. The principles to be applied in an extension of time case are well known. In *R v Hughes* [2009] EWCA Crim 841 at [20] it was said that an extension would "be granted only where there is good reason to give it, and ordinarily where the defendant will otherwise suffer significant injustice". In *R v Thorsby* [2015] EWCA Crim 1 it was stated "the principled approach to extensions of time is that the court will grant an extension if it is in the interests of justice to do so". It was also said in that case that "the public interest embraces also, and in our view critically, the justice of the case and the liberty of the individual…" and "the court will examine the merits of the underlying grounds before the decision is made whether to grant an extension of time." It was also noted that the passage of time may put the court in difficulty in resolving whether an error has occurred and if so to what extent."

25. The last sentence from that citation reflects what has been said in many cases where long extensions of time are requested and, in particular, the ever-present risk that matters will look rather different and, with the best will in the world, may present a changed complexion if presented at a time when those concerned with the original trial are no longer able to remember with accuracy what happened, why they happened, or the dynamics and the nuances of the trial process. See, for example *Gabbana* [2020] EWCA Crim 1473 at [110], citing *Hunter* [2015] EWCA Crim 631 at [98].

26. We shall deal first with the application to call further evidence. Given the nature of the application, we shall not provide extensive details of the evidence; but we have read it all and keep all of it in mind when considering the opposing submissions.

The additional evidence

27. Mr Paul Risbridger wrote two letters in January 2012 but was not called to give evidence. His evidence was therefore readily available at the time of trial. He says that the Applicant's lorry was booked to go to a garage in Kent on 19 April for checks on the speed limiter and the tachograph. The Applicant gave evidence to that effect

and the evidence of Mr Risbridger is relied upon as corroborating that evidence. It is said to be important because it shows that the Applicant would not be present when Mr Matthews' truck was unloaded. His previous solicitors and counsel have no useful recollection or information to provide, though the solicitors say that the prosecution accepted that the applicant did not have a key to Mr Matthews' lorry. We agree with the prosecution's submission that whether or not the Applicant would be present when Mr Matthews' lorry was unloaded is irrelevant to the question whether he knew at Dover that the drugs were on Mr Matthews' lorry. We see no basis for criticising trial counsel for not calling Mr Risbridger.

28. Mr Ken Summerton provided two witness statements. The first was dated 11 March 2013, before the retrial. The second is undated. The witness and (at least) his first statement were readily available at the time of trial. The Applicant had received a payment of 3000 euros into his Irish bank account on 8 April 2011, which he said was payment for suspension parts that he had sold to a third party. He said he had received the suspension parts from Mr Summerton in return for some work he had done for Mr Summerton. Mr Summerton states that he supplied some suspension parts to the Applicant in April 2012, a year after the payment of the 3000 euros, which contradicts the Applicant's account. He says the Applicant told him he was going to sell on the parts "to cover his costs". The other content of his first statement, if admitted, would have served to implicate Mr Matthews but not to exculpate the Applicant, which may explain why the purpose of his second statement was to change that information so far as it related to the Applicant. Counsel at the retrial says that the decision not to call Mr Summerton was taken in consultation with the Applicant. We are not persuaded that the decision not to call Mr Summerton was incompetent; nor are we persuaded that his evidence about supplying suspension parts to the Applicant could or would have had a material impact on the trial if it had been called. Much more relevant would have been direct evidence of the identity of the payer of the 3000 euros, which as yet is not forthcoming. As things stand, the Applicant's evidence is that he received the 3000 euros from the R-man's partner because he had sold the suspension parts to someone else. The source of the 3000 euros is not identified. The scope for an inference that it was a down payment for the Assen job clearly remains.

