Neutral Citation Number: [2013] EWCA Crim 1893

Case No: 201701423/B5

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Date: Friday, 20 July 2018

B e f o r e :

LORD JUSTICE HOLROYDE

MR JUSTICE JULIAN KNOWLES

THE RECORDER OF BIRMINGHAM

HIS HONOUR JUDGE MELBOURNE INMAN QC

(Sitting as a Judge of the CACD)

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R E G I N A

v

LEE PAUL KELLY

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Computer Aided Transcript of the Stenograph Notes of

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(Official Shorthand Writers to the Court)

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Mr B Richmond QC appeared on behalf of the **Appellant**

Mr D Atkinson QC and Mr H Gray appeared on behalf of the **Crown**

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J U D G M E N T (Approved)

1.

LORD JUSTICE HOLROYDE: On 3 October 2016, after a trial in the Crown Court at Manchester Minshull Street before Mr Recorder Nuttall and a jury, this appellant was convicted of offences of conspiracy to supply a controlled drug of class A, namely heroin, and conspiracy to supply a controlled drug of class B, namely cannabis. He had at an earlier date pleaded guilty to an offence of possession of a different drug of class A, namely cocaine. For these offences he was sentenced to a total of nine years' imprisonment. By leave of the full court he now appeals against his convictions for conspiring to supply controlled drugs on a single ground relating to a decision of the learned recorder not to exclude certain evidence.

2.
The relevant facts can be briefly summarised. At 1020 on 9 December 2014 the appellant was a passenger in a car driven by his girlfriend. The car was stopped and searched by the police. The police found in the boot a gym bag in which there was a quantity of cocaine. The appellant admitted it was his. That was the subject of the charge of possession to which he pleaded guilty. In the possession of the appellant himself the police found a Nokia phone which the appellant admitted was his. It was given an exhibit reference MJT/1 but for convenience we shall simply refer to it as "the Nokia".

3.
In the possession of the appellant's girlfriend the police found a BlackBerry phone, which also the appellant admitted was his. This was given exhibit reference JLN/2. We will refer to it as "the BlackBerry".

4.
Following those discoveries the appellant was arrested. He was interviewed under caution. He made no comment. He was released on bail at about 2300 that night.

5.
The Nokia and the BlackBerry were sent for examination and analysis. On the Nokia there was found a text message which had been sent to the appellant at 1302 on 7 December 2014 - that is, about 46 hours before the phone was seized by the police. It was an agreed fact at trial that the text message which had been sent to the appellant at that time was in these terms:

"need to get this bill cleared, Lee, its fucked me up and still outstanding, you know the crack. You're gonna have to get off someone else one way or the other, gone on for far too long and not a penny in."

6.
Examination of the BlackBerry established that it had only been used to send and receive emails. Retrieving those emails was difficult because there were two levels of encryption. First, there was a level of encryption which was a standard feature of the phone and which in this case had been activated. Secondly, there was an additional level of encryption provided by software known as "PGP" which had been added to the phone. PGP stands for "Pretty Good Protection".

7.
The first expert who examined the BlackBerry on behalf of the prosecution, a Mr Long, was unable to get past the PGP. He found that there were 28 emails on the BlackBerry device, three of which had been deleted, but he was unable to read the emails because the encryption prevented him from reading them.

8.

An expert instructed on behalf of the appellant, Mr Johnson, was in a similar position. He too found 28 emails, although he found that five had been deleted. He too was unable to read the emails.

9.
A further expert witness instructed by the prosecution, Mr Chan, was more successful. We will refer shortly to the evidence which he gave to the jury about this. He was able to read and to take screenshots of 23 emails passing between someone who had been using the BlackBerry and someone giving the name "Mickymouse" between 1319 on 7 December 2014 and 0851 on 10 December 2014. It is not necessary for us to read all of these emails, but we quote the terms of a series of emails which were exchanged between the BlackBerry and Mickymouse between 0815 and 0837 on 9 December 2014, that is to say about two hours before the appellant was arrested.

