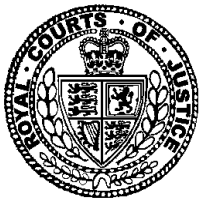

Neutral Citation Number: [2020] EWCA Crim 1241

Case No 201804002 C5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LEEDS
HIS HONOUR JUDGE BAYLISS QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/09/20

Before :

LORD JUSTICE HICKINBOTTOM

MR JUSTICE SPENCER
and
HER HONOUR JUDGE MOLYNEUX
(sitting as a Judge of the Court of Appeal (Criminal Division))

- -

Between :

R

Respondent

- and -

ANDREW NEIL TURNER

Appellant

- -
- -

Dean George QC (instructed by **Stokoe Partnership Solicitors**) for the **Appellant**
Angus MacDonald and **George Hazel-Owram** (instructed by **CPS Appeals Unit (Special Crime Division)**) for the **Respondent**

Hearing date: 24 July 2020
Further written submissions: 7-15 September 2020

- -

Approved Judgment

Lord Justice Hickinbottom:

Introduction

1. On 21 August 2018 in the Crown Court at Leeds before His Honour Judge Bayliss QC and a jury, the Appellant was convicted of conspiring to supply Class A drugs (cocaine) and conspiring to transfer criminal property (money) between 1 August and 31 December 2016. In respect of a third conspiracy to produce cannabis with which the Appellant was also charged, the judge acceded to an application of no case to answer. Others (including a man called Wesley Bell) had earlier pleaded guilty to that charge, which plays no direct part in this appeal.

2. At the same trial, two co-defendants, Lee Mabbott and Michael Lumb, were each convicted of the same two conspiracy offences as the Appellant; and Leslie Yeats was convicted of the conspiracy to transfer criminal property, the only charge he faced. Prior to the trial, Lee Brook had pleaded guilty to the conspiracy to supply cocaine, and also, together with his wife, to separate charges of possessing cocaine and ecstasy with intent to supply. On the first day of the trial, Akab Hussain pleaded guilty to the conspiracy to transfer criminal property, and to converting criminal property. A further co-defendant, Justine Choudury, was charged with, but ultimately acquitted of, the conspiracy to supply cocaine.

3. On 23 August 2018, Judge Bayliss sentenced the Appellant to 20 years' imprisonment for the drugs conspiracy, and 6 years concurrent for the conspiracy to transfer criminal property. His co-defendants were sentenced to terms of imprisonment ranging from 14 months (Hussain) to 18 years (Mabbott).

4. With the leave of the full court, the Appellant now appeals against conviction. He has also sought permission to appeal against sentence, but it has been agreed that that application will in any event be adjourned to be dealt with at a later date together with Mabbott's renewed application for permission to appeal his sentence.

5. As in the Crown Court, before us, Dean George QC appeared for the Appellant, and Angus MacDonald and George Hazel-Owram for the Crown. We have been greatly assisted by their written and oral submissions. Written submissions were made by the parties after the hearing on transcripts of the evidence-in-chief and re-examination of one witness (Mrs Sarah Gosnay) which we directed be made available to the parties, only her cross-examination being transcribed for the hearing. In his post-hearing written submissions, Mr George raised the issue of whether the court might be assisted by further oral submissions on this new material; but we consider the submissions that we now have are comprehensive and sufficient to enable us to determine this appeal.

The Prosecution Case

6. It was the prosecution case that, between 1 August and 31 December 2016, the Appellant and his co-accused Brook, Lumb and Choudury were part of a conspiracy to supply cocaine; and the Appellant and his co-accused Lumb, Hussain and Yeats were part of a conspiracy to transfer criminal property in the form of large sums of money connected to the supply of drugs.

7. During the course of the police investigation, officers conducted surveillance operations in relation to those suspected of being involved and, from time to time, key events occurred in which they seized substantial quantities of high purity cocaine and/or cash or interrupted what they believed to be drugs deals. The main events in the prosecution case, so far as relevant to this appeal, were as follows.

8. On 23 August 2016, Hussain was stopped in a vehicle on the M62 motorway, and was found to have over £100,000 in cash. The bags which contained the cash were tested and found to have the fingerprints of both Lumb and the Appellant on them. In addition, tests showed that some of the money was contaminated with diamorphine.

9. On 31 August 2016, the Appellant was observed getting into a blue Audi. Later that day, a car was seen to meet Brook and an exchange apparently took place. It was the prosecution case that the car on each occasion was the same; and this was a drug transaction.

10. On 21 September 2016, officers observed a meeting between Yeats and another man. When that man was stopped, he was carrying a bag containing just under £60,000 in cash. Mobile telephone evidence suggested that the Appellant had been in contact with Mabbott, Yeats and the other man the previous day. Further documentation showed that the vehicle that had been driven by Yeats was insured by Mabbott, and that both he and the Appellant were named drivers on the policy.

11. On 30 September 2016, officers stopped a vehicle being driven by Brook, in which they found four blocks of pressed cocaine, each of about one kilogram and 90% purity, with an estimated wholesale value of £196,000 and street value of £320,000. That same day, Brook's home was searched, and a further 3.6kg of cocaine of 92% purity, 787 grams of ecstasy and items linked to drug dealing such as the cutting agent benzocaine, a press and plastic bags were found in various parts of the house. During the course of the search, a vehicle was seen to drive past Brook's address, stop briefly and then drive quickly away. Officers took its registration number, and later investigations suggested that both the Appellant and Mabbott had links to the car. The prosecution case was that, before and after this search, there was substantial telephone communication between Mabbott, Lumb and the Appellant. In particular, a mobile number ending in 5722 was in frequent use that day, and it was the prosecution case that that phone was being used by the Appellant to contact his co-conspirators to organise a drugs transaction.