29. Mr William Clarke has provided two witness statements. The first was, by process of deduction, made in 2013. It says he would often call the Applicant on a Sunday or Monday (18 April 2011 being a Monday) and had in the past called him from the Drogheda area. He gives as his opinion that the Applicant is a trustworthy and upstanding member of society, which does not sit easily with the Applicant's acceptance of his involvement with smuggling tobacco. His second statement was made in January 2020. He identifies a number ending 1286 as being his in 2011 and now, that being the number used to send 5 texts to the Applicant between 13.01 and 13.23 on 18 April 2011. He would sometimes call from a phone box or using a mobile provided to him by his employer, which ended 2255. Unsurprisingly he cannot now remember whether he called the Applicant from a phone box on 18 April 2011. The asserted relevance of this evidence is that the Applicant said in evidence he thought the calls on 18 April 2011 from the Mazda dealership and the call box were from Mr Clarke. Mr Clarke does not confirm either aspect of the Applicant's evidence. Nor does he explain why, in addition to the phone from which he texted and which was accepted to be his, he should have made multiple calls from the

premises of a Mazda dealer who was not his employer. In our judgment, Mr Clarke's evidence is peripheral at best, quite apart from the fact that it would inevitably be vulnerable to cross-examination about any suggested burst of communication from multiple phones located in or near Drogheda on 18 April 2011. We are not remotely persuaded that the failure to call him could be ascribed to incompetence by the Applicant's legal team or that it would have made any difference.

30. Scott Allison says he has been a friend of the Applicant since childhood and confirms in a statement dated 18 July 2019 that the Applicant's nickname is Jake. He produces an old phone with messages that he says are to the Applicant addressed as "Jake" in July 2013, i.e. after the events that were the subject of the prosecution but before the retrial. This is said to be relevant because the Applicant received a text during the crossing to Dover which said no more than "Jake": see [19.(iii)] above. The prosecution suggested this was a contact name for the purposes of the importation and delivery of the drugs. The defence case was that this was one of his friends sending a contact text to inform the Applicant of a new phone number. In our judgment the suggested evidence of Mr Allison is peripheral. He does not identify the phone number 6533, which sent the "Jake" text on 18 April 2011, as his and says that he does not ever recall using a phone with that number. He provides examples of other texts he sent to the Applicant, but none of them is as terse or short as the 18 April 2011 message. If anything, his evidence tends to support the prosecution case that the 18 April 2011 text was a form of coded message and not a friendly notification of a change of number. If it had been important, we have no reason to doubt that this evidence could have been obtained in time for the trial; but we are not persuaded that it is, was or could have been other than peripheral. The prosecution point to the limited references in the Judge's summing up as additional reason to consider the evidence to be peripheral: that may be right but we do not base our decision upon it.

31. Mark Pearson also confirms that the Applicant's nickname was Jake. Although he says that the 6533 number is familiar to him he cannot say that it is one that he has used. He says that a one word "Jake" text is "the type of thing I would do"; but he does not say he did so on 18 April 2011 and his evidence does not link him in any way with that message. For the same reasons, we consider this to be peripheral in the absence of any evidence that the 18 April 2011 text was sent by one of these friends. Fiona Cole adds nothing of substance in a witness statement dated 17 February 2020, the main significance of her evidence being that she says she came into possession of the handset that had been Mr Allison's. The evidence of Mr Damian Allain goes to the possession and custody of the handset but, in a witness statement dated 12 March 2020 says nothing of substantive value about the events that led to the Applicant's arrest. Mr Tim Neville was a Transport Manager at Mr Clarke's employers, National Vehicle Distribution in Wexford at the material time. He confirms that a mobile phone with a number ending 2255 was provided to Mr Clarke for a while. For the reasons we have given in relation to Mr Clarke's proposed evidence, this takes matters no further.

32. Mr Grant Covus has made a statement dated 22 October 2019. He was the person to whom the Applicant initially ascribed the Australian +61 phone which he later said should be ascribed to Mr Matthews. The Applicant was cross-examined on the basis that his original attribution had been a deliberate lie, and the jury were duly given an appropriate lies direction by the Judge. In his statement Mr Covus says he is an

Australian citizen who has known the Applicant for years and has always had a +61 number. He says that in 2011 the Applicant owed him money for some suspension from the year before. The Applicant was going to give him the money at the Assen meeting. He thinks it was about £500 and that he was paid at the meeting. The Applicant submits that this evidence would have a double significance: first, in proving that Mr Covus exists; second, to support a submission that the Applicant's misattribution of the "Assen is pay day" text to Mr Covus was mistaken rather than dishonest. In our judgment, bolstering the original explanation (upon which the Applicant no longer relied) is peripheral and unlikely to be of any real moment in the overall context of the trial and the evidence that the Applicant faced. His original legal team is unable to assist: his original counsel does not recall Mr Covus being on the list of potential witnesses that he had discussed with the Applicant.

