Neutral Citation Number: [2023] EWCA Crim 424

Case No: 202201206 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BIRMINGHAM
HER HONOUR JUDGE KRISTINA MONTGOMERY KC
Indictment No. T20170537

Royal Courts of Justice
Strand, London, WC2A 2LL

21/4/2023

Before:

LADY JUSTICE ANDREWS
MR JUSTICE MORRIS
and
HH JUDGE EDMUNDS KC,
THE RECORDER OF KENSINGTON AND CHELSEA

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Between :

DAVID JOHN MITCHELL (AKA DAVID JOHN)	**Applicant**
- and -	
THE KING	**Respondent**

- -
- -

The **Applicant's** brother and Mackenzie Friend, Mr Christopher Kennedy, was allowed to address the Court briefly on his behalf.

Hearing date: 24 March 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on [21st April 2023] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Hon Recorder of Kensington and Chelsea:

1. The applicant, David John Mitchell, is now aged 31.

2. On 31st August 2017, in the Crown Court at Birmingham before HHJ Kristina Montgomery QC, the applicant, then aged 26, pleaded guilty to three offences.

3. He subsequently instructed new solicitors privately, and following a request by them for the case to be listed for sentence the applicant was sentenced on 22nd January 2018, almost five months after he had entered his pleas, by Mrs Recorder Thompson:

4. On Counts 1 and 2, being possessions with intent to supply of crack cocaine and diamorphine respectively, he was sentenced to three years imprisonment on each concurrent, and on Count 3 for dangerous driving he received 9 months consecutive. The applicant was disqualified from driving for 37 months and was ordered to take an extended re-test. No separate penalties were imposed for driving without a driving licence or insurance.

5. A co-defendant was then awaiting trial. No reporting restrictions were imposed in the court below and none has been sought before us.

6. The applicant now renews his application for an extension of time by 1,163 days to apply for leave to appeal against conviction on the two matters of possession of class A drugs with intent to supply. He is no longer in custody in relation to these matters but remains in custody on other matters,

7. There is a side issue in that the applicant says that he was prosecuted as David James Mitchell whereas his real name is David John. Whilst that is a matter which we will invite the Criminal Appeal Office to refer to those responsible for criminal records, it does not affect the merits of his present application.

8. The applicant explains the delay saying that he has dyslexia and severe issues with reading and writing so as to be dependent on others to read and reply to all his letters, and that he was only recently made aware of the appeal process. The applicant has received assistance from his brother, Mr Kennedy, who has been in such regular contact with the CAO that the office has been obliged to remind him of the limited role of a third party.

9. The applicant did not have a right to be present for the purposes of a renewed application of this sort. Within our papers is a document from the applicant dated 4th March giving his consent for Mr Kennedy to act as his McKenzie friend and speak on his behalf. It is clear from that document and the materials that Mr Kennedy has sought to file on behalf of the applicant that the reality of the application is that Mr Kennedy be permitted to act as litigator and advocate.

10. Mr Kennedy, together with the applicant's mother, attended the hearing. We had in mind the guidance of Hallett LJ in **R v Conaghan [2017] EWCA Crim 597** which makes clear that only in exceptional circumstances will this Court permit a person without formal rights of audience to act as advocate and such exceptional circumstances are not made out in this case.

11. Nevertheless, we took the opportunity to allow Mr Kennedy to identify for us what he felt were the key issues and we are grateful to him for the measured, courteous, and clear assistance that he gave us. Of that more later.

12. The circumstances can be stated shortly. On the afternoon of 19th February 2017 at about 2:30 pm a police officer saw the applicant driving a Vauxhall Astra at speed in Gypsy Lane, Erdington, a suburb of Birmingham. The applicant's driving during the pursuit resulted in the charge of dangerous driving. When the pursuit ended in Greenholme Road, Great Barr, the applicant jumped out of the driver's side and a passenger, the co-defendant, ran off from the other side. The co-defendant had £630 in cash on him and, when about to be detained, he threw away a Boots bag later found to contain 60 wraps of heroin and 242 wraps of crack cocaine. The co-defendant also had a further two wraps of heroin on his person. The total value of the drugs was around £3,040.

13. When detained, the applicant had on him £836 in cash but no drugs.

14. The two counts of possession of drugs with intent to supply were put on the basis that the applicant and the co-defendant were engaged in a joint enterprise, each playing their respective roles.

15. There were a number of other aspects of the case.

16. First at the time of the decision to plead, and now, there were two SFR1 fingerprint reports on the Digital Case System file. They reported respectively a match to the applicant's left middle fingerprint on the inside of the Boots bag and the left middle fingerprint of the co-defendant on the outside of that bag. Had the matter proceeded to trial and the content of the report had been disputed then a SFR2 report would doubtless have been ordered.

17. In paper submissions, the applicant has suggested that the fingerprint in fact derived from the car rather than the bag. We asked Mr Kennedy to clarify his reasons and he referred to documentation he had obtained from the CPS which we understood him to say spoke of a fingerprint recovered from the car steering wheel. We therefore asked to see the material that related specifically to fingerprints before we made a decision on this application, and Mr Kennedy provided further materials for which we are grateful. In fact, the pages he initially supplied appeared incomplete, so the position was checked with Mr Kennedy who sent in further scans. We are satisfied we have all the material on which Mr Kennedy, and thus the applicant, relies on for this issue.

