No: 9701082/Z2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2

Tuesday 10th March 1998

B E F O R E :

LORD JUSTICE BUXTON

MR JUSTICE ROUGIER

and

THE COMMON SERJEANT
HIS HONOUR JUDGE DENISON QC
(Acting as a Judge of the Court of Appeal Criminal Division)

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R E G I N A

- v -

Jameel AKHTAR

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MR ENRIGHT appeared on behalf of the Applicant

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JUDGMENT
(As approved by the Court)

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10th March 1998

LORD JUSTICE BUXTON: This is a renewed application for leave to appeal by Mr Jameel Akhtar who was convicted in the Crown Court in Birmingham on 17th January 1997 before His Honour Judge Geddes and a jury of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a class A drug, that being diamorphine. He was eventually sentenced to 13 years' imprisonment by that same judge.

We need to say something about the background of this case before turning to the various points that have been ventilated before us by Mr Enright who appeared together with leading counsel for Mr Akhtar at the trial.

The Crown's case was that the applicant had asked two men, Abdullah Khan and Rafiq Khan, to purchase heroin in the tribal area of Pakistan and have it delivered to the applicant in the United Kingdom. It was alleged that the applicant had made a payment of cash.

The two Khans were to employ a courier whom the applicant was to pay. The man the Khans approached was in fact a person called, for the purpose of the proceedings, Mark, who unknown to them was a paid and participating informer employed by the British Customs and Excise.

The Crown allege that the applicant's motive was a financial one; he, so the Crown said, being in financial difficulties. The substance of the applicant's defence was that he had never been concerned in the importation of heroin. His discussions with Mark, to which we shall come to later, had not been about the taking, delivering and paying for heroin but about the sales prospect for an entirely different item, herbal medicines, within the United Kingdom.

It was the applicant's case or suggestion that Mark was a tool of persons in Pakistan who had hatched a plot to implicate the applicant in order to ruin his political career in Pakistan.

Mark gave evidence of a background as a paid informer for Customs and Excise and that he had acted in that capacity on a number of occasion in the last ten years or longer. He had been approached by the man Abdullah Khan

to take 20 kilogrammes of heroin, and Abdullah Khan also made an appointment for Mark to see Rafiq Khan. Mark informed the officer of the Customs and Excise who was, in colloquial terms, his controller or handler. As a result of advice from that person Mark negotiated with the Khans and agreed to take the 20 kilogrammes of heroin into the United Kingdom. Mark said that he had been told that the consignee was the applicant: a person whom he, Mark, did not know. Mark was told by the Khans that when he arrived in the United Kingdom he was to telephone Pakistan, and he would be told when he could contact the applicant. A code word or code phrase was given that the applicant would use to identify himself.

The way in which the matter was dealt with was that the drugs were not taken by Mark to the United Kingdom but were passed into the hands of the Customs and Excise. Mark however continued with the plan. He arrived in the United Kingdom and made arrangements to meet the applicant at a hotel. There were lengthy negotiations with the applicant, according to Mark being all about drugs, including the applicant saying that he wanted a sample in order to check the quality of the heroin. The arrangement, according to Mark, had been that he would receive £2,000 from the applicant. All the applicant handed over to him was £150.

We do not perhaps need to detail the various exchanges alleged by the prosecution, except that there was a meeting between Mark and the applicant at a branch of McDonalds which Mark attended with a concealed recording device. The conversation between them took place in Urdu. Mark afterwards made a note in English of what he alleged had been said, which he handed over to the Customs and Excise. Mark said that this conversation was to do with the delivery of the heroin. There were further transactions or discussions with regard to that matter.

The defendant said that it had not been his intention in anyway to be involved in heroin: he knew nothing about it. The reason he had met Mark had been that one of Khans had telephoned him and had asked him to look after him in the United Kingdom. The applicant agreed as a favour to an important person in Pakistan. Khan had told the applicant that Mark had been sent to Birmingham, where these events occurred, to do market research on, that is to say to promote, homeopathic medicines. It was the applicant's case that he was an appropriate person to assist Mark in that regard as the applicant's father had been a homeopath. The conversations between them were entirely to that end. In so far as there was reference to a sample and to getting a report on the sample in the conversations alleged between

himself and Mark, they were to a sample of homeopathic medicine.

After these events the applicant was arrested on 17th October, that is so say shortly after the discussions in the McDonalds. He complained that he did not understand or sufficiently understand the translation at his interviews, a matter to which we will return.