33. Ms Aoife Corridan provides formal evidence about the charges faced by Mr Mitchell and the fact that he was acquitted in 2015. We have no reason to doubt the accuracy of her evidence which, unlike the other evidence to which we have referred, would not have been reasonably available at the retrial. Its significance goes directly and only to the question whether the Judge wrongly admitted evidence about Mr Mitchell's arrest and subsequently allowed that information to be put to improper use, without adequate directions during the summing up, so that it is arguable that the Applicant's conviction is unsafe.

34. Subject to that, however, we are not persuaded that any of the additional evidence to which we have referred is other than peripheral or that, if admitted, it affords any grounds for allowing an appeal. Equally, we are not persuaded that the failure to call the evidence amounted to incompetence on the part of the Applicant's original legal team. To the contrary, in each case it seems to us that there are sensible reasons why, if the legal team had been in a position to call the evidence, they may have decided not to.

Mr Mitchell's arrest

35. It is obvious that the fact of Mr Mitchell's arrest on drug charges did not prove him to be guilty of those charges. It also appears that questions arose at the first and second trial about the admission of information about Mr Mitchell's arrest.

36. On 24 February 2011, during the first trial, the prosecution submitted written submissions on the Bad Character of Mr Mitchell. Paragraph 1 summarised three links that were to be found between the Applicant and Mr Mitchell namely (a) the texts between the Applicant and Mr Mitchell before Mr Mitchell's arrest, which, the prosecution submitted, suggested their joint awareness of a smuggling plan from Assen; (b) the text messages between the Applicant and Mr Mitchell's partner after Mr Mitchell had been arrested, which, the prosecution submitted, indicated the Applicant's "knowledge of Mr Mitchell's involvement in drug smuggling and his working for a criminal organisation including [the R-man or R-fella]"; (c) the text from the Applicant to Mr Mitchell's partner suggesting that Mr Mitchell should say he was an innocent dupe – that being the defence that the Applicant had previously used when found in possession of smuggled tobacco the previous year.

37. The prosecution proposed to advance a statement of the basic facts of the Mitchell case, to be included in a statement from a representative of UKBA. This was

necessitated by the fact that the Irish prosecuting authorities would not give permission for the use of the witness statement by an officer of the Garda setting out the same details. The prosecution relied upon s 100(1)(b) of the Criminal Justice Act 2003 (wrongly referred to as section 101(1)(b) in the written submission) as justifying the admission of the material relating to Mr Mitchell as having substantial probative value in relation to one or more matters in issue in the proceedings or as being of substantial probative value in the context of the case as a whole and again identified the three areas of asserted relevance that we have just set out.

38. The Judge dealt with the prosecution submission the same day. We have the transcript. Counsel the acting for the Applicant said:

> "The second area of bad character, as it were, that the Crown say relates to Mr Roe. So far as the Crown application in respect of Mr Mitchell is concerned, I've considered advisedly the comments made by your Honour before the PII application. In so far as that is concerned as a matter of generality, I don't object to the evidence of bad character of Guy Mitchell relevant to the purposes to which the Crown seek to put those pieces of evidence which is contained within their paragraph 2 of the prosecution submissions re. bad character of Guy Mitchell, if your Honour has that document. Admission under Section 101(1)(d), substantial importance in the context of the case as a whole and the Crown particularise three particular problems, one that Mr Roe was aware of the plan to smuggle drugs and/or firearms from Holland into the UK before it took place. That is obviously a matter of issue in the case itself. Two, text messages sent by Roe to his girlfriend at the time relate to his knowledge of the drugs and firearms in the lorry or not. Well, that's a matter that is going to be an issue of itself. The third matter, the defence of innocent dupe advanced by Roe in this case is the same as the dishonest one he has used for supply in the past. In the event that the Crown confine their introduction before the jury of text messages and/or contacts that go to those three issues, they say, then I have no objection."