10.
After an initial exchange of enquiries about whether some previous messages had been received, the BlackBerry asked the following question of Mickeymouse:

"0815 how soon for the other to get up there with?"

At 0818 Mickeymouse replied:

"The pols are up there, I'll get the shit sputnick passed to you today an do you still want a half W."

The BlackBerry responded at 0825:

"Ok that's cool Yeah my m8 and the marsh too! How many ov the sputnick?"

Mickeymouse responded at 0827:

"iv got loads m8 its shit tho, shall I just get you a bar to show people? If its right I'll put whatever you want up there, I'll get on my pal now who's got the marsh."

At 0829 the BlackBerry replied:

"Yeah drop a bar he goin up 2day an ill let u no the bobby too!"

Mickeymouse at 0830 responded:

"5weet."

At 0832 the BlackBerry said:

"Let me no a time so get my driver ready my mate!!! Have u got the stuff that goes with the bobby?"

At 0837 Mickeymouse replied:

"I can get it but haven't got it round me m8 that an the marsh might take a few days, I thought my m8 had marsh round him but he's none left till next week, the half an the bar are already in your town soon as I get my m8 up I'll get to come an see you."

The exchange ended with the BlackBerry saying at 0838:

"Ok that's sweet get on me lata."

11.

It was the prosecution case, supported at trial by officers with extensive experience of terminology used amongst drug dealers and users, that this exchange related to the supply of drugs. "W" was said to be a term for cocaine, "bobby" a term for heroin, "sputnick" a term for cannabis, a "half" was said to refer to a weight of drugs and a "bar" to refer to a block of cannabis resin. The appellant in his evidence admitted familiarity with at least some of these terms.

12.
The appellant was interviewed for a second time on 27 April 2015. As to the Nokia, he said that he did not remember the text message which we have quoted and could not explain what it meant. As to the BlackBerry, he said he had bought it the night before his arrest (that is 8 December 2014) for either £20 or £30 from a drug user in a pub. He said he had been unable to get into the phone and was on his way to have the code removed when he was stopped by the police on the morning of 9 December. He denied that he had sent or received any of the emails.

13.
On that account, the BlackBerry had been in the appellant's possession when the exchange of emails which we have quoted above had taken place on the morning of 9 December. It was accordingly the prosecution case that the appellant was the person who had been using the BlackBerry to send and receive those emails.

14.
In his evidence at trial, the appellant was to add to the account he had given in interview that he had bought the BlackBerry believing it to be stolen. The seller, from whom he had bought items before, had told him of a place where he would be able to get the code removed. He had not bought a BlackBerry charger, and indeed the point was made on his behalf at trial that no such charger was found in any relevant police search.

15.
The appellant's defence at trial was that he did not know about the sophisticated PGP encryption which had been added to the BlackBerry.

16.
Also in his evidence at the trial, the appellant accepted that the text found on the Nokia related to money which he owed for drugs. He said that the cocaine found in the boot of the car had been bought 'on credit'. It was worth £130.

17.
The case was initially listed for trial in February 2016 but was not able to proceed on that date. The defence made application for disclosure of certain material. The material sought included the following:

"There is an issue to be resolved as to whether the experts for the Crown conducted their work properly and reliably. In order to be properly advised by our expert, the defence need to know the precise processes which were followed (including a step by step description of each stage of the process and the names of programmes used). As yet our expert has been unsuccessful in obtaining these working notes or this information. We request its provision to the defence."

Counsel who appeared for the prosecution on the occasion when that request was made, indicated that it would be the subject of a PII application, that is to say an application to withhold material from disclosure on grounds of public interest immunity.

18.
The trial was then listed for late September 2016. The defence made an application to exclude certain evidence, including an application to exclude "any evidence relating to the contents of the BlackBerry, including details of any emails therein." The application was made pursuant to section 78 of the Police and Criminal Evidence Act 1984 (“PACE”), which relates to the exclusion of evidence which is admissible, but the admission of which would have such an adverse effect on the fairness of the trial that it should be excluded.