That was the broad structure of the case. It clearly depended, as we are told the prosecution accepted, to a large extent on the evidence of Mark; though there were other matters that were open to the jury to take note of, not least the applicant's failure in his interview to explain that he was concerned with herbal remedies and nothing else, and various other discrepancies to which the learned single judge drew attention.

We turn to the matters which taken, as Mr Enright emphasises, cumulatively arguably render the conviction unsafe. We should say that we have the benefit, as does Mr Enright, of having before us an exceptionally detailed and careful analysis of the grounds of appeal made by the learned single judge, Mr Justice Mance, the effect of that analysis having been that a number of points originally relied on by the applicant have been abandoned before us. We deal now with those that are still active.

The first objection now taken before us is that the judge ruled that there should be admitted in evidence what was described as a declaration which Mark said had been put before him, the effect of which was that he should say that he had fabricated and told untruths about the matter; and that that had been supported by threats made to him as to what would happen if he did not agree to sign that declaration. The judge admitted that evidence and allowed Mark to give it.

In the context of a sustained attack on Mark by the defence alleging, as we have already indicated, that he had fabricated his evidence and taken part knowingly in a scheme to implicate Mr Akhtar simply with a view to making money, Mark adduced the fact that this declaration had been put before him and that he had been threatened and also offered a large sum of money in order to sign it as evidence that he was not in fact engaged in this matter in order to make money out of any source other than the Customs and Excise.

The judge was conscious that this evidence carried certain difficulties or dangers. He admitted it, as he said at a ruling at page 31, in the following terms:

"Part of the defence case ... is to undermind the credibility of Mark by putting to the jury that he is telling lies, the motive behind that being that he should receive from Customs and Excise and perhaps from Rafiq Khan also a substantial payment.

"The evidence objected to if believed by the jury would, in my judgment, tend to negative that attack because it would show that Mark was prepared to reject a far larger sum than he is currently receiving. In those circumstances, I do not think the admission of that evidence would have such an effect upon the fairness of the proceedings -- fairness, that is, both to the prosecution and the defence -- that I ought to exclude it. In coming to that decision I very much bear in mind the potentially prejudicial effect of that evidence on the defendant, that being that the jury might infer that he was in some way implicated in that attempt to pervert the course of justice."

He then said that the prejudicial effect could be neutralised by an appropriate direction. Such an appropriate direction was indeed given by him at page 19 of his summing up where he said this at letter F:

"... in the circumstances the safest course would be to draw no inferences adverse to the defendant from that evidence and to look at all the rest of the evidence in the case, of which you may think there's an enormous amount."

Perhaps appreciating that that was a decision of a discretionary nature taken by the judge under section 78 of the Police and Criminal Evidence Act, that being the ground upon which this evidence was sought to be excluded, Mr Enright before us argues rather that at least the evidence of Mark as to what had been said to him about the declaration was wholly inadmissible; and not merely admissible, but such as the judge should not permit the jury to see.

The reason Mr Enright gave for the evidence being inadmissible was that the oral or reported part of the evidence emanated from Mark himself, he being the person to whose credibility in general the evidence was said to go, and in respect of an attack on whose credibility the evidence was properly adduced in the context of that attack.

It seems to us that that argument is misconceived. It goes to the weight or reliability of that evidence and we do not doubt that to that extent it was a relevant issue at the trial. It is therefore quite impossible to say that this evidence is not admissible, as my Lord Rougier J pointed out in argument. Once it is accepted, as it is, that is relevant to an issue in the case, it is only inadmissible if there is some positive reason for not admitting it. The judge dealt with all that in his ruling on the section 78 point.

It is, of course, the case as Mr Enright further argued that if what was said or allegedly said to Mark by third parties in respect of the declaration had been admitted as showing the truth of what was said it would have been hearsay, but that was not ground upon which it was admitted. It was admitted simply to demonstrate the position in which Mark found himself.

Even if there had been any doubt upon this point the judge set it all to rest in the direction that we have just cited, by telling the jury not to take note of matters detrimental to the defendant.

In our judgement the trial judge correctly ruled upon this matter on the grounds that were put to him at the trial, that is to say simply the section 78 point. We see no reason to go behind his ruling. Further points not put to the trial judge, but ventilated before us by Mr Enright, similarly in our judgement have no force. There is nothing in this ground.

