Regina v Ryan McNaught

No: 201704678/B4

Court of Appeal Criminal Division

27 June 2018

[2018] EWCA Crim 1588

2018 WL 03364306

Before: Lord Justice Hamblen Mrs Justice Nicola Davies DBE The Recorder of Redbridge His Honour Judge Zeidman QC (Sitting as a Judge of the CACD)

Wednesday, 27 June 2018

Representation

Miss J Lewis appeared on behalf of the Appellant.
Mr E Culver appeared on behalf of the Crown.

Judgment

Lord Justice Hamblen:

Introduction

1 On 21 September 2017 in the Crown Court at Blackfriars before Her Honour Judge Sullivan, the appellant was convicted of knowingly permitting premises to be used for the supply or attempted supply or offering to supply a controlled drug of class A (count 5) and a controlled drug of class B (count 6).

2 On 23 October 2017 before the same court, he was sentenced to six months' imprisonment on count 5 and two months' imprisonment concurrent on count 6. The sentence was suspended for 24 months with a requirement to carry out 150 hours of unpaid work.

3 His co-accused Alan Roper was convicted of two counts of possessing a controlled drug with intent (class A and class B), possessing criminal property and having an offensive weapon (counts 1 to 4 respectively). He was sentenced to a total of 66 months' imprisonment.

4 The appellant appeals against conviction by leave of the single judge.

The outline facts

5 On 22 March 2017 the appellant's co-accused was arrested and searched by police officers. He was found in possession of a mobile telephone, two small wraps of cannabis and a set of keys, including the keys to access 53 Sperling Road, Tottenham which was nearby.

6 Shortly thereafter, the police executed a search warrant at 53 Sperling Road, a first floor one bedroom flat. The appellant was the occupier of the address and was in the bedroom at the time of the search. A quantity of cocaine and cannabis was found at the premises, together with over £3,000 in cash, scales, self-seal bags, a notebook containing lists of telephone numbers and a number of mobile telephones. The items were located around the flat, including in unlocked kitchen cupboards, on the bed in the bedroom and on the living room table. Bags containing the drugs were sent for fingerprint analysis. A palm print matching the co-accused was found on one of the bags containing skunk cannabis. No marks with any match to the appellant were found. Each of the mobile telephones seized were analysed and no communications relating to the supply of drugs were found.

The case at trial

7 The prosecution case was that the co-accused supplied or offered to supply class A and class B drugs on the premises. The appellant knowingly permitted or suffered the supply or offer of supply of those drugs on his premises. The flat was small and the drugs and associated paraphernalia were obviously stored and left out.

8 The prosecution relied in particular upon:

(1) the statement of Police Constable Feeney who recorded a comment made by the appellant on arrest following caution, namely: "I have asked him not to leave stuff here. I don't look around when he leaves stuff here." He recorded that the appellant then said: "I don't need this stuff." It goes on: "I agree that this is a correct record of what was said."
(2) Admissions agreed between the parties listing the items found at the premises and the palm print of the co-accused on one of the bags of drugs found at the premises.
(3) The appellant's police interview in which he accepted that he was the occupier of 53 Sperling Road and that he had given a spare key to the co-accused who he knew as Ferds. He allowed the co-accused to leave some items such as a bag of clothes in the cupboard in the kitchen. He said he had met the co-accused in a café and got to him know him over a period of time. He allowed him access to the flat as he believed he had housing problems. The co-accused would come and go from the flat during the day but never stayed overnight. He said he smelt cannabis in the flat quite a few times, but just thought it was a small amount. He was unaware of the quantity of cannabis that he was smelling. During the interview the appellant was asked to explain the comment he had made to PC Feeney at the time of arrest. The appellant responded saying the way he should have put it was: "I asked him not to leave his stuff here just in case", meaning by that his full property.

9 The defence case was a denial of any knowledge of drugs on the premises. The defence relied on the fact that there was no direct evidence of drug dealing on the premises. The appellant did not give evidence but relied upon the explanation he gave in his police interview. The appellant was of good character.

10 The co-accused gave evidence. He said that he had known the appellant for approximately six months. The appellant had given him a key to his flat because he knew he had difficulties. He said he stored cash at the property and smoked cannabis there. He confirmed the cash under the sink was his and said it was from gambling. He said he did not store his clothes or personal belongings at the flat and did not put possessions in any cupboards other than the cupboard under the sink. The items found in the kitchen corner cupboard were not his. In his police interview the co-accused exercised his right to silence.

11 The issue for the jury was whether they could be sure that the supply of, or offering to supply, class A and class B drugs took place on the premises and that the appellant knowingly permitted or suffered the supply or offer of supply of those drugs on the premises.