39. Counsel then expressed a concern that the Crown was relying on virtually every single text message. The Judge's response was:

> "JUDGE JAMES: But isn't the Crown entitled to say this is not a passing interest in Mr Mitchell's situation but there is a regular source of information and apparent concern about Mr Mitchell's position?
>
> COUNSEL: Yes. I mean, if they want that, I'm happy to put that in an admission, that they were close associates or good friends. Much of this goes to the question of a friendship and is not strictly either under Section 101 or under any sections evidence of, unless there's a real stretching of it---

> JUDGE JAMES: If it's not evidence of bad character, then the only test is its relevance.
>
> COUNSEL: Its relevance. Quite so.
>
> JUDGE JAMES: The relevance is it shows the degree to which the two were associating to which the Crown say is a significant point that the jury ought to be considering, that the defendant is a regular and friendly associate with and closely knows Mitchell, who is apparently a suspected drug trafficker as it currently stands, potentially convicted drug trafficker by the time we come to trial."

40. Counsel for the prosecution then clarified the Crown's position in relation to the many texts in an exchange with the Judge, saying:

> "MR BURGE: Not only do these text messages show, we say, a link between Mitchell and Roe, they also show on the face of it that both Mitchell and Roe were working for the same organised criminal group headed up by the man, 'R man' or the 'R fella' because he features both in the text messages between Roe and Miss Whalley after Mr Mitchell's arrest in Ireland and also prior to Mr Roe's arrest in text messages between Roe and others about who is behind this importation. So, the Crown say that the Mitchell material provides that essential link to demonstrate that the R fella/the R man---
>
> JUDGE JAMES: You say this isn't evidence of bad character. This is evidence of, evidence of the potential crime and it has to do with the offences themselves?
>
> MR BURGE: Well to that extent that is. It will only make sense if we really know of---
>
> JUDGE JAMES: You have the bad character.
>
> MR BURGE: Of bad character, exactly.
>
> COUNSEL FOR APPLICANT: Well, I am grateful for that indication. I will leave it. I'm not going to pursue this. It's a matter for the jury what they make of this material.
>
> JUDGE JAMES: There may be submissions to be made but that material will remain in the schedule and I'm quite content that it is admissible."

It therefore appears that Counsel for the Applicant accepted that the texts should go before the jury. That was confirmed by the Judge who said that "bad character in relation to the prosecution's application is agreed."

41. A little later, counsel for the Applicant addressed the question of further evidence from UKBA saying:

> "COUNSEL FOR APPLICANT: Number 7, service by Ben Munroe of the Irish case against Mitchell. Well, your Honour dealt with that before.
>
> JUDGE JAMES: Yes. Well, it rather looks as though there's either going to be a public document which sets it out or a public utterance or by the time we'll reach the trial, we'll know what the verdict is, which would be the most ideal set of circumstances, would it not?
>
> COUNSEL: Yes."

42. There, it appears, the question was left. It appears from the extracts that the fact of Mr Mitchell's arrest was not contentious.

43. What happened at the re-trial is not entirely clear, because trial counsel could not remember, years later, if the "bad character" evidence concerning Mr Mitchell's arrest was opposed. No formal submissions or ruling have been identified. However, trial counsel had retained his notes which include the following:

> '…Mutual set of circ[umstance]s
>
> G[uy] M[itchell] arrested facing trial for drug offences as does P[hilip] R[oe]
>
> G[uy] M[itchell] [for?] driving HGV → unit
>
> Searched Cannabis in Unit
>
> Thought case v G[uy] M[itchell] would be concluded
>
> He awaits trial
>
> P[rosecution] left with not being able to prove his arrest and charge
>
> Circ[umstance]s that lead to are more complicated
>
> P[rosecution] have it from Irish
>
> Garda has said OK to use it but will not provide a witness
>
> UK and Pros[ecution] now in diff[icult] situation
>
> Sought to adduce evidence from a UKBA officer about what he has been told re[garding] case v[ersus] Mitchell, some in public domain
>
> P[rosecution] want it in
>
> *Def[ence] concede arrest and charge and drugs involved can go in.*