Not necessarily the second complaint in order of importance but the second complaint in the way in which they are deployed in the notice of appeal, concerns the evidence of a Dr Ballard that was sought to be adduced on behalf of the defendant.

The learned single judge made the point that this evidence was produced at a really impossibly late point. It was not produced until three weeks before the trial started, nor was leave to adduce it sought until the first day of the trial. Had the judge admitted that there would have had to have been a substantial adjournment. However it is fair to say that that is not the ground on which the judge proceeded. He proceeded on the substance of the matter.

We have read Dr Ballard's report which has been put to us in its full form. Dr Ballard is, in fact, a lecturer in comparative religion at the University of Manchester, but he says in his report that he is in truth an anthropologist and has knowledge through first-hand fieldwork, and also no doubt academic study, of the literature, social conditions, mores and the like, both in Pakistan and those areas from which the protagonists in this case are said to come, and also Pakistani practices in England.

It is difficult to summarise Dr Ballard's report and we will not seek to do so, save to say in very brief terms that first of all Dr Ballard sought to analyse the conversations between Mark and Mr Akhtar and to indicate how they fitted into the cultural background of those taking part, and how therefore that might reflect on the alleged credibility or

content of those conversations; and also gave extensive evidence, or wished to do so, about cultural and social aspects of life and politics in Pakistan: the importance that would be attached to persons like the Khans, the dangers for a man like Mark of double crossing them as Mark, in effect, said he had done in this case, and the extent to which unfair practices took place in Pakistani politics, such as Mr Akhtar alleged had been his fate in this case.

Mr Enright says that the prosecution accepted that part at least of this report was relevant to the trial. Whether they accepted it was admissible is another matter.

The judge, however, was clear that none of it should be admitted. He was assisted in that view, though it is fair to say that he did not rely on this fact, by the prosecution indicating that they were ready to make concessions or admissions in respect of a substantial part of that which Dr Ballard alleged, for instance, that there was substantial trade in herbal medicine, a matter that Dr Ballard had gone into in some detail; and to admit, if admission was necessary, that there was the possibility within Pakistan of political plots taking place of the sort that Mr Akhtar alleged had happened in this case.

The substance of the judge's ruling, however, was that in so far as the evidence went to an issue in the case, it concerned issues that were for the jury to decide.

Mr Enright has stressed the different cultural background of the jurors in this case and those concerned in events in Pakistan. That is true, but juries in this country often find themselves trying cases of this sort, and with assistance from the judge, such as the jury certainly received in this case, they are able to do that perfectly fairly. None of the issues in this case are unusual.

Again, as was pointed out in argument, it is not the prerogative of Pakistan or of any country for it to be the case that to cross an influential drugs dealer is something that is only done with caution and trepidation. Nor will it be surprising to people in any country that there may be political plots which lead to events such as Mr Akhtar alleged to have happened in this case. To that extent, therefore, the judge was quite right to think that the additional evidence of Dr Ballard would not add anything in substance; quite apart from the fact, and we emphasise the judge did not rely on this, that Dr Ballard's evidence, no doubt, would have been met by other evidence from other anthropologists or other universities, an accretion of evidence that would be wholly unjustified.

We further say, however, for the avoidance of doubt, that insofar as Dr Ballard's evidence was going to be relied upon by the defence to seek to elucidate the truth or plausibility of what Mr Akhtar gave as the explanation of his various conversations with Mark, we consider it was inadmissible in any event. It was or would be evidence seeking to support the credibility or truth of another witness. This was nothing to do with the evidence of Mr Akhtar's psychology, state of mind or anything of that sort. It was evidence of cultural background which, in our judgement, would not be admissible in any event when the issue in the case was whether when they met on those occasions Mark and Akhtar had been discussing heroin or herbal remedies: a matter in our judgement not illuminated at all by any expert in any discipline whatsoever.

It was for the trial judge to decide whether Dr Ballard should be allowed to give evidence. He was entirely right in not admitting his evidence.

The next matter is that the judge admitted evidence of conversations between Mark and Akhtar, in particular the meeting at McDonalds which was tape recorded; though in addition Mark gave evidence, without the benefit of tapes, of other encounters at other places in the days immediately before. That evidence was of great importance in the case.

The complaint is made that the judge should have excluded all of that evidence because of Mark's status as an informer. Reference is made to the decision of this court in Smuthwaite v Gill, 98 Cr App R 437, which was cited to the judge and which Mr Enright relies on before us. There, dealing with the matter under section 78, Lord Taylor gave guidance as to the circumstances in which evidence given to an agent provocateur might be excluded under that section.

The trial judge took the view that that authority did not help him. He was right to take that view. The argument in this case was not that Mark was an entrapper or agent provocateur, in the sense that he persuaded Akhtar against his better judgment to do something that was a crime but which Akhtar left to himself would not have done. Rather, the issue between them was simply whether or not the transaction that Akhtar had entered to, entirely willingly on his own evidence, was a transaction about heroin or a transaction about herbal medicines. That was an issue of fact.

The two parties could give evidence about the conversations, and say how they entered into them and what had been said. It cannot possibly be the case that evidence given by an informer who is dealing with a matter in this way should be excluded under section 78, which is what seems to be argued here, otherwise any case in which such a person

reports a conversation would fall under that condemnation.

It is understandable in Smuthwaite v Gill why particular attention was paid to the issue of agent provocateur, but the case did not help the judge in this case and he was right to make his own view clear about it. There is nothing in his ruling that causes us to fault what was again an exercise of his discretion.

A further point is taken about the conversation at McDonalds, where the tape had a number of gaps and omissions in it. Mr Enright fairly says that he does not suggest that those gaps concealed matters that would in themselves cause a court to take a different view of its task under section 78. He merely says that because the conversation was not complete, and because it was only before the jury not in its original tape form but in the form of a translation, it was necessary for both parties to the conversation to give their account of it. No doubt it was.

That cannot possibly be a reason for excluding it, but simply a reason for the jury, having been properly directed as this jury was, to decide whether they are satisfied on the basis of the conversations looked at in the context of the case as a whole (and we emphasise that) that the evidence of the prosecution was something that they can act on. In our judgement, therefore, here again this was a matter very much for the trial judge. He dealt with it, if we may say so, impeccably, and there is nothing in this point.

The final complaint concerns the admission of Mr Akhtar's interviews with the police.

The complaint here was that when the matter was gone into it appeared that the interpreter who interpreted the interview to Mr Akhtar may not have literally translated into the language of Mr Akhtar the terms of the caution.

The judge dealt with this at page 22, explaining the background:

"What was said by the officer who was cautioning the defendant is recorded in the transcript of that interview and was as follows: 'Before we go any further I'm going to caution you. You do not have to say anything but it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence'. That was translated, insofar as is material, as follows: 'If you wish, you may remain in silence. This is your right, but if you don't reply to us now about anything and when you do go to court and try to answer for these things, then this may go against you'."

Two complaints were made before the judge: that there was a material difference in the main part of the translation; and secondly no mention was made in the translation that anything said by Akhtar may be given in evidence.

There is, we have to say, absolutely nothing in this point. First of all, in our judgement, the translation accurately and realistically got across to the person listening to it the substance of the caution. That is really all we can say about it. Secondly, so far as Mr Akhtar was not told that what he said might be given in evidence, that point goes completely out of the window because he was attended at this interview by an English solicitor, who heard the caution and was in a position to advise him to stay silent: which is what she did. She is recorded on the transcript as having given that very advice, and as having made that clear to the police officers. For reasons that are not clear Mr Akhtar chose to volunteer various observations, and his solicitor chose at that point not to reiterate her advice that he should not do so. What the rights and wrongs of that are one simply does not know, but one thing it has nothing to do with is the form of the caution that he was given at the beginning.

Mr Enright said, when this point was put to him, that Mr Akhtar also had complaints about the person who had translated his interview with his solicitor. He being apparently the same person who acted as the translator in the interview itself. Mr Enright said that if he translated the caution incorrectly he might have mistranslated what happened in the interview. As we have said, the case that this gentleman was incompetent, insofar as it rests upon the alleged mistranslation of the caution, is very far from made out. Not even if that was so this point, as far as we know, was never before raised in this case, and is certainly not something that this court would go into now.

We have looked at each of these points separately and, as Mr Enright urged on us, looked at them together. Viewed on either of those tests, we have to say there is really nothing in them at all. Despite Mr Enright's devoted efforts on behalf of Mr Akhtar, we can see no grounds whatsoever for differing from the extremely careful and full observations of the learned single judge, and no reason at all for acting on the additional points that Mr Enright has put before us today.

This application, therefore, is dismissed.