The ruling on submission of no case to answer

12 Counsel for the appellant made a half-time submission of no case to answer, submitting that, as in the case of *R v McGee [2012] EWCA Crim. 613* , there was no evidence that any supply of drugs took place on the premises as opposed to from the premises. The judge ruled that:

> "At the close of the prosecution case Miss Lewis has submitted on behalf of Ryan McNaught that there is no case for him to answer on Counts 5 and 6 of the indictment, which are allegations of knowingly permitting his premises to be used for supplying, attempting to supply, or offering to supply controlled drugs. Miss Lewis' point is a discrete one, and is based on the decision in *R v McGee* . She submits that as in the case of McGee there is no evidence that any supply of drugs took place on the premises as opposed to from the premises. McGee establishes that it is necessary from the supply actually to take place on the premises.
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> As far as the definition of supply is concerned, I have been referred by the prosecution to the case of *R v Martin and Brinecombe [2014] EWCA Crim 1940* . This case addressed the definition of being concerned in the supply of drugs and is only relevant in so far as it establishes that supply is a broad term, and is not confined to actual delivery or past supply: it refers to the entire process of supply.
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> What I have to determine is whether a reasonable jury properly directed could be sure in this case that the supply, attempted supply, or offer to supply drugs was taking place on Mr McNaught's premises at 53 Sperling Road, Tottenham. It is right to say that there is no evidence of drug users attending the premises to purchase drugs, and no evidence of supply, or offers to supply on the telephones found at the premises. However, it would in my view be open to the jury to infer from the list of names and telephone numbers, and the quantity of snap bags found on the table in the living room, together with the fact that the first defendant was found near the flat in possession of two snap bags of cannabis, that part at least of the process of supply or offering to supply was

taking place on the premises of the second defendant Ryan McNaught.

For these reasons I have ruled there is a case for Mr McNaught to answer on both Counts 5 and 6."

The grounds of appeal

13 The sole ground of appeal is that the trial judge was wrong to reject the submission of no case to answer in light of the case of *McGee* and that the conviction is accordingly unsafe.

14 In her submissions before us today, Miss Lewis has stressed three points in particular:

(1) Whether the case falls within the principle of *McGee* .
(2) Whether the authoritative status of *McGee* has been affected by subsequent decisions such as *Martin* .
(3) Whether the judge made an error of law in her decision that there was a case to answer.

15 As to her first point, in *McGee* the appellant was the occupier of an address where she lived with her son who pleaded guilty to a number of charges including conspiracy to supply class A drugs. Under the appellant's bed was found an open block of 100 grams of cocaine. Other quantities of drugs were found in the appellant's son's room. Cutting agent and other items used for the preparation and packaging of drugs were found in the utility room and a hydraulic press and a further amount of cutting agent were found in the shed. The appellant denied knowledge of the items.

16 The appellant was charged with "permitting her premises to be used for the supply of class A drugs" contrary to section 8(b) of the Misuse of Drugs Act 1971 ("the 1971 Act").Section 8 of the 1971 Act provides:

> "A person commits an offence if, being the occupier or concerned in the management of any premises, he knowingly permits or suffers any of the following activities to take place on those premises, that is to say—
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> (a) producing or attempting to produce a controlled drug in contravention of section 4(1) of this Act;
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> (b) supplying or attempting to supply a controlled drug to another in contravention of section 4(1) of this Act, or offering to supply a controlled drug to another in contravention of section 4(1) …"

17 In *McGee* the Court of Appeal approved the earlier case of *R v Auguste [2003] EWCA Crim 3229* in which it was held that for a charge under section 8 of the 1971 Act it is necessary for the prosecution to establish that the requisite activity had actually taken place before a conviction could be sustained. In *McGee* the court held as follows at [9]:

> "We accept that there can be no doubt …that with drugs of this quantity there was an obvious intention to supply them to third parties. It is impossible to suggest otherwise. However, that does not establish the element of this offence. It is necessary for the supply actually to take place on the premises. The section does not say 'from the premises' …It may well be that the son did indeed pass drugs to third parties on the premises, but the fact is that there was no evidence of that before the jury."

So the principle to be derived from *McGee* , as Miss Lewis submits, is that the relevant activity must actually take place "on" the premises.

18 As to her second point, Miss Lewis submits that the case of *Martin* is distinguishable. In the case of *Martin* the appellant had been convicted of "being concerned in the supply" of controlled drugs contrary to section 4(3)(b) of the 1971 Act. In dismissing the appeal the court made the following observations:

> "13 …The sole issue, and the only point taken on behalf of the appellants, was: had there been supply of drugs to another?
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> 14. It seems to us that this is a very short point of statutory construction. Was the evidence that was called before the jury sufficient to constitute evidence of 'supply to another'? Those are the words in the statute. It does not say 'actual supply to another'; nor does it say 'delivered to another'. It simply says 'supply to another'…
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> …
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> 16. The word 'supply' is a broad term. It does not by any stretch of the imagination result in a confinement to the expressions 'actual delivery' or 'past supply'. It refers to the entire process of supply. In the present case there was clear evidence that the drugs were en route from London to Portsmouth. They were being transported so that they could be delivered to others in the Portsmouth area. It seems to us that that falls plainly within the word 'supply'. The case resolves itself with no more difficulty than that.
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> 17. We were referred to two further cases: *R v McGee (Anne) [2012] EWCA Crim 613* and *R v Manh Toan Dang and Others [2014] EWCA Crim 348* . They add nothing to the clear words of the statute."

