

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NOS 202102970/B3 & 202102971/B3
[2022] EWCA CRIM 1475

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 21 October 2022

Before:

LADY JUSTICE SIMLER DBE
MRS JUSTICE FOSTER DBE
MRS JUSTICE TIPPLES DBE

REX
V
DANIEL BURDETT
RICHARD BURDETT

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR J NUTTER appeared on behalf of Daniel Burdett
MR J SMITH appeared on behalf of Richard Burdett

J U D G M E N T

LADY JUSTICE SIMLER:

Introduction

1. Daniel and Richard Burdett are brothers. On 19 August 2021, in the Crown Court at Manchester before Her Honour Judge Goddard QC and a jury, both were convicted of offences of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of goods, contrary to section 170 Customs and Excise Management Act 1979. Richard Burdett was convicted of two such offences and had earlier pleaded guilty to fraud on 21 July 2020. He was sentenced by the judge to a term of 18 years' imprisonment, less the days spent in a foreign prison which were calculated and accounted for. Daniel Burdett was convicted of five such offences. He was sentenced to a total of 25 years' imprisonment, less the calculated foreign prison days.
2. Both applicants renew their applications for leave to appeal against conviction and for representation orders following refusal by the single judge. Both are represented by defence trial counsel who acted on their behalf below. Mr Nutter appears for Daniel Burdett. Mr Smith appears for Richard Burdett. Their essential case is that the trial judge erred in rejecting submissions of no case to answer in both cases. We are grateful to both counsel for their comprehensive written and concise oral submissions on these applications.

The facts

3. There were two illegal importations in this case. On 20 April 2018 a heavy goods vehicle was stopped and searched entering the Port of Dover. Firearms, ammunition and silencers were found concealed within the vehicle. The driver was arrested, and the items were forensically analysed. DNA was discovered on both the packaging and on one of the firearms. Analysis of DNA recovered from a knotted clear plastic bag which contained

rounds of ammunition revealed a mixed DNA result which indicated the presence of DNA from at least three individuals, including at least one man. Based on that finding it was possible to say that DNA from the mixed DNA profile was 370 million times more likely to have originated from Daniel Burdett and two other men than from three unknown men. The expert who analysed the DNA concluded that the results provided extremely strong support for the suggestion that the mixed profile contained Daniel Burdett's DNA. There was also analysis of DNA recovered from a handle of a revolver. That too revealed a mixed DNA profile, this time made up from four contributors. A complete major profile matching that of Daniel Burdett was found. Based on that finding it was possible to say that DNA in that mixed DNA profile was one billion times more likely to have originated from Daniel Burdett and three unknown people, than from four unknown people. The expert who analysed the DNA concluded that the results provided extremely strong support for the suggestion that the mixed profile contained Daniel Burdett's DNA.

4. On 1 September 2018 another heavy goods vehicle was stopped and searched at the Port of Killingholme. Firearms and ammunition were found concealed in plastic boxes. Again the driver was arrested and the weapons and other items were forensically analysed. DNA and fingerprints matching Richard Burdett was found on the packaging. DNA from Daniel Burdett was also found on packaging and on one firearm. The firearms comprised ten Heckler and Koch brand P2000 self-loading pistols. The serial numbers had been mostly removed. Pistols 1-4 and 6-10 were packaged with 25 live 9 x 19mm calibre bulleted cartridges. Pistol 5 was packaged with 26 9 x 19mm calibre bulleted cartridges. In each case the ammunition was suitable for use with the firearm with which it was packaged.
5. DNA matching Daniel Burdett was found on firearm 6 and on packaging from firearms 3, 4, 6 and 7. DNA matching Richard Burdett was found on packaging from firearms 6 and