> *Def say wrong for any details of case v[ersus] G[uy] M[itchell]to be admitted*
>
> *I agree*
>
> Looking at S.114, not in interests of justice for details
>
> An extrapolation of the details of the case v[ersus] G[uy] M[itchell] similarities or not. Similarities of P[hilip] R[oe] [?] + def[ence] can't challenge
>
> *Give leave for hearsay evidence*
>
> *→ limited to –*
>
> *G[uy] M[itchell] 12/8/69 arrest in Eire on 10/3/11 under MDA 1977 relating to 78 KG of resin + 54 of can[nabis]. He provided address of……He was charged, awaits trial + is currently on bail…'* (Emphasis added)

44. The contents of this note clearly indicate that it is recording speech by the Judge. The end result is that the Defence conceded and the Judge ruled that the facts of the arrest and quantities of drugs concerned could go in, as had been the case at the first trial. The evidence that was admitted by agreement closely followed the last part of the Judge's ruling as set out above, as follows:

> "Guy Mitchell (born on 12th August 1969) was arrested in Ireland on 10th March 2011 for offences under Ireland's Misuse of Drugs Act 1977 in relation to 78kg of cannabis resin and 34kg of herbal cannabis. On arrest he stated his home address was 9 Riching Lee, Blaydon, Newcastle, Tyne and Wear. Enquiries made by UKBA confirm that Guy Mitchell and Gillian Whalley are resident at that address. Guy Mitchell was later charged by the Irish Police (the Garda) with knowingly importing those drugs into Ireland and he is currently on bail awaiting trial … ."

In fact, as we have set out above, Mr Mitchell was charged with possession for the purpose of selling or otherwise providing rather than with importation. It is not suggested that anything turns on this inaccuracy.

45. When the Judge came to sum up the case to the jury he said:

> "You've heard that Guy Mitchell – with who the defendant was in regular contact; we know that via his partner – has been arrested and charged with drug trafficking offences in the Republic of Ireland. Now, this evidence has been placed before you as the prosecution say it is important and relevant evidence that you are entitled to look at when you come to consider the reason for the contact between Mr Roe, Mr Mitchell, his former partner, Gillian and of course the "R-Man", during the period immediately after Mr Mitchell was arrested.

> What appears clear is that Mr Roe became aware that Mr Mitchell was alleged to have been involved in drug … smuggling and having learnt about such he continued contact with both him – and it would appear – the "R-Man". Now, whilst if you thought it fair and reasonable to do so, you'd be entitled to look at Mitchell's circumstances in interpreting what the contact between him and Roe and between Mr Roe and "R-Man" related to, it's important that I warn you about the limits and extent to which Mitchell's arrest can properly have any relevance in respect of the case against Mr Roe.
>
> Firstly, you of course need to bear in mind that although Mitchell has been arrested and charged – in respect of his own involvement with a completely different shipment of cannabis – he denies his guilt and has yet to be tried. He therefore has not been convicted of anything and as any person who's not been convicted of anything; they are entitled to be presumed innocent. The mere fact that Mr Mitchell is a friend or acquaintance of Mr Roe cannot mean that Mr Roe can in any way be implicated in what Mr Mitchell is suspected to have been doing in Ireland.
>
> The simple fact that you might have a friend who has a criminal past cannot be taken as direct evidence against you, and it would be entirely wrong for you to conclude or even entertain any argument along the lines of, "Well, he knows somebody who's suspected to be a drug trafficker. Therefore he must be one or is more likely to be one." That would be flawed logic and as a matter of law as well as good sense such conclusions of guilt by association are not permitted, and must not be made in this or indeed any other case. The only relevance that Mr Mitchell's conviction can have – in respect of Mr Roe's case – is in assisting you in determining what the contact between Mr Roe and Mr Mitchell was all about. That's why you've heard about Mr Mitchell."

46. It will be noted that the Judge in the last paragraph referred to Mr Mitchell's "conviction". While this was a mistake, it was obvious and would have been obvious to the jury who had sat through the trial and who had the benefit of having the full summing up. We should say in passing that we have read the whole summing up. Subject to the points now raised on this application, to which we turn next, the summing up is clear, concise, thorough and fair in all respects.

47. The Applicant now submits that the agreed facts about Mr Mitchell's arrest should not have been admitted at all. We were referred to the leading cases, including *Braithwaite* [2010] EWCA Crim 1082 and *Warren* [2010] EWCA Crim 3267 and to the inability of the prosecution in the present case to prove the facts alleged. The Applicant reminded us of the difficulties that a jury may face when attempting to evaluate unsubstantiated evidence of bad character. And the Applicant relied upon the fact that Mr Mitchell was ultimately acquitted which, it is submitted, shows the dangers of relying at all on mere allegations in the absence of proof or conviction.

48. In our judgment, the first difficulty that the Applicant faces is that this material was admitted by agreement. It was therefore admissible pursuant to section 100(1)(c) of the Criminal Justice Act 2003. While we have outlined the sequence of events that appears from the information we have, it is hardly surprising that the Applicant's trial counsel has no real recollection other than what is set out in his note. His recollection, so far as it goes, is that the point had been conceded at the first trial and that it fed into his client's defence, in a manner that is unspecified and not entirely clear to us. The transcript of 1 March 2013 supports trial counsel's recollection that the point had been conceded. Nearly 10 years later, prosecution counsel cannot remember if he had any discussions with original or second-trial counsel on the point or whether agreement was reached with them; but we accept that the transcript supports the conclusion that agreement was either reached in advance or conceded during the re-trial, as it had been at the original trial.

49. We have set out the relevant texts on which the Prosecution relied in some detail because it is the cumulative impact of the various strands of circumstantial evidence that was, in our judgment, important and admissible evidence of the existence of a drug conspiracy based in Ireland and of which the R-man was an integral part. We reject outright the suggestion made on the Applicant's behalf that the evidence of the existence of such a conspiracy, or the R-man's involvement in it, was either tenuous or "thin". The "coincidence" of the calls on 18 April 2011 from various phones, including a public phone box and the premises of a Mazda dealership, in or around Drogheda was one for the jury to assess; and it was one which, when taken with the earlier exchanges and depending on the view the jury were to take of the Applicant's explanations and his truthfulness (or otherwise), provided cogent evidence of the existence of a drug conspiracy centred on Drogheda and the R-man.

50. One strand of the evidence was the reaction to Mr Mitchell's arrest, involving not just the Applicant and Ms Whalley but also the R-man, as we have set out in detail above. In our judgment, the fact of Mr Mitchell's arrest and charge plainly was relevant to provide the context for the Applicant's later communications with his partner and the R-man which indicated a close connection between them going beyond what might normally be expected of McGill's yard manager, Mr Mitchell's partner and a friendly HGV driver in the position of the Applicant. That evidence could only be properly understood with the knowledge that Mr Mitchell had been arrested, and was known by the participants to have been arrested, on serious drug charges; and it was not affected by whether or not he was ultimately convicted or acquitted. What mattered was that the participants made their comments in the context of his being arrested on serious drug charges. In that context, their response provided evidence that was relevant both to the question of an Irish-based conspiracy and to the question of the involvement in it of the Applicant and the R-man. One piece of evidence makes the point: after Mr Mitchell's arrest, the R-man wanted to provide the Applicant with a new contact number; but he did so by giving it on a piece of paper to Mr Mitchell's partner so that she could post it to the Applicant in England, a process that was accepted to be an anti-surveillance technique. Viewed in isolation, we would not consider that it carried the prosecution case much further; but we do not consider it to be reasonably arguable that it should have been excluded, or that its admission of itself could arguably render the conviction unsafe. At its lowest it added to the list of questions that might reasonably be asked and inferences that might reasonably be drawn on the question whether the Applicant and the R-man were involved in drug

smuggling or just good friends. By way of further example, the fact of Mr Mitchell's arrest on serious drug charges provided necessary context for the exchanges showing the R-man's close involvement in getting "his woman" to call Ms Whalley, and in the Applicant's question to Ms Whalley on 11 April 2011 about whether the R-man was trying to sort the money for Mr Mitchell's bail.

51. Nor are we persuaded that (subject to the giving of proper directions to the jury) the two trial counsel for the Applicant were wrong to concede the admission of the limited information about Mr Mitchell's arrest as they did. For the reasons we have given, it was relevant contextual evidence and counsel were right to recognise that it should be admitted.

52. We turn then to the direction that the Judge gave, which we have set out above. The first thing to note is that the Judge correctly directed the jury about what they could *not* infer from the evidence. The second is the extremely limited basis upon which the Mitchell arrest information was left to the jury: "The only relevance that Mr Mitchell's arrest [said by a slip of the tongue to be "conviction"] can have – in respect of [the Applicant's] case – is in assisting you in determining what the contact between [the Applicant] and Mr Mitchell was all about."

53. The fact that its relevance was limited does not support a submission that the evidence about Mr Mitchell's arrest should have been excluded altogether. It was evidence that the jury could properly take into account in conjunction with the substantial other evidence about the Applicant's dealings with Mr Mitchell, the R-man and those associated with them when assessing the Applicant's state of mind and whether he was a knowing party to the importation on 18 April 2011. We therefore reject the first ground of appeal as unarguable.

54. Similarly, we reject the second ground of appeal – which asserts that the Judge's direction was inadequate because it "was incumbent on the learned judge to direct the jury that they must be sure that the evidence was true." There was and is no doubt about the truth of the evidence of his arrest and being charged (other than the reference to importation rather than supply, which is immaterial for present purposes). The Judge was right to restrict the evidence about the arrest to the bare facts that were not in dispute. He did not fall into the trap either of letting factual evidence about Mr Mitchell's alleged underlying offence go to the jury or leaving to the jury the question whether Mr Mitchell was in fact guilty of the offences. To the contrary, he told them in the clearest possible terms that Mr Mitchell was to be presumed innocent. That did not make the fact of his arrest irrelevant or inadmissible, for the reasons we have given.

55. The Applicant complains that the Judge did not direct the jury that they needed to be sure of the truth of the Irish allegations against Mr Mitchell, or to be sure that the Applicant *knew* them to be true before they could rely on any of the material contained in the text messages concerning Mr Mitchell. It is even submitted that no reliance could be placed on the texts in January 2011, which we have set out at [9.] above, unless the Applicant then knew the March allegations to be true. The proposition only has to be stated to be seen to be absurd. First, and most obviously, the Applicant could not possibly know in January 2011 that allegations of criminal behaviour arising out of what Mr Mitchell was to do in March 2011 were or would be true. Second, that was no part of the Prosecution case. Third, the content of the

January 2011 texts stand on their own as evidencing a conspiracy to smuggle and that the R-man was involved in addition to the Applicant and Mr Mitchell. There was scope for the Applicant to dispute that inference, or to argue about whether it related to a conspiracy to smuggle drugs or tobacco; but no further context or evidence was necessary for the January text evidence to be admissible.

56. We reject the second ground of appeal as unarguable.

57. The third ground of appeal asserts that the Judge allowed the trial to become distorted by the "bad character" evidence. The Advice and Grounds itemise points in the cross-examination of the Applicant where, it is said, Prosecution counsel went on an unjustified and prejudicial foraging exercise, introducing unacceptable speculation that may have confused the jury and led to the conviction being unsafe.

58. We have read the evidence of the Applicant from cover to cover with extreme care. We have also read the summing up in full to see whether it supports the submission that the trial became enmeshed in prejudicial irrelevance.