19 Miss Lewis submits that the case of *Martin* is of limited assistance in this case as it relates to the meaning of supply in the context of offences of "being concerned in the supply" under section 4(3)(b) of the 1971 Act. Further, the case of *McGee* was considered by the court in *Martin* , but it was not overturned or even criticised. Miss Lewis accordingly submits that the principle established in *McGee* continues to apply and is directly relevant to this appeal.

20 As to her third point, Miss Lewis submits that the judge was in effect bound to follow the same approach as the court had taken in *McGee* and to conclude that in this case

there was no or no sufficient evidence of the completed activity of "supply" or "offering to supply" to leave the case to the jury. In all the circumstances, the judge should have accepted the case of no submission to answer.

21 The prosecution oppose the appeal on three main grounds:

(1) *McGee* can be distinguished on the facts.
(2) *McGee* , unlike the present case, did not involve an indictment that included "offering to supply" but was limited to "supply".
(3) *McGee* has to be interpreted in light of the decision in *Martin* .

22 As to the first point, the prosecution rely on what is contended are the following significant factual differences between the present case and *McGee* :

(1) The existence of two deal bags of cannabis on the co-accused on his arrest near to the property indicated contemporaneity and proximity of supply with the items set out in the flat, whereas in *McGee* the items found could have been taken away and supplied at some time many days or weeks in the future.
(2) It was suggested in *McGee* that the appellant did not know of the drugs in the house or the equipment in the shed. In the instant case the drugs and money were visible in bags in unlocked cupboards in the kitchen, with two sets of scales, snap bags, a phone and notebook with names and telephone numbers clearly visible on top of the coffee table in the living room of the small flat. The fact these items were on view at the time suggests supply had just taken place or was just about to.
(3) The jury returned guilty verdicts on count 3 of the present case, namely that the £3,260 found in two bags in the kitchen cupboards at the flat was criminal property from the previous supply of drugs, indicating the jury were sure of the co-defendant's previous involvement in the supply of drugs, as opposed to casino winnings, whereas in *McGee* the defendant could explain the provenance of the £7,000 cash found.

23 As to the second point, the phrasing of the indictment in the present case included the phrasing "supply" or "attempting to supply" or "offering to supply" rather than just "supply", as appears to be the case in *McGee* . This is in line with the legislation and allows for a conviction on the basis that the offer of supply was completed from the premises and that the handover took place elsewhere. It is a point that does not appear to have been considered in *McGee* . Although the co-accused's arrest a few streets away could have been supportive of the supply of drugs taking place away from the premises, there is a credible alternative inference that could be drawn from the facts, namely that the co-accused had prepared a drugs deal and made the offer to supply the drugs from the premises. The absence of visitors or text messages linked to drugs does not preclude such offer being made by telephone. Indeed if it had not been arranged already there would seem little reason for the co-accused to have left the property with the two bags of cannabis.

24 As to the third point, the case of *Martin* involved, as already observed, section 4(3)(b) of the 1971 Act and "being concerned in the supply" of controlled drugs. It is submitted that the case sheds light on the meaning of "supply" and in particular supports a broad approach being taken encompassing the entire process of supply.

25 We note that Blackstones 2018 Edition at B.19.89 observes that: "It is respectfully submitted that the decision in *McGee* is plainly correct. The opening words of section 8 speak in terms of activities that 'take place on the premises'."

26 *McGee* was a decision on section 8 which relied on the language there used and in particular the requirement that the activity take place "on" the premises. *Martin* related to the meaning of "being concerned in the supply" in section 4(3)(b) of the 1971 Act and it is in that context that the court's comments about the meaning of "supply" were made.

27 As a Court of Appeal authority on the meaning of the section of the 1971 Act with which this appeal is concerned, we consider we are bound to follow and apply *McGee* , the reasoning of which respectfully appears to be correct, as Blackstone observes.

28 In our judgment, however, *McGee* can nevertheless be distinguished on the grounds that: the indictment in this case included "offering to supply" not merely "supply" and that the evidence of supply and in particular of "offering to supply" was considerably more extensive than in *McGee,* as the prosecution submits.

29 In particular:

(1) In *McGee* the evidence was essentially limited to the drugs themselves and equipment used for the preparation of and packaging of the drugs. In the present case there was additionally evidence relating to dealing in drugs, such as a notebook with contact telephone numbers, a number of mobile phones and a significant sum of cash which was to be found to be criminal property.
(2) The co-accused was discovered nearby ready to deal in drugs. The inference that such dealing was arranged from the adjacent flat was obviously open to the jury.
(3) There was nothing surreptitious about the co-accused's drugs involvement at the flat. His "stuff" was left openly all over the premises.
(4) The fact that there was so much drugs paraphernalia left on view at the time supports the inference of recent "supply" or "offering to supply".

30 In all the circumstances, we are satisfied that there was evidence upon which the jury could properly conclude that "supply" or "offering to supply" had taken place "on" the premises and that the judge was accordingly entitled to reject the submission of no case to answer.

Conclusion

31 For the reasons outlined above the appeal must be dismissed.