9. Fingerprints matching Richard Burdett were identified at 16 locations on a black bin bag from which firearm 10 was recovered.
6. At the same time as the lorry driver of the second heavy goods vehicle was in Amsterdam, Richard Burdett's telephone was in the same district of Amsterdam. This is where the weapons were assumed to have been placed onto the vehicle. There was an unknown mobile phone user using a number ending 518 and it was the prosecution's case that this user was responsible for the provision of the weapons. There was, however, no telephonic link between Richard Burdett and the lorry driver or the unknown 518 mobile phone user.
7. The prosecution relied on Richard Burdett's movements to and from Amsterdam and Dublin during the period before and after importation. These were encapsulated in a sequence of events chart. The prosecution also relied on Richard Burdett's use of several mobile phones, one of which ceased use several days after the second importation was stopped. Richard Burdett was found with two encrypted phones on his arrest at Manchester Airport in April 2019. He refused to provide PIN numbers to the police in respect of those phones. He breached his bail and returned to the Netherlands where he was stopped by the police in July 2019. He produced a false passport to Dutch police on that occasion and ultimately was extradited to the UK in October 2019 to face these criminal proceedings. He gave a no comment police interview. Daniel Burdett was never interviewed by police.
8. The applicants both denied involvement in the importation of firearms. They accepted that whilst they could be linked to the firearms and/or to the packaging by forensic evidence, that by itself did not prove their participation in any importation, still less importation to this country. Neither gave evidence in his defence at trial.
9. The prosecution relied at trial on the DNA evidence as the principal evidence in the case.

The DNA of Daniel Burdett was found, in summary, in the first importation on the bag of ammunition and the handle of the firearm. In the second importation, it was found on the clear clingfilm surrounding firearm 3, the heat sealed plastic around firearm 4, the clingfilm pouch surrounding firearm 6 and the creased edge of the packaging surrounding firearm 7. The prosecution also relied on circumstantial evidence and inferences in his case.

10. The case against Richard Burdett also rested principally on DNA and fingerprint evidence. In summary, this was found on the outside surface of the clingfilm pouch of firearm 6; on the outside surface of the clingfilm pouch of firearm 9, and the fingerprints on the black bin bag containing firearm 10. Then prosecution also relied on the sequence of events chart to which we have referred, his attempt to conceal his travel between the UK and Holland by the use of a false passport and his use of mobile phones and changes in use of mobile phones and numbers around the time of the importation.

The submission of no case to answer

11. The applicants made a submission of no case to answer at the end of the prosecution case. That submission was essentially founded on the contention that DNA evidence on its own was insufficient in both cases. The judge rejected those submissions. In her careful ruling the judge summarised the fact that there were two separate illegal importations of firearms and ammunition into this country from the Netherlands and that Daniel Burdett was alleged to have been involved in both importations and was charged jointly with his brother in relation to the second importation.
12. The judge directed herself in accordance with the well-known principles set out in Galbraith (1981) 73 Cr.App.R 125. She said that she would have to decide if the prosecution case taken at its highest was such that a reasonable jury properly directed

could convict each defendant. She was referred to Tsekiri [2017] EWCA Crim 40, Jones [2020] EWCA Crim 1021 and Bech [2018] EWCA Crim 448. We too were referred to those cases and have read them. The judge acknowledged that in Daniel Burdett's case, the prosecution largely, if not solely, depended on the DNA evidence. Nonetheless, as she recognised, a case can be left to a jury solely on the basis of the presence of a defendant's DNA profile on an article left at the scene in an appropriate case (see the Tsekiri factors).

13. So far as Daniel Burdett was concerned, Mr Nutter conceded that the DNA evidence was sufficient to establish a case of criminal possession within the Netherlands but not sufficient to found a case of importation into the UK. That is an argument he repeated before us. The judge however concluded that it was highly significant that his DNA was found, not only on the firearms, but on the packaging itself, which was a foundation for importation. The photographs showed the careful way items were packaged, with guns being wrapped in clingfilm, in plastic which was heat sealed and then brown plastic tape. It followed, she concluded, that the significance of the presence of Daniel Burdett's DNA was enhanced by the way the items were packaged. She accepted, as the prosecution contended, that it was a reasonable inference for the jury to draw that the packaging of the firearms was for the purpose of the importation into the UK and not simply for possession within Holland. The absence of evidence of Daniel Burdett's presence in Holland or Amsterdam at the time of either importation, notwithstanding his arrest in the Hague in December 2019 and the absence of evidence of telephone links were not, she concluded, relevant to the half time submission which depended on the sufficiency or otherwise of the actual evidence.
14. The judge acknowledged that the jury would have to consider the evidence against each defendant separately but concluded that they would be entitled to consider all of the