18. The prosecution also relied on telephone evidence. Three telephones identified as PS7, 8 and 9 were recovered from the co-defendant. The content of the first could not be accessed. The second was attributed to the co-defendant and had messages and photographs relating to drug dealing, and the third was said by the police to be a phone for a drugs line called "the Dave line", which in turn the prosecution linked to the applicant.

The application

19. The grounds identified by the applicant may be summarised for present purposes in these terms:

i) That the applicant was pressurised to plead guilty due to negligent advice of solicitors and counsel;

ii) That the applicant's two firms of solicitors failed to pursue evidence from bank accounts, Universal Credit or his father that might support an innocent account as to the origin of the money found on him, or after his plea to apply before sentence for permission to change his plea.

iii) That the SFR1 report of the finding of a fingerprint match on the inside of the Boots bag was both a deception by the prosecution, it being suggested that the fingerprint was derived from the car rather than the bag, and was used in a coercive and deceptive manner by his lawyers to obtain a guilty plea from the applicant.

iv) That the prosecution relied upon telephone evidence which the applicant says was inadmissible evidence obtained in breach of ACPO guidelines.

20. To us the key points that Mr Kennedy emphasised were:

i) That the applicant had learning difficulties so as to be vulnerable;

ii) That in this case the drugs were all found on or associated with the co-defendant, none being found on the applicant;

iii) That his concern for his brother was that he had been pressurised into pleading guilty, in particular because of advice about the credit available for an early guilty plea.

iv) That the advice was defective because at that stage the full prosecution case had not been served so that the applicant could be advised properly, and that the material available, in particular the SFR1, meant that he was advised on a false basis.

21. Many and varied legal submissions have been made in the written materials submitted, including the material submitted by Mr Kennedy in an email dated 10th February 2023 and bearing a signature from the applicant dated 2nd March 2023.

22. The applicant is fortunate to have the support of his brother and mother. However, many of the submissions indicate misunderstandings of applicable legal concepts. We do not say that in any spirit of criticism, but assure the applicant that they have been considered by us even if this ruling does not address each in turn.

23. The applicant has also submitted requests for disclosure. We are satisfied that this application can properly be considered without addressing that matter. Were leave to be granted, further directions could be considered.

24. In view of the criticisms made of counsel and solicitors who represented him at the time of his guilty plea, the applicant was invited to and did waive his privilege in respect of his communications with them. We have before us responses from solicitors and counsel to which the applicant himself has responded. We have also considered the responses of those representing the applicant at the time of sentence and that of the Respondent.

Discussion

25. So that we do not risk losing sight of the wood for the trees it is right to identify from the first that this was a strong prosecution case. The summary we have provided speaks for itself. With that in mind we turn to the applicant's arguments, having made clear that this ruling will not deal with every detail.

26. Any advocate representing the applicant would be obliged to advise, even in robust terms, on the strength of the prosecution case, the evidence apparently available, and as to the credit available for an early plea of guilty, whilst at the same time making it clear that if a defendant is not guilty they should not plead guilty. Credit for plea is given precisely to encourage a defendant who is in fact guilty to plead guilty at an early stage, before the time set for full service of the case.

27. We acknowledge that the applicant reports his difficulties in reading and writing, described by Mr Kennedy as learning difficulties. That sadly is not uncommon among defendants. However, it is clear that he had the opportunity to discuss the case orally with both solicitor and counsel prior to entering his pleas and to give his instructions orally. Indeed the late arrival of his co-defendant gave additional time for discussion. It is also the case that he subsequently instructed new solicitors who acted for him in the period of almost five months before he was sentenced.. We see no basis to conclude that his literacy or learning difficulties in themselves undermine the safety of this conviction.

28. Particular concerns were raised with us about the SFR1 fingerprint material. The SFR1 is in standard form authored by Ian Williams and dated 19th April 2017 with crime number 20BW/37832R/17. It reports a match to the applicant's left middle finger. The source of the match is reported as:

> *PS/4-JCT3 Taken from PS/4 WHITE CARRIER BAG (BOOTS) CONTAINING EXHIBITS PS/1 AND PS/3 Mark Location: Inside of white carrier bag (Boots)(PS/4)*

29. PS4 is the exhibit reference given by PC P Sutton who seized the bag at the scene. We infer that JCT3 is the exhibit reference for the fingerprint lift that would have been taken by an investigator, probably a scenes of crime officer, for submission to the Fingerprint Bureau. A continuity statement from such an officer would not usually be served unless a dispute was indicated, so it is unsurprising that none appears on the court file.

30. We observe that the report refers to a total of five lifts (JCT 1-5) all taken from the Boots bag and is not, in any way concerned with the Astra motorcar.

31. The SFR1 therefore appears on its face to be a report of the finding of a print matching the applicant on the inside of the Boots bag. Had the case continued to be contested by the applicant and the fingerprint not admitted, then it would be at that stage that a full SFR2 report would have been commissioned. There is nothing before us that suggests that at the time of plea or sentence the advocates for the applicant or the prosecution had any reason to doubt the bona fides of the report.

32. We turn to the question whether there is material suggesting that the SFR1 which would have been considered by the applicant in making his decision on plea was, unbeknownst to his legal representatives at the time, in error.

33. Of the material first provided by Mr Kennedy there are three pages of relevance to fingerprints. They have side numbering 85, 86 and 88. The pages 85 and 86 are identical and bear the numbering *page 1 of 13*, and page 88 bears the numbering *page 10 of 13*). They bear the same crime number as the SFR1, being the overarching crime number for this enquiry. The pages have been subject to some redaction including of the initials of exhibits, but we can see on the page 88 reference to six attempts to find marks using two different types of treatments and that, for each one, no marks were found. The exhibit numbers are shown as 2 through to 7 but the letters preceding have been redacted. It may well be that those attempts to develop marks were made on the Vauxhall Astra that the applicant had been driving, although that is not confirmed. We cannot tell from those pages the sites from which attempts to obtain marks failed.

34. Those pages appeared incomplete, and so Mr Kennedy was given an opportunity to supplement them and did so sending scans of 7 pages which we have also considered. There is some overlap with pages sent before (particularly further copies of the pages that, when previously supplied, had the side numbers 85 and 88), and what appears to be an intermixing of police documents with pages recording events at the first appearance at Birmingham Magistrates Court, at which stage not guilty pleas were being indicated by the applicant to the drugs matters.

35. Therefore, the materials put before us are not evidence of the finding of a print from the applicant on the steering wheel, let alone evidence that such a print has been confused and misreported as having come from the Boots bag.

36. As for the other aspects of the case, the applicant was himself best placed to know if such further enquiries would indeed materially support his case. He says that the cash he had on him could have been accounted for via bank statements, Universal Credit records and a statement from his father. It is all too clear that none of those matters would be determinative. Once he had chosen to plead guilty, there can be no criticism of his legal representatives for not pursuing enquiries that were no longer relevant. The criticism that the absence of assets identified in the POCA proceedings should have caused his solicitors to review the evidence falls away when the basis of plea presented in mitigation is considered, and that we review later.

37. It is suggested that the telephone evidence was inadmissible, but no reason why it would be inadmissible is offered other than a suggestion that there was a breach of ACPO guidelines, or that because the phone concerned was recovered from the co-defendant its contents could not be used against the applicant. These are simply not matters which, in themselves, would make the material inadmissible.

38. A defendant who delays a plea to wait for, for example the service of a full SFR2 statement and continuity evidence on a fingerprint finding, or for his legal team to pursue evidence that may support his account about cash sums found upon him, and then pleads guilty, will necessarily suffer a loss of credit.

39. Mr Kennedy complains that offering the applicant the prospect of a reduction of sentence for an early guilty plea put improper pressure upon him. The reduction in sentence for early guilty pleas is an established part of our process for good policy reasons. It presents defendants with a choice which can be a difficult one. However, the applicant's legal representatives were bound to advise him about it for the applicant to make his decision. The response of counsel to the allegations is that proper advice about credit for plea was given, including that the applicant should not plead guilty unless he was guilty.

40. The sentencing took place almost five months after the pleas were entered. In the interim the applicant chose to instruct new solicitors privately. Although the applicant asserts that the new solicitors were instructed to vacate his pleas, there is no confirmation from those solicitors of any such instructions. In any event a defendant may not withdraw a plea of guilty as of right, but only if the court permits him to do so following a successful application.

41. If the applicant is right that the matter was raised with his new solicitors, then it was clearly not pursued by him at that time. It is inconsistent with the solicitors instead writing to the Court applying for the applicant to be sentenced before the co-defendant's trial. It is also inconsistent with the fact that at sentence the applicant's new advocate, Mr Peggs, presented in mitigation an account that the applicant had been pressured by the co-defendant into acting as driver for the co-defendant's drug dealing. The advocate also spoke of threats to the applicant's girlfriend. We have a transcript that includes this assertion:

> *One of the people to whom he owed money was [*the co-defendant*] and it was agreed that Mr Mitchell would drive for [*the co-defendant*] whilst [*the co-defendant*] supplied drugs to other people and Mr Mitchell took part in that.*

42. It is clear from the sentence remarks that the basis presented was accepted and resulted in a reduction in the sentence passed.

43. Thus, the mitigation presented is wholly inconsistent with the position the applicant now seeks to take. We see no basis for concluding that the mitigation was simply invented by the advocate, it must have originated from instructions given by the applicant.

44. Taking these factors individually and collectively we identify no argument that has been presented that has any prospect of success so as to justify granting leave to pursue this appeal. There are simply no arguable grounds that these pleas were other than voluntary and informed, or that the applicant was deprived of a defence which would probably have succeeded, or that the convictions are in any other way unsafe.

45. That being so, there can be no point in granting any extension of time. The renewed application is therefore dismissed.