12. On 12 October 2016, Mabbott was arrested as he was walking in Gledhow Valley Road, Leeds. He was with a small child, and found to be in possession of a shopping bag containing just under £110,000 in cash. His home address was searched, and a further £3,400 was found. Some of the money seized was contaminated with amphetamine and a chemical found in cannabis.

13. On 27 October 2016, officers witnessed Choudury and then the Appellant entering and leaving an apartment block in Carlton Rise in Leeds, where Choudury lived. When Choudury left the property, he did so with a rucksack. He got into a van and drove off; but a few minutes later this van came back to Carlton Rise, where it was abandoned with a kilogram of cocaine of 75% purity and documents in Choudury's name inside it. When Choudury's home address was searched by the police, they found paperwork which linked the Appellant to the van. In addition, further enquiries

established that the insurance policy for the van had been issued to someone using the name "Andrew Turner". Choudury said that he was a long-standing friend of the Appellant's wife and had used the Appellant's name without his knowledge to obtain car insurance because he (Choudury) was a disqualified driver.

14. On 22 December 2016, two addresses linked to Lumb were searched by the police. At the first, Lumb's father-in-law's address considered by the police to be the safe house used by the conspirators, they found cocaine, cutting agents and other items linked to the onward supply of drugs. At the second, Lumb's home address, the officers found Mabbott. He was searched and found to be in possession of £1,635 in cash.

15. It was the prosecution case that the Appellant was the directing force in each of these conspiracies: he was linked to the vehicles used in furtherance of the conspiracies, his fingerprints were found on bags of criminal money, surveillance evidence linked him to the money that was recovered on 23 August and 21 September 2016 and, vitally, he had had substantial telephone contact with his co-accused shortly before and on the key dates. For example, it was the prosecution case that there was substantial telephone communication between the Appellant, Mabbott and Lumb on 30 September 2016, the day when the police seized over 7kg of cocaine from Brook's car and home.

16. In support of its contention that the Appellant had had frequent contact with his co-accused, particularly at key points in the conspiracies, the prosecution sought to attribute particular mobile telephones to him. For example, as we have indicated, one of the phones in frequent use on 30 September 2016 ended in 5722; and it was the prosecution case that that phone was being used that day by the Appellant to contact his co-conspirators to organise a drugs transaction.

The Telephone Evidence

17. The police investigation suggested that many mobile telephones had been used by the conspirators, most for only a short period of time (for example, outgoing calls were made from the 5722 number over only the ten-day period 27 September to 6 October 2016). Evidence of attribution of the mobile phones to particular conspirators was therefore a crucial plank of the prosecution case.

18. The primary prosecution witnesses who dealt with this attribution was Mrs Sarah Gosnay (formerly Miss Sarah Dinsdale), a Mobile Telephone Analyst with West Yorkshire Police. Her report dated 15 March 2017 set out all of the evidence upon which the prosecution based its contention that a particular phone was attributable to a particular conspirator. In respect of none of the relevant telephones was any subscriber information available from the service provider. The evidence of attribution of a particular phone to a particular person essentially comprised three strands:

    i) evidence that the phone contacted, and was contacted by, known associates of that person (e.g. in respect of the 5722 number, over the ten-day period, 59 calls were made to two numbers of telephones attributed to Mabbott, and 12 to a number attributed to Lumb, both known associates of the Appellant);

ii) evidence that the number was saved in the name of an identifiable individual in the phones of known associates of that person, e.g. (a) in a phone seized from Mabbott when he was arrested, the number ending 5955 was stored under the name "AT"; and (b) in a phone seized from Lumb, a number ending in 6823 was stored under the name "Bald", and in a phone seized from Mabbott under the name "Baldy": the Appellant being bald, the prosecution contended that that was evidence that the 6823 number was attributable to him; and

iii) an analysis of the cell site billing data to identify the frequency with which a number used particular masts, on the basis that the mast most frequently used ("the top mast") would be evidence of where the user might live. For example, in respect of the 5722 number, 49% of all calls were registered on a mast located 0.55 miles away from the Appellant's home. A telephone analyst cannot say definitively whether a particular mast does in fact serve a specific address – that is the function of a radio frequency survey (see below) – but the prosecution contended that the analysis performed by Mrs Gosnay (including the position of the top masts relative to his home) was nevertheless evidence that certain phones, including the 5722 number, were attributable to the Appellant. For each phone, the location of the top mast in relation to the person's home address was then plotted on a map, as well as a "spider" attribution diagram for each defendant which set out on one sheet of paper the attributed phones, the phones contacted, the top masts and the home address.

19. On the basis of all these strands of evidence, Mrs Gosnay's report attributed nine mobile telephone numbers, including the 5955, 6823 and 5722 numbers, to the Appellant; and, in respect of each attributed phone for each conspirator, set out the part it was alleged to have played in the conspiracies.

20. The time when data were available to the defence in accessible form is disputed. However, Mrs Gosnay's report was served on the defence on 18 April 2017, prior to the Plea and Trial Preparation Hearing ("the PTPH") which was held before Judge Bayliss on 10 May 2017. The underlying call data themselves appear to have been provided to the legal teams of the Appellant and each of his co-defendants on disk, as unused material, on 17 May and 19 June 2017. Thereafter, some issues arose over apparent difficulties of access to the data (resulting from, e.g., the fact that relevant tables could not sensibly be viewed within the Digital Case System ("DCS") and had to be downloaded), and whether service of the data as unused material (as opposed to evidence upon which the prosecution relied) was adequate, but (i) the defence appears to have had access to all of the underlying data by 19 June 2017, and (ii) in response to an application to dismiss on the basis that the telephone data upon which the Crown relied had not been identified, on 27 July 2017, the prosecution served the specific data upon which it did rely as set out in Mrs Gosnay's report, which was uploaded onto the DCS (following which the application to dismiss was abandoned).

21. At the PTPH, Judge Bayliss directed that defence statements be served by 19 May 2017, and he fixed the trial date for 9 July 2018. In the event, the Appellant's defence statement was not served until 28 April 2018, and Mabbott did not serve his until May 2018.

22. It was certainly clear by April 2018 that the attribution of telephone numbers was a vital plank of the prosecution case: indeed, as we have indicated, by then, as a general

proposition that had been clear for a year, and it was clear that the attribution of the number ending 5722 was of particular importance because of its pivotal nature in the prosecution case so far as the 30 September 2016 events were concerned. In his defence statement, Mabbott indicated which phones he accepted were attributable to him. However, the Appellant's defence statement was coy – indeed, effectively silent – on this crucial matter of telephone attribution, simply stating (at paragraph 5(x)) that: "It is disputed that the prosecution has correctly attributed all of the numbers in the case, specifically some of those attributed to Mr Turner". That suggested that the Appellant accepted that he had used some, but not all, of the phone numbers attributed to him. It neither confirmed nor denied that the Appellant accepted attribution of the 5722 number. On 1 May 2018, three days after receipt of the defence statement, the prosecution wrote to the Appellant's solicitors asking them to clarify this issue. No response was received.

23. The trial commenced on 9 July 2018, but the first week was taken up with legal argument and in the second week the judge was detained on other judicial business. The case was therefore due to be opened to the jury on Monday 23 July 2018.

24. On 20 July 2018 (i.e. the Friday before the trial before the jury was due to get underway), the Appellant's solicitors informed the prosecution that the Appellant accepted that three identified numbers (i.e. including the number ending 5955) were his, but he did not accept the other six numbers (including the numbers ending 2525 and 5987, and well as the 5722 number). For the first time, the Appellant expressly put the attribution of these numbers in issue.

25. The acceptance of the attribution of three of the telephone numbers to him allowed further call analysis to be done, namely co-location analysis, to demonstrate the frequency with which accepted numbers and disputed numbers were in the same or similar places at the same or similar times. Mrs Gosnay performed that further analysis, and prepared a second report. That included three spreadsheets of instances which, the prosecution contended, demonstrated that the accepted numbers and the disputed numbers were often co-located in that sense. The spreadsheets were supported by 12 pages of maps showing the instances of co-location alleged, e.g. in Otley on 15 September 2016, in Newcastle and Stockton-on-Tees on 26 August 2016, in Newcastle again on 28-29 October 2016, and in particular parts of Leeds on various days.

26. She also performed correlation analysis of the location of masts used by disputed numbers compared with surveillance sightings of the Appellant, which were also plotted on the maps. This surveillance evidence had not previously been served on the defence, but statements from the surveillance officers were served at the same time as Mrs Gosnay's second report and it was made clear that, if the sightings were disputed, the officers were available to be cross-examined. We should add that, in addition to the sighting which (the prosecutions said) supported the attribution of particular phones to the Appellant, the prosecution also conducted a review of the surveillance evidence to identify any such evidence which placed the Appellant in an entirely different place from the location of a disputed telephone.

27. Mrs Gosnay's second report was served on the Appellant on Friday 27 July 2018. In total it provided sixteen pages of new charts and maps showing additional evidence supporting the attribution of the disputed numbers to the Appellant in these two

respects, with 76 pages of schedules of data which had already been made available to the defence but which underlay the new schedules etc. In addition to maps, as part of the documents served, Mrs Gosnay prepared further spider attribution diagrams which had the co-location and correlation evidence plotted, but which also (for the first time) described the "top mast" for some phones as a "serving mast" for the Appellant's home. For example, Exhibit SD2-16-58 did so in respect of the disputed 5722 number. Those diagrams later formed part of the jury bundle.

28. On Monday 30 July 2018, Mr George on behalf of the Appellant objected to the new evidence from Mrs Gosnay being admitted, on the basis that:

i) this was expert opinion evidence but presented by Mrs Gosnay who is not an expert;

ii) the evidence was too late, being served five days after the case was opened before the jury and nearly at the end of the prosecution case;

iii) due to the lateness of the evidence, the defence could not reasonably be expected to deal with it in the available time; and

iv) the hitherto unserved surveillance evidence upon which the correlation evidence relied was hearsay, and there had been no compliance with the formalities for such evidence.

Mr George does not appear to have taken specific issue with the use of the term "serving mast" in the spider attribution diagrams.

29. The judge refused the application in a ruling given the following day. In short, he found that:

i) Mrs Gosnay's evidence was not expert evidence; it was merely the collection and analysis of call data, including co-location and correlation analysis;

ii) her further evidence had been served late because, contrary to the obligation in CrimPR rule 3.3 and the judge's direction to serve a defence statement by July 2017, the Appellant had not indicated which mobile phones he accepted were properly attributable to him until 20 July 2018; no co-location or correlation analysis could be conducted until he had indicated which numbers he accepted as his own because, without that admission, there was nothing to co-locate or correlate against;

iii) there was no unfairness in admitting the evidence: as part of that ruling, the cross-examination of Mrs Gosnay was put back to 2 August which, the judge considered, would give the Appellant's legal team sufficient time to prepare for it; and

iv) although the surveillance evidence was new, if the defence did not accept the alleged sightings, then the surveillance officers could be called, if available: the problem had again arisen because the Appellant had been late in indicating which telephones he accepted as his.

The judge considered the Appellant could not have been surprised by the service of such an analysis, given that a similar analysis had been performed and served in respect of the phones attributed to Mabbott once he had indicated which phones he accepted were properly attributed to him in his defence statement served in May 2018; and that to refuse to admit the evidence would reward the Appellant's failure to make his case known earlier when, in relation to attribution of phones, he could and should have made it known.

30. As we have indicated, with regard to call data, Mrs Gosnay simply analysed the telephone mast/cell to which activity on a particular phone was registered. Insofar as the top mast was close to a person's home, that was in itself probative evidence of attribution; but that analysis could not provide a definitive answer to the question of whether a particular mast was a "serving mast" i.e. whether it served a specific address such as a person's home (in which case it would be a "home serving mast" or "home mast"). However, that could be confirmed by a radio frequency survey, which ascertains whether there is signal coverage for a particular cell site at a specified location.

31. Rachel Mounsey, a Radio Frequency Propagation Survey Technician also employed by West Yorkshire Police, performed such a survey in the period 17-22 May 2018. Her report, dated 13 June 2018 and served on 23 June 2018 (i.e. shortly before trial) demonstrated that, for the disputed 2525 and 5987 numbers, for which O2 was the service provider, the top masts identified by Mrs Gosnay *did* provide coverage at the Appellant's home address. In relation to the 5722 number, for which Vodaphone was the service provider, Miss Mounsey noted that a number of the Vodaphone cells identified by Mrs Gosnay did not appear when she searched for them from the Appellant's home address; but information provided by Vodaphone indicated that cells used during the period of alleged offending had been deactivated on 1 November 2016, i.e. prior to her survey. In terms of attribution, her survey was thus neutral so far as the 5722 number was concerned. All of that was disclosed to the defence.

32. In the event, the prosecution decided not to call Miss Mounsey, on the basis that coverage did not appear to be in particular issue; they did not consider that her evidence was needed in respect of attribution; and, although generally supportive of the prosecution case, her evidence was not especially helpful on any issue and was of no help on the question of the attribution of the 5722 number. However, the prosecution made it clear to the defence that Miss Mounsey was available for cross-examination, if required. Mr George reserved the Appellant's position on that until Mrs Gosnay's evidence had been concluded, when he indicated that he did not require her to be called.

The Grounds of Appeal

33. Initially, the Appellant relied upon five grounds of appeal; but permission was refused on Ground 4, namely that the judge erred in failing to discharge the jury after the successful application of no case to answer in respect of the cannabis conspiracy charge. We need say nothing further about Ground 4, except that we respectfully agree that there was no arguable merit in it.

34. Of the remaining grounds, three directly reflect the grounds upon which Mr George contended before Judge Bayliss that Mrs Gosnay's late evidence should not be admitted, namely:

    i) Judge Bayliss erred in permitting the prosecution to adduce Mrs Gosnay's second report, and to examine her at trial about cell site coverage, because this was expert evidence that she was not entitled to give (Ground 1).

    ii) He erred in allowing the prosecution to rely on the surveillance evidence, which was hearsay evidence for which there had been no compliance with required formalities such as service of a hearsay notice (Ground 2).

    iii) He erred in failing to give the defence sufficient time to address the new evidence in Mrs Gosnay's second report (Ground 3).

    The final ground (Ground 4) concerns the accuracy and fairness of the summing up.

35. We will deal with these grounds in turn.

Ground 1

36. As Ground 1, Mr George submitted that Judge Bayliss erred in concluding that Mrs Gosnay's evidence was not expert evidence, and in allowing her to give expert evidence during the course of evidence-in-chief at trial. Expert evidence is, of course, an exception to the usual evidential rule that witnesses cannot express an opinion: an expert can express an opinion within the proper scope of his or her experience and/or expertise.

37. He submitted that the evidence given by Mrs Gosnay included expert evidence of cell site coverage and, the evidence not being in expert form and Mrs Gosnay not being an expert (not having any qualifications or experience to deal with coverage issues, as opposed to call data analysis), the judge erred in admitting it. In particular, Mr George relied upon the fact that, in her examination-in-chief (which took place over three days: 24, 26 and 30 July 2018), Mrs Gosnay used expressions such as "cell site evidence", "serving cells" or "serve", and "a mast covering an area" – and Mr MacDonald on behalf of the Crown asked question using these terms which Mrs Gosnay adopted. That, Mr George submitted, betrayed the true nature of the evidence. Twice before the jury, she was referred to as "an expert". Furthermore, in relation to the co-location evidence, she relied upon occasions when, not the same mast, but masts "in the same vicinity" had been used by different phones, which necessarily incorporated an element of opinion or judgment as to what was "in the same vicinity" for these purposes.

38. Mr George submitted that, contrary to the judge's conclusion that Mrs Gosnay was not giving evidence as an expert, at times during her oral evidence she moved into opinion evidence on coverage which was not only expert evidence that had not been the subject of the usual restrictions and formalities attaching to such evidence, but was evidence that went beyond her experience and professional expertise in call data analysis.

39. However, we are unpersuaded by this ground. In coming to that conclusion, we have taken into account, in particular, the following.

40. Expert evidence was given during the course of the trial, in respect of the identification and valuation of drugs, drug paraphernalia and contamination of banknotes. It was throughout treated as such.

41. Mrs Gosnay clearly has considerable experience in assembling and portraying call data evidence for the purposes of supporting the attribution of a phone to a specific person. However, the analysis she performed does not require any particular expertise or experience – which is the hallmark of an expert in this context – and she was not put forward as an expert witness. In her evidence, she made expressly clear that she was not an expert witness: she said she was a professional witness who simply analysed data which she then set out in a report (2 August 2018 Transcript, page 2F) on the basis that the top mast for a particular number may "give an indication of where the user might live" (see, e.g. Mrs Gosnay's first report at page 5). We find nothing wrong with that description of her proper function.

42. The judge held that, in setting out that analysis of data, her evidence was not expert (31 July 2018 Transcript, page 5E-G); and twice intervened in her evidence-in-chief, when he was concerned that Mr MacDonald was possibly moving towards expert issues, to emphasise that Mrs Gosnay was not giving or permitted to give expert evidence (24 July 2018 Transcript, page 44A-C, and 30 July 2018 Transcript, pages 56G-57C). In relation to the former occasion, Mr George submitted that, the judge having pulled up Mr MacDonald, Mrs Gosnay nevertheless went ahead and answered his question in any event; but in response to his question she said – in our view, fairly – that she was able to say whether the data showed that a particular phone had travelled from Rawdon to Kirkstall. That was, in substance, neither expert evidence nor evidence of coverage. In his summing up (15 August 2018 Transcript, page 2C-3A), the judge gave an expert evidence direction in respect of the expert evidence in relation to the drugs to which we have referred, but not in relation to any evidence given by Mrs Gosnay: indeed, at page 3B, he expressly confirmed that she was not an expert, and so (he said) "she's not entitled to express an opinion".

43. Mr George submitted that references in Mrs Gosnay's evidence to "historic cell site data" showed that she was straying into areas of expert coverage evidence; but, as her first report makes clear, her "analysis of historic cell site evidence" was simply an analysis of cell site data to identify the mast registering the greatest number of calls for a phone. That is also how she described "cell site analysis" in her oral evidence (24 July 2018 Transcript, page 10G-11E). That touched upon coverage, but only in simple terms and to the extent that was necessary to explain her own legitimate role. It was not expert evidence. Mrs Gosnay later confirmed that, although there had been some reference to "cell site", the schedules she had produced simply analysed the billing data and showed which phones had communicated with each other (24 July 2018 Transcript, page 29A).

44. In respect of Mrs Gosnay's use of "serving mast", "home mast" and similar phrases during her oral evidence, we accept that the position is different. Before us, Mr MacDonald accepted that these are terms of art used in the context of cell coverage, and that the use of these terms should be restricted to a mast which has been confirmed as a mast which covers a specific location such as a house by, e.g., a radio

frequency survey. Mrs Gosnay's first report (correctly) used the term "top mast" to mean the mast which registered the most calls from a particular phone, which her analysis could identify. In that report, there were no references to "serving masts" or "home masts". However, as we have described (paragraph 27 above), the term "serving mast" appeared in the relevant spider attribution diagrams produced after the Appellant had indicated which phones he accepted were attributable to him and served on the defence on 27 June 2018. That appears to be the first time in Mrs Gosnay's evidence that she refers to "serving mast" or the like. She clearly used such terms there, not as incorrect terms for simply the top mast, but in the sense of a mast which served (i.e. provided coverage for) a particular location, namely (in the relevant diagrams) the Appellant's home.

45. Although those diagrams were in the jury bundle, at trial, Mr MacDonald himself appears to have introduced the term "serving mast" during Mrs Gosnay's evidence-in-chief (24 July 2018 Transcript, page 12F) in the context of a telephone attributed to Bell which, it seems, only registered calls to two masts, both of which were close to Bell's home. As we have indicated (paragraph 1 above), Bell pleaded guilty to the cannabis production conspiracy prior to the trial starting. However, that was not the focus of Mr George's complaint, which was on Mrs Gosnay's evidence on 30 July 2018 during which, often in response to questions from Mr MacDonald, she confirmed that a top mast for a particular phone was a "serving mast" for the Appellant's home address. For example, in respect of the disputed 5722 number, the transcript reads as follows (page 23G-H):

> "Q We have the serving mast constituting 49 percent of the calls?
>
> A Yeah.
>
> Q And that being a serving mast for the home address of Andrew Turner?
>
> A Yeah."

Mr George submitted that this was clearly expert evidence on coverage which Mrs Gosnay was not able to give. It should not have been admitted.

46. Mr MacDonald conceded that Mrs Gosnay's use of "serving mast" and "home mast" was wrong; and, if and insofar as, by using them, Mrs Gosnay had conveyed the view that she could and did confirm that the Appellant's address was certainly covered by a particular mast, that was evidence she was not entitled to give.

47. However, although this cannot of course clothe Mrs Gosnay with expertise she did not have – and the prosecution had determined not to rely on Miss Mounsey's evidence – Miss Mounsey's report had been served and it had been made clear that she was available for cross-examination. When Mrs Gosnay gave her evidence, it was not known whether Miss Mounsey would or would not be required to give evidence by the Appellant.

48. Miss Mounsey's report did deal with the specific issue of whether, for a particular phone, there was coverage of a specific location (e.g. the Appellant's home address)

from a particular mast, notably the top mast as identified by Mrs Gosnay. Of the Appellant's relevant phones, with the exception of the 5722 number, she confirmed that there was coverage of the Appellant's address from the top mast. As we have described (see paragraph 31 above), because the mast had been decommissioned in the meantime, her evidence in relation to the 5722 number was neutral. It was not, as Mr George at times appeared to suggest in his submissions, negative as to attribution: had it have been so, then Mr George would more likely have called Miss Mounsey. Whilst of course it was for the prosecution to prove its case, there was no evidence that the top mast in respect of any phone attributed to the Appellant did not cover that phone at the relevant time.

49. Mr George was clearly well aware of, and sensitive to, the limitations on Mrs Gosnay's evidence. In cross-examination, he was anxious to correct the impression that might well have been given by her references to "serving masts" in her evidence-in-chief that she was able to give evidence in relation to coverage. He challenged her on the suggestion in her evidence of the previous day that the top mast was the "home mast", i.e. a mast that could serve the Appellant's home address. When in cross-examination she was asked questions which might have required her to express an opinion about cell sites, she declined to do so – indicating that these were matters for Miss Mounsey (see, e.g., 2 August 2018 transcript, page 10E) or at least they were matters with which she herself could not help. She readily confirmed that, unless it had been confirmed by someone else (such as Miss Mounsey), it could not be said that a particular mast served a particular location; and she confirmed that, in her evidence-in-chief, she had simply meant that, in respect of whether there was coverage:

> "I just show the mast on my maps in relation to the home address. So it's up to yourselves to kind of draw that conclusion" (2 August 2018 Transcript, page 10E-11A).

Similarly, when asked if she had considered closer masts to a location than the most used mast, although she did say that she would expect a phone to use the nearest mast, she made clear that she had simply plotted the most used mast and did not claim that that was the closest mast (page 15G-H).

50. Even without this clarification, looking at the evidence as a whole, in our view the jury would probably have had very little doubt as to the limits of Mrs Gosnay's evidence; but, in our view, after this exchange, they could have had none. Mr George did not further complain at trial about the use of those terms by Mrs Gosnay. In our view, despite her use of the terms "serving mast" and "home mast", the jury could not have been in any doubt that Miss Gosnay was not giving, and could not give, evidence as to coverage from a particular location. She merely gave evidence, taken from the call data, as to where the top mast for any phone was situated relative to the home address of the person to whom, on the basis of all the evidence, the phone was attributed.

51. In any event, as we have explained, although at the time Mrs Gosnay gave her oral evidence the prosecution had decided not to rely on Miss Mounsey's evidence, it had made clear that she was available to be cross-examined. It was clear that Mrs Gosnay's evidence could not, in itself, prove coverage. Mrs Mounsey's evidence confirmed that the Appellant's home address was covered by the top mast for several

of the disputed phones but not for the 5722 number in respect of which her evidence was neutral. In any event, although of course if there had been positive evidence that the top mast for a disputed phone coverage did not cover the Appellant's home, that may have been determinative of the issue of attribution of that phone, there was no such evidence; and coverage was not put forward by either prosecution or defence as a critical issue. As such, there was no focus upon it. In the event, Mr George took the understandable tactical decision not to have Miss Mounsey called: her evidence was, at best from the Appellant's point of view, double-edged, and would probably on balance have favoured the prosecution case.

52. We can understand why the prosecution and the defence, for different reasons, did not consider that it was necessary or advisable for Miss Mounsey to be called to give evidence. However, whilst her evidence was never before the jury, it remained, spectral, in the background; and the fact that there was such a survey report was from time to time mentioned. Therefore, when Mrs Gosnay gave evidence as to the juxtaposition of a sighting of the Appellant at a fast food restaurant and a mast at which a disputed phone registered at or about the same time, he asked her whether she was aware of a cell site survey that the cell site she had referred to did not, in fact, serve that restaurant (2 August 2018 Transcript, page 26A-D). In the summing up, the judge referred to Mrs Gosnay not expressing an expert opinion or carrying out coverage tests, "although she did rely on tests carried out by an expert in cell site evidence" (i.e. Miss Mounsey). Without Miss Mounsey's evidence being available to the jury, we accept that any references to it were not ideal.

53. However, Mr George maintained a low profile in relation to it. So far as we can ascertain, whilst establishing as a general proposition that she could not give expert evidence on coverage, he did not ask Mrs Gosnay any questions about the disputed 5722 number. He did not, for example, complain about the references in the summing up to which we have referred; although he did, on several occasions, ask the judge to correct other matters which he considered inaccurate or unfair. Given the state of Miss Mounsey's evidence as expressed in her report, we understand this tactical stance which, in the circumstances, appears to us to have been a perfectly reasonable one to take. However, having taken it, the Appellant cannot complain that coverage was dealt with in this way.

54. On co-location, in respect of which Mr George also criticises Mrs Gosnay's evidence as expressing opinion, she made clear that she was just accurately presenting data – and considered wider questions would require her to speculate (page 25C-D). In our view, Mrs Gosnay saying that a particular mast was "in the vicinity" of a location could not, in context, be considered to have been expert evidence in any way. It is noteworthy that, in the summing up (at page 3F-H), the judge used the co-location evidence as an example of the limitations of Mrs Gosnay's evidence and how it should be treated by the jury.

55. For those reasons, we do not consider that Judge Bayliss erred in holding that Mrs Gosnay's evidence was not expert evidence; and, even if and insofar as Mrs Gosnay referred to home serving masts in her spider diagrams and oral evidence (notably on 30 July 2018), we do not consider that the jury could have been in any doubt about the fact that she could not give any expert evidence about coverage of a particular location. We are entirely confident that any error by Mrs Gosnay in this regard does not undermine the safety of the convictions in any way.

Ground 2

56. Of course, as we have indicated, some of the surveillance evidence relied upon by the prosecution in respect of the key events was very much disputed, and the relevant surveillance officers were called to give evidence and were cross-examined. However, as his second ground, Mr George submitted that the judge erred in allowing the prosecution to rely on the surveillance evidence which Mrs Gosnay referred to as showing sightings and the use of a phone registered to a mast in the same vicinity, because it was hearsay evidence for which there had been no compliance with required formalities such as service of a hearsay notice.

57. In his ruling on 31 July 2018, the judge dealt with this evidence thus (page 5H-6A):

> "I accept that the incorporation of surveillance evidence is new material, in other words, the correlation of the cell site to the surveillance, and if the defence do not accept those sightings the prosecution, I suppose, will have to call the officers concerned, if they're available, but the sightings amount to no more than ten sightings in total, three sightings in the case of the 2525 phone, three sightings in the case of the 5722 phone and four sightings in the case of the 5987 phone. This too is evidence which, had the defence made their position clear at an early stage of the proceedings, could all have been served months ago."

The prosecution made it clear that the relevant surveillance officers could and would be called, if needed; but no further point was taken by Mr George.

58. Section 114(1)(c) of the Criminal Justice Act 2003 provides that, in criminal proceedings, a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if one of four conditions are met, including (as (c)), "all parties to the proceedings agree to it being admissible". However, Mr George submitted that a hearsay notice is still required, the Appellant never waived the requirement to serve a such a notice, and no notices were in fact served. Another way of admitting the evidence of sightings would have been in the form of agreed facts; but that was not done either.

59. Mr MacDonald denied that there was any requirement to serve a hearsay notice in respect of evidence that is agreed; but it is not necessary for us to determine any such issue. The surveillance evidence was only used in respect of sightings of the Appellant at various locations at particular times, with which masts to which disputed phones were registered at or about the same time could be correlated. As noted by the judge in his summing up (15 August 2018 Transcript, page 73B), although in two respects Mr George did challenge Mrs Gosnay's accuracy in what she had relied upon, the sightings of the Appellant at the locations and times recorded by the surveillance officers were not disputed. It is not open to the Appellant now object to that evidence on the basis that it was hearsay. In any event, even if there had been an infringement of the formal requirements, in the circumstances, that could not possibly undermine the safety of the convictions or either of them.

60. We do not consider that this ground has any force.

Ground 3

61. Finally in respect of the telephone evidence, Mr George submitted that Mrs Gosnay's second report was, for no good reason, served very late – the analysis of the co-location evidence and evidence of correlation between sightings and use of a disputed phone could have been done and served months before – and, by serving it in the middle of the trial and towards the end of the prosecution case, the defence had insufficient time to deal with it properly. Mr George emphasised, as was the case, that he was sole counsel and assisted by only a solicitor's agent.

62. However, we are again unpersuaded. We agree with Judge Bayliss: for practical purposes, co-location and correlation analysis could not be done unless and until the Appellant had informed the prosecution of the phones he accepted were attributable to him. Mr MacDonald submits that the only reason why this acceptance was so late was deliberately to hamper the prosecution of the case by making such analysis impossible. That may or may not have been so. It is unnecessary for us to go that far; and, certainly, wherever the fault lay, there is no evidence or suggestion that Mr George behaved other than in a proper manner in relation to this late disclosure. However, in practice, it was not feasible for the prosecution to have done such an analysis on each combination of the nine telephones which they attributed to the Appellant, or of each sighting correlated with the use of each of the nine phones. No explanation has been given as to why the Appellant, who had all of the relevant data as well as his own knowledge, could not have identified the phones he accepted were attributable to him much earlier. It is noteworthy that he did not make that identification even in his April 2018 defence statement, when he was required to do so at a time when he must have known which phones he accepted were his. In our view, the only reason why the prosecution's new analysis was prepared and served so late was because of the Appellant's very late acceptance of telephones attributable to him.

63. Whilst not underestimating the burden on sole counsel in a case such as this, the judge particularly considered the issue of giving the defence sufficient time, and he postponed cross-examination of Mrs Gosnay until Thursday 2 August 2018, a date which has to be seen in the context of the date the new evidence was served (Friday 27 July) and the date of the hearing which admitted it (Monday 30 July). The trial judge was in the best position to determine the appropriate time required to deal with the new evidence; but, in our view, the time given was adequate. The new evidence was relatively modest; and, looking at the transcript of Mrs Gosnay's cross-examination which we have, there is no suggestion that Mr George was anything less than fully and properly prepared, as ever. The defence were in a position to challenge those parts of Mrs Gosnay's evidence they wished to challenge: and challenge them they did. In our view, there was no prejudice to the Appellant in the manner in which this additional evidence was adduced including the timing of it.

Ground 4

64. As his final ground, Mr George submits that the judge's summing up was not accurate or balanced. It was a general criticism; but he focused on two aspects.

65. First, he submitted that the judge failed to sum up the evidence of Mrs Gosnay in a fair and balanced manner, overemphasising her evidence and (for example) describing

it as "helpful" whilst failing properly to set out the challenges to her evidence made by Mr George on behalf of the Appellant.

66. We do not consider there is any force in this complaint. As Mr MacDonald emphasised, the judge made the limits of Mrs Gosnay's evidence clear to the jury and stressed that it was entirely a matter for them, on all the evidence, as to whether they were satisfied that a particular phone was properly attributable to a specific person (see, e.g., 15 August 2018 Transcript, pages 3B-H, 40H-41A and 61H-62A); and, even then, they had to be satisfied that it was, at crucial times, being used by that person (see page 3C-D). That properly described the limits of Mrs Gosnay's evidence, and the jury's role. In portraying Mrs Gosnay's evidence in a fair and proper manner, that was critical.

67. Those observations of the judge were not undermined, as Mr George submitted they were, by him saying (at page 28B-D) that "what the criminals… don't reckon with is the ability of people like Mrs Gosnay to analyse [the call data]". That was a summary of the general point that analysed call data evidence might form the basis of a jury being satisfied as to the attribution of particular phones– which, the judge made clear (at page 28D-E), the defence did not agree the jury could do in this case. Mrs Gosnay's analysis of the data which went to the issue of phone attribution was properly described by the judge as "helpful" to the jury in their task.

68. The judge did, in our view, appropriately sum up the defence case on Mrs Gosnay's evidence, notably at pages 38D-H, 59G, 62C-63B and 73B-F. In particular, at page 62F, he reminded the jury that Mr George had stressed that, just because a mast is near a location (whether that location is a person's home or where a person was sighted on surveillance), that does not mean that the mast serves that location, the fundamental restriction on Mrs Gosnay's evidence which he has highlighted in this appeal.

69. We do not consider that the summing up in any way dealt with Mrs Gosnay's evidence in an unfair, partisan or inadequate way.

70. Second, Mr George criticises the way in which the judge dealt with the evidence of DC Senior relating to the sightings of the Audi car on 31 August 2016. It was the prosecution case that, that day, surveillance officers (including DC Senior) saw the Appellant enter a blue Audi; and later that day that same car was seen by surveillance officers (including DC Senior) to meet Brook, when an exchange took place. No seizures were made that day; but the prosecution contended that, on the basis of all the evidence, the jury could be satisfied that this was a drug transaction. Mr George submitted that it was only in the summing up that it was suggested that this was a drug transaction; but we are satisfied that this had throughout been put forward as the prosecution case (see, e.g., paragraph 178 of the Prosecution Opening Note).

71. As well as the summing up, we have the benefit of a transcript of the cross-examination of DC Senior by Mr George on 26 July 2018. Whilst of course it did not set out DC Senior's evidence verbatim, we cannot see any way in which the summing up was inadequate. It made clear that DC Senior did not see the Appellant hand over anything to the men in the Audi when he met it earlier in the day. The judge made clear that, on the later occasion, DC Senior accepted that he was observing the event from a bush and did not have a clear view of the Audi; and described the two men in

the Audi as white males, whilst another surveillance officer who observed the car from a different place described them as black males, one having a lighter skin than the other. The judge specifically told the jury that they would have to consider whether this evidence was reliable because of that difference in evidence. The other officer apparently saw the car a little later, to which the judge did not refer – but we do not consider that meant that the summing up in respect of the events that day was unfair or in any way inaccurate.

72. In respect of the more general point that the summing up was imbalanced in favour of the prosecution case, again we cannot agree. In the Respondent's Notice, at paragraph (xvi), Mr MacDonald sets out places in the summing up where the defence case on particular points was made clear; and, at page 136, the judge set out in some detail Mr George's closing which reminded the jury of the main points raised by the defence during the trial.

73. We have considered the summing up with care. We do not consider that, when looked at as a whole, it was in any way unbalanced, or deficient, such as to make the verdicts possibly unsafe. On the contrary, in our view, the summing up focused the jury's attention clearly and fairly on the issues they had to consider and decide.

Conclusion

74. For those reasons, we do not consider that any ground has been made good; and we dismiss this appeal against conviction.

75. As we have indicated, the Appellant's application for permission to appeal against sentence has been adjourned so that it can be dealt with at the same time as Mabbott's similar application. Those applications can now be set down for hearing. Although, if convenient, they could be listed before this constitution of the court (or a constitution in which one or more of our number are members), we do not consider that any such constraint on the constitution is necessary.