19.
In support of his application to exclude this evidence, Mr Richmond QC (then as now appearing for the appellant) relied on the following. First, he submitted that ordinary principles of fairness together with the provisions of Article 6 of the European Convention on Human Rights require that there be equality of arms between prosecution and defence. The defence were entitled to verify the work of the prosecution expert, including by having access to the BlackBerry itself and to any working notes. Mr Richmond submitted that the defence were entitled to receive the co-operation of the prosecution in this regard but had not received it. Secondly, Mr Richmond placed reliance on a number of the provisions of the ACPO Guidance in relation to disclosure of digital material (the “Good Practice Guide for Digital Evidence” published by the Association of Chief Police Officers). Thirdly, Mr Richmond argued that there was no proper audit trail of the work done by the prosecution experts. Mr Johnson had pointed out that there was no explanation for the change between the three emails which Mr Long had found to have been deleted and the five emails which Mr Johnson himself had found to have been deleted. It was submitted by Mr Richmond that in the absence of any explanation, the defence could not be sure that the data said to have been recovered from the BlackBerry was complete.

20.
The prosecution for their part made an application to withhold details of Mr Chan's methods on grounds of public interest. The written notice of this PII application, which was provided to the defence, said that PGP was rarely encountered by the police but was known to be used by persons engaged in high level drug dealing. The prosecution submitted that the ACPO Guidance had been complied with, and that the BlackBerry had been made available to Mr Johnson for him to examine, but he lacked the specialist knowledge which had enabled Mr Chan (but not him) to decrypt the messages. It was submitted that the method used by Mr Chan was highly confidential and that if it became known to more people there was a risk that the information would fall into the hands of criminals. It was therefore submitted that disclosure of Mr Chan's precise methodology would run the risk of serious prejudice to an important public interest, namely the prevention and detection of crime. The court was accordingly invited to rule that Mr Chan's methodology should be protected by public interest immunity.

21.
The learned recorder conducted the PII hearing in the absence of the defence. This court has seen a transcript of that hearing. Thereafter, in open court the recorder gave his ruling. Although the recording of his ruling is incomplete, the recorder was later able to provide a draft note of what he said. The note shows that he concluded in these terms:

"I do not consider that the admitting of the evidence of the prosecution will have an adverse effect on the fairness of the proceedings. Nor do I find that the prosecution have, in the context of the issue being raised in this case, failed to disclose all that they need to."

Thus the recorder permitted the prosecution to withhold any further material relating to Mr Chan's methodology.

22.
The trial thereafter proceeded. Mr Chan gave evidence, but without explaining precisely what technique he had used. He did explain that it involved removing a chip from the BlackBerry and then putting it back on. This was referred to as the "chip-off, chip-on" technique. Mr Chan said of the work he had done that it was a very delicate process and there was a risk that the chip would be damaged and data lost in the course of carrying it out. He went on to say that in this instance he had been able to power on the screen of the BlackBerry and to read what was on the screen. He extracted the data from the handset and photographed what was on the screen. He said that to access the emails a person would need to know the correct password. The emails found on the BlackBerry had been sent and received by that BlackBerry. Mr Chan said a person would not be able to tell just by looking at the handset that there was a sophisticated security package on it. It was only when trying to use the phone that a person would realise he or she was locked out. He agreed that the ACPO Guidance represented the best practice to follow when examining digital devices. He said he had followed that guidance. He accepted that any change to the data should be recorded. He, however, had not changed or modified any data. In a vivid phrase he said he had simply "sucked out" all the information. What he reviewed was what was there to be seen. There may have been some lost data. He could not account for any lost data. Mr Chan said he did not know whether data protected by PGP could be accessed by more than one phone. He therefore could not say whether, if someone lost the BlackBerry, he would still be able to access the emails on it by using another phone.

23.
One of the police officers who gave evidence at the trial and who was experienced in drugs cases gave evidence that the PGP security cost in excess of £1,000 for 12 months.

24.
The appellant gave evidence, as we have briefly indicated. The jury convicted of both the charges of conspiracy.

25.
The sole ground of appeal is that the learned recorder erred in refusing to exclude the evidence of the contents of the BlackBerry. In his helpful written skeleton argument, Mr Richmond submitted that pursuant to Article 6 the minimum requirements of a fair trial include that a defendant should have a reasonable opportunity of presenting his case in such conditions as would not place him at a substantial disadvantage compared to the prosecution. In consequence, any expert instructed by a defendant should have equal treatment with any expert instructed by the prosecution. The defence expert should therefore have equal access to any exhibit and relevant material which is the subject of the prosecution's expert evidence. In a case where reliance is placed upon expert evidence, Mr Richmond argued, the defence is entitled to understand the methodology used in order to ascertain whether the prosecution's witness had acted in a proper professional manner, and whether his reasoning was sound and his conclusions reliable. In cases where the nature of the process to be undertaken risked destruction of an exhibit, the defence should be informed so that they could make representations about having their own representative present. Where such a risk exists, it is essential for the prosecution's expert to keep a detailed record so that the defence expert can analyse precisely what was done.

26.

Mr Richmond went on to submit in his skeleton argument that the defence had made clear that there was an issue as to whether the experts who had decrypted the phone on behalf of the prosecution had done their work properly and reliably. Had they been given full disclosure as sought, the defence may have been in a position to make an abuse of process submission or to challenge the evidence of the prosecution experts. Thus it was argued that the withholding of evidence on PII grounds placed the appellant at an unfair disadvantage, with the result that his convictions are unsafe.

27.
In a Respondent's Notice and skeleton argument Mr Atkinson QC and Mr Gray on behalf of the prosecution emphasised the importance of keeping in mind the true nature of the appellant's defence and the real issues in the case. They pointed out that there was no issue that the messages which Mr Chan placed before the jury had been recovered from the BlackBerry and had accurately been reproduced in the evidence. There was indeed a formal admission in the course of the trial that those messages were sent and received at the times indicated. The appellant's defence was that, whatever emails there may be on the BlackBerry, they were nothing to do with him: he had neither sent nor received any of those emails and knew nothing about them. The real issues in the case, the prosecution accordingly submitted, therefore related to the appellant's account of how the phone came to be in his possession and whether or not he knew the contents of the emails. The prosecution went on to submit in writing that the learned recorder had conducted a proper procedure in determining whether there was material that undermined the prosecution case or assisted the defence case and whether the fairness of the proceedings required the exclusion of the contentious evidence. It was submitted that he had been entitled to reach the decision he did.

28.
In the written submissions an analogy was drawn by prosecuting counsel with cases involving informants or involving the use of covert observation posts. Such cases were relied upon as showing that in a proper case, evidence may be admitted even though the details of the method by which the evidence was obtained have been withheld on grounds of public interest.

29.
These submissions have been developed orally before us and we are grateful for the assistance which we have had from counsel in this case.

30.
There is, as it seems to us, no dispute between the parties as to the applicable principles. We would summarise them as follows. Article 6 of the Convention requires that the trial process must as a whole be fair to the accused. The provisions of the Criminal Procedure and Investigations Act 1996 require the prosecution to disclose material in their possession which might reasonably be capable of undermining the case for the prosecution against the accused or of assisting the case for the accused. However, as was recognised by the House of Lords in H [2004] 2 AC 134, the public interest may in some cases require that there be a departure from the general requirement of full disclosure. The decision of the committee was given by Lord Bingham of Cornhill. Putting the matter generally, he said at paragraph 18:

"Circumstances may arise in which material held by the prosecution and tending to undermine the prosecution or assist the defence cannot be disclosed to the defence, fully or even at all, without the risk of serious prejudice to an important public interest. The public interest most regularly engaged is that in the effective investigation and prosecution of serious crime, which may involve resort to informers and under-cover agents, or the use of scientific or operational techniques (such as

surveillance) which cannot be disclosed without exposing individuals to the risk of personal injury or jeopardising the success of future operations. In such circumstances some derogation from the golden rule of full disclosure may be justified but such derogation must always be the minimum derogation necessary to protect the public interest in question and must never imperil the overall fairness of the trial."

Where a PII application is made, the proper approach to be taken by the trial judge was stated by Lord Bingham at paragraph 36 of his speech in the following terms:

"36. When any issue of derogation from the golden rule of full disclosure comes before it, the court must address a series of questions:

(1) What is the material which the prosecution seek to withhold? This must be considered by the court in detail.

(2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If Yes, full disclosure should (subject to (3), (4) and (5) below be ordered.

(3) Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If No, full disclosure should be ordered.

(4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence?

This question requires the court to consider, with specific reference to the material which the prosecution seek to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge. In appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected (see paragraph 22 above). In cases of exceptional difficulty the court may require the appointment of special counsel to ensure a correct answer to questions (2) and (3) as well as (4).

(5) Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.

(6) If limited disclosure is ordered pursuant to (4) or (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.

(7) If the answer to (6) when first given is No, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced?

It is important that the answer to (6) should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review."

31.
It is necessary also to refer to the provisions of Part 19 of the Criminal Procedure Rules relating to expert evidence. Rule 19.3(3) lists a number of steps which must be taken by a party who wishes to introduce expert evidence which is not admitted by any other party. These requirements include by paragraph (d):

"If another party so requires, give that party a copy of, or a reasonable opportunity to inspect—

(i) a record of any examination, measurement, test or experiment on which the expert's findings and opinion are based, or that were carried out in the course of reaching those findings and opinion, and

(ii) anything on which any such examination, measurement, test or experiment was carried out."

By rule 19.3(4) a party may not introduce expert evidence if it has not complied with paragraph (3) unless the parties otherwise agree or the court directs. Thus, where (as in this case) a defendant seeks to exclude from expert evidence on grounds of non-disclosure, the challenge may be made either as a challenge to admissibility on the basis of non-compliance with rule 19.3(3) or as an application to exclude the evidence on grounds of fairness pursuant to section 78 of PACE 1984. In our view, nothing turns on which of these approaches is adopted. In either case the court will need to consider the admissibility of the evidence, and in circumstances such as these will need to consider the claim to public interest immunity.

32.
In the present case, no PII application was made which sought to prevent Mr Johnson from examining the BlackBerry. He was able to examine the phone and did so. The PII application in respect of the details of Mr Chan's methodology was properly made. The learned recorder had to decide, following through the series of questions posed in paragraph 36 of the decision in H , whether there was a public interest in withholding details of Mr Chan's methodology. Mr Richmond frankly recognises that there is or may be a public interest in not revealing details of investigative methods and techniques, the revelation of which may assist criminals to avoid detection or conviction for their crimes. But as Mr Richmond forcefully emphasised throughout his submissions, that does not mean that the entitlement of a defendant to a fair trial can be overlooked. He submits that in circumstances such as the present, no fair trial was possible unless the appellant was able to know the precise details of Mr Chan's methodology so that Mr Johnson could properly assess the reliability of Mr Chan's work and of his conclusions. Mr Richmond emphasised in his submissions that one fact which is known here is that there was a difference between the findings of Mr Long and the findings of Mr Johnson as to the number of deleted emails. Mr Richmond submitted that something had clearly changed between the two examinations; but the reasons for that change, and the extent of what had been lost, could not be ascertained.

33.
For our part we have no doubt that there is an important public interest in not disclosing information which would jeopardise the effective prevention and detection of crime. Where such an issue arises the court must therefore consider, in accordance with the principles of H , whether it is proper to derogate to some extent from the golden rule of full disclosure.