evidence in the case and would be entitled to take into account the fact that Daniel Burdett's brother was implicated in the placement of the firearms and ammunition onto the trailer in the Europaplein district of Amsterdam in September. Ultimately she concluded that the DNA evidence alone, bearing in mind that there were two separate importations where Daniel Burdett's DNA was found, together with the way the goods were packaged and in the absence of any innocent explanation for the presence of all the DNA, was sufficient evidence on which a reasonable jury properly directed could convict Daniel Burdett of being knowingly concerned in the fraudulent importation of the items on all counts.

15. For Richard Burdett, Mr Smith submitted, again as he did before us, that the evidence relied on by the prosecution based on the DNA evidence was so inherently weak and unsafe that the case should not proceed beyond the halfway point. On its own he submitted that the DNA evidence was insufficient. He suggested that the evidence pointed to RB residing in Amsterdam. The evidence about his phone usage in the same district and time as the lorry driver and the supplier were in contact was not so surprising given RB's links to Amsterdam. The fact RB's phone was contacting his partner at the same time as those engaged in the importation pointed away from guilt. Moreover, there was no DNA from Richard Burnett on the weapons themselves and his DNA was found only on the packaging. It was a mixed profile and that showed others had also had contact with those items. Richard Burdett did not immediately change his mobile phone after the importation, that was only done some six days later, and the fact he used a false name was of little assistance to the prosecution given his criminal past.
16. The judge once again accepted the prosecution contention that it was a reasonable inference that the packaging of the firearms in clingfilm, heat sealed plastic and brown tape

was for the purpose of importation. She regarded that as significant in relation to the counts charged and to knowledge that the goods were to be illegally imported into the UK. She placed reliance on the evidence of Richard Burdett's presence in Holland as demonstrated by the sequence of events. In her sound ruling, she referred to the fact that there was no telephone evidence to connect Richard Burdett with the driver or with anyone else who might have been involved in the importation in September; nor was there evidence of meetings that could show his participation. Those were all valid points about the strength or weakness of the prosecution case that could be raised with the jury, but her task was to consider the sufficiency of the actual evidence. There was no evidence that Richard Burdett resided in Amsterdam and no explanation why he would travel via Dublin. No explanation had been provided to the police in interview for the presence of his DNA on the items seized. The judge looked at the evidence available by way of DNA; she looked at the presence in the same district of Amsterdam at the time the goods were handed over to the driver; she looked at the change in mobile phone usage a few days later, together with Richard Burdett's travel arrangements and the encrypted phones found on him. She concluded that the evidence as a whole could properly lead to the inference that he was knowingly concerned in the importation of the items and therefore there was a case to answer on which a reasonable jury properly directed could convict Richard Burdett on the counts that he faced.

The application

17. Mr Nutter on behalf of Daniel Burdett repeats the submissions made before the judge. He referred to the joint expert report which could not say when or how the DNA came to be deposited. The DNA proved contact and might be said to have proved possession in Holland, but it went no further, and certainly did not make the leap to proving a case that

Daniel Burdett was knowingly involved in the importations concerned. This is the crux of the case. The prosecution had to prove knowing involvement in importations and the evidence was simply not capable of doing that. He emphasised the inability to identify when the DNA was deposited and that it can persist for a considerable period of time. The earlier the deposit the less likely the connection with the importation is to have been and in all the circumstances the DNA evidence by itself came nowhere near to proving knowing importation. There was nothing in the sequence of events that supported the inferences relied upon by the prosecution either.

18. We have considered those submissions with care but have concluded that the application is not arguable. In considering and rejecting the submissions made in the court below, HHJ Goddard QC recognised correctly that the prosecution case was largely, if not solely, founded on DNA evidence. She applied the relevant law correctly and considered the factors relevant to cases resting solely or mainly on DNA evidence. She made no arguable error in doing so.
19. It is significant that the DNA on which the prosecution relied against Daniel Burdett was not only present in two unconnected importations from Holland to the UK, but also on the layered, carefully organised items of packaging. It was a reasonable inference that the packaging of the firearms in this way was for the purpose of the importation. All of the features to which the judge referred, and we have identified briefly, called for an explanation and were features the jury was entitled to rely on. In all those circumstances we are in no doubt that there was sufficient evidence on which a reasonable jury properly directed could convict Daniel Burdett of being knowingly concerned in the fraudulent importation charged. There was unarguably enough evidence for the case to continue and, notwithstanding the clear submissions advanced by Mr Nutter on this application, it is

refused.