59. In our judgment this submission fails to appreciate the cumulative effect of the evidence relating to Mr Mitchell. In its bad character application the prosecution identified the material relating to Mr Mitchell on which it relied, which we have summarised at [36.] above. Those identified strands of evidence were capable of supporting an inference that the Applicant was involved in the smuggling of drugs, which also involved Mr Mitchell and the R-man. While it is true that the communications in the aftermath of Mr Mitchell's arrest did not provide direct evidence of the R-man taking a physical role in the unlawful possession of the drugs that were the subject of the charges against Mr Mitchell, his involvement afterwards, which we have summarised above, provided admissible support for the existence of an organisation operating in Ireland, of which the R-man was an involved and integral part; and that the Applicant believed the R-man to be sorting out the consequences of Mr Mitchell's arrest because of his wider involvement.

60. We accept that the Prosecution spent a significant part of the cross-examination of the Applicant developing and putting its case that there was, to the Applicant's knowledge, a conspiracy based in Ireland of which the R-man was an integral part. We would also accept that some of the questions went too far in asserting that the Applicant *knew* that Mr Mitchell was involved in drug offences when it would have been technically correct to put that he *believed* Mr Mitchell was so involved. However, having read all of the available materials with care, we are not remotely persuaded that it is arguable that the trial became distorted by the admission and use of the evidence relating to Mr Mitchell.

61. Even if we had been persuaded that the cross-examination by Prosecution Counsel was excessive in scope or duration, the Judge's thorough and concise summing up restored order, both by his legal directions and in his summing up of the evidence. We therefore reject the third ground of appeal as unarguable. That would be our conclusion even if we had decided to admit the new evidence and to treat it as being true for the purposes of this application. For the reasons we have given previously, none of the new evidence could or would have made a material difference.

The extension of time

62. We return to the criteria for giving an extension of time, which we summarised at [24.] above. For the reasons we have given we do not consider it arguable that an appeal on the merits would have any real prospect of success. It would therefore serve no useful purpose to grant an extension of time.

63. However, we cannot leave the case without echoing what has been said many times before, not least at [110] of *Gabbana*. More than 9 years after his conviction, a fair retrial now would realistically be impossible. On reading the Advice and Grounds one could be forgiven for thinking that the question of Mr Mitchell's arrest was a central, if not *the* central, issue that troubled the Court below. Having now heard the submissions on behalf of the Applicant and the Prosecution and having had the opportunity to review the available materials in depth since the conclusion of the hearing for the purposes of writing this judgment, we have been driven to the conclusion that the issues surrounding the evidence about Mr Mitchell were, quite simply, not as prominent at trial as the Applicant would now wish to convey. What is more, there are obvious and good reasons why they were not: the evidence about the arrest was (rightly) admitted by agreement and the texts upon which the prosecution relied were rightly admitted because they were capable of giving rise to or supporting the inferences for which the Prosecution contended.

64. In the end, the issue for the jury was whether they gave any credence to the various explanations that the Applicant gave in support of his central assertion that he knew nothing about the drugs in Mr Matthews' lorry. There was much in the admissible evidence against him that called for explanation; and he tried to explain, albeit with explanations that changed over time. It is clear that the jury were sure that they could reject his explanations. There was ample evidence upon which they could reasonably come to that conclusion. It is not arguable that the conviction is unsafe.

65. In these circumstances it is not necessary for us to analyse in this judgment why it has taken so long since 2014, when the Applicant first made contact with Junior Counsel, until now for this application to reach fruition. As we have already said, it is plain that Junior and Leading Counsel have worked long and hard on this application. It is also plain that some unexpected obstacles emerged along the way, the nature of which it is not necessary to detail save to say that they reflect no discredit upon those attempting to put the case together. However, by any standards, the aggregation of the periods taken to complete particular steps, even if those periods were individually justifiable, led to an overall delay that causes considerable concern about the balancing of the interests of justice. Had we thought that there was arguable merit in the substantive application, we consider that the balancing of the interests of justice would itself have been a difficult exercise, the outcome of which may have been uncertain.

66. This application, including the application for an extension of time, is dismissed.