34.
The issue for this court to resolve accordingly is whether in the circumstances of this case the learned recorder was entitled to conclude that no further disclosure needed to be made. We have no doubt that he was so entitled. It is apparent from the notice of the PII application that that application was

properly made. Having seen the transcript of the hearing of that application, we are satisfied that a proper procedure was followed. Given the evidence that this expensive PGP software is used by serious criminals who can be expected to be sophisticated in trying to avoid detection, it seems to us that the public interest in protecting the details of the methodology by which Mr Chan was able to decrypt messages despite PGP was a high one.

35.
In our view, the withholding of the details of Mr Chan's methodology did not imperil the fairness of the trial. There are a number of reasons for that conclusion. First, as we have indicated, it was an agreed fact at the trial that the emails which Mr Chan adduced in evidence were recovered from the BlackBerry. This is not a case in which, for example, it is said that the methodology adopted by Mr Chan had in some way completely transformed the contents of the emails. Secondly, this is not a case in which it is alleged that there was deliberate bad faith or deliberate destruction or corruption of material on the BlackBerry, though we bear in mind Mr Richmond’s point, forcefully made, that there remains the possibility of negligent or inaccurate conduct of the examination technique. Thirdly, Mr Chan in his evidence told the jury a substantial amount about his work. He acknowledged that the work he undertook carried with it a risk of damaging the relevant chip and losing data from it. He also acknowledged and admitted that he could not explain why there was a difference between the findings made by Mr Long and the later findings made by Mr Johnson. Next, and in our view very importantly, the defence case was not that different emails had been sent or received, or that the pattern of email correspondence was incomplete and therefore misleading, or that the contents put before the jury would mislead them as to the true nature of the exchanges between the BlackBerry and Mickeymouse. Rather, the stark and simple defence was that the emails, whatever they said, were nothing to do with the appellant. His case and his evidence was that he did not know anything about these emails and had neither sent nor received any of them. He was well able to advance that defence. In view of the concession made by Mr Chan as to his ignorance on this point, the appellant was able to make the point to the jury that Mr Chan did not know whether or not someone could remotely have accessed the BlackBerry after it had come into the appellant's possession.

36.
We would emphasise that the application of the principles in H involves in each case a fact-specific consideration of the evidence and issues in the particular case. Here, the learned recorder heard evidence which satisfied him that there was a strong public interest in keeping confidential the precise method which had enabled Mr Chan to read the emails. The recorder was satisfied that in the circumstances of this case the upholding of that public interest did not prevent a fair trial, because no further disclosure was necessary for the defendant to be able to present his case fully and give his evidence.

37.
The recorder's ruling indicated, as we have said, that he was satisfied that there was nothing further which needed to be disclosed. It follows from that, that the provision in rule 19.3(4) enabled the court to direct that the evidence could be adduced notwithstanding the withholding of some information as to Mr Chan's methodology.

38.
In our judgment the learned recorder was entitled to reach those conclusions. For the reasons we have given, it was not necessary, for this appellant to have a fair trial, that he should have disclosure of the precise technique by which Mr Chan retrieved the emails which it was accepted he did retrieve and which the jury could therefore consider.

39.
In these circumstances, there is in our judgment no reason to doubt the safety of the convictions. The jury were clearly entitled to infer that the emails passing between the BlackBerry and Mickeymouse showed that the persons engaged in that dialogue were conspiring to supply heroin and cannabis. The jury were no doubt struck by the coincidence that the appellant, in debt for drugs, chanced to buy in a public house a BlackBerry which had either been lost by, or stolen from, someone who had installed expensive software on it and who continued to use it whilst the handset was in the appellant's possession. They were no doubt also struck by the further coincidence that one of the emails sent by the BlackBerry referred to arranging for a driver only about two hours before the appellant (himself a non-driver) was a passenger in his girlfriend's car. This was in our judgment a strong prosecution case and the convictions are safe. Grateful as we are to counsel, we conclude that this appeal fails and must be dismissed.

40.
(Discussion followed about the making of a written application to certify a point of law of general public importance and for leave to appeal to the Supreme Court).