20. So far as Richard Burdett is concerned, Mr Smith submitted, as he did below, that the judge was in error in rejecting his submission of no case to answer. The prosecution case was inherently weak.
21. Mr Smith amplified that overarching submission, both in writing and orally. He submitted that the DNA evidence alone was insufficient for the reasons advanced by Mr Nutter. Moreover, the judge placed too much reliance on Richard Burdett's presence in Amsterdam as being supportive of the prosecution case in circumstances where there was clear evidence that he resided in Amsterdam in any event. She placed too much reliance on his silence in interview and her error in her first ruling was an error that reduces confidence in her ruling overall. There was simply insufficient evidence for a jury properly directed to convict and the case should not have proceeded.
22. Once again, and forcefully as those submissions were advanced, we do not regard them as arguable. Here too we can see no basis on which to conclude that the judge made any arguable error in her summary of the principles of law and in the factors on which she relied. As we have said, there was DNA from Richard Burdett on the outside surface of the clingfilm pouch wrapped around firearms 6 and 9 and there was fingerprint evidence on the black bin bag containing firearm 10. Again, it was open to the jury to conclude that the careful packaging of the firearms in this way was for the purposes of importation. In addition, Richard Burdett was in the same district of Amsterdam, namely Europaplein, at the same time as the user of the 518 number and at a time when that number was in contact with the lorry driver who was to drive the prohibited items into the UK. That was significant evidence (as the judge explained) in describing the movements of the user of the 518 number and the circuitous route that had been taken to Europaplein via Huizen,

Alkmaar, Europaplein and then Hilversum, Utrecht and Lekkerkerk. There was evidence of the lorry driver's phone also using a mast in Lekkerkerk at the same time as the 518 user and being in contact with that 518 number. Even if Richard Burdett had an innocent reason to be in Amsterdam, or indeed Europaplein, it was the arrival of the unknown 518 user at the same time and in the same area of Amsterdam as Richard Burdett that was highly significant, both as the prosecution contended and as the judge concluded. In any event, the evidence did not show that he resided in Amsterdam. It simply indicated that he was there on numerous occasions. Evidence in the sequence of events showed his phone being used to call an Amsterdam taxi firm on various dates between 14 August and 7 September 2018. There was no evidence as to the location of the phones at that time. The restaurant card did not support the submission that he resided in Amsterdam, still less Europaplein. Indeed there was no evidence as to the location of his residence. As we have said, the significance of the location evidence was not so much that Richard Burdett was present in Amsterdam, but that he was in the particular district of Amsterdam when the unknown user of the 518 number travelled to the same district. Accordingly, it seems to us that it was an entirely proper and by no means too tenuous an inference, that the user of the 518 number travelled to Europaplein to meet Richard Burdett.

23. We acknowledge the factual error made by the judge in her first ruling. However, the judge corrected that factual error having heard further submissions, and her second ruling made no reference to it.
24. Finally, so far as Richard Burdett's silence in interview is concerned, it seems to us that the judge was entitled to rely on his silence in interview when considering the submission of no case to answer. R v Jones [2020] EWCA Crim 1021 is not authority for the proposition advanced by Mr Smith in writing. That case turned on its own facts as the court was at

pains to emphasise.

25. These are all fact specific cases and ultimately this application, like Daniel Burdett's application, boils down to the question whether the evidence was sufficient to enable a reasonable jury properly directed to conclude that Richard Burdett was knowingly involved in the importation of the items concerned. We are in no doubt that it was, and there was no error or unfairness in the rejection of the half time submission in his case either.
26. For all those reasons, the application for permission to appeal is refused in Richard Burdett's case also. Accordingly, all applications are refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Fournival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk