Regina v David Reece


No Substantial Judicial Treatment

Court
Court of Appeal (Criminal Division)

Judgment Date
24 January 2020

2018/01429/C2

Court of Appeal Criminal Division

[2020] EWCA Crim 44, 2020 WL 00433833

Before: Lord Justice Singh Mr Justice Spencer and His Honour Judge Leonard QC (Sitting as a Judge of the Court of Appeal Criminal Division)

Friday 24th January 2020

Representation

Mr M Harries QC appeared on behalf of the Appellant.
Mr A Ford appeared on behalf of the Crown.

Judgment

Friday 24th January 2020

Lord Justice Singh:

1. On 8th March 2018, in the Crown Court at Preston, the appellant, who was tried with a number of other defendants, was convicted by a majority of 10:2 of conspiracy to fraudulently evade the prohibition on the importation of a controlled drug of Class A, contrary to section 1(1) of the Criminal Law Act 1977 (counts 1 and 2), and of two further charges of conspiracy to supply a controlled drug of Class A to another, contrary to section 1(1) of the 1977 Act and section 4(1) of the Misuse of Drugs Act 1971 (counts 3 and 4).

2. On 9th March 2018, the appellant was sentenced by His Honour Judge Medland QC to sixteen years' imprisonment, to run concurrently on each count, and he was ordered to pay a victim surcharge in the appropriate sum.

3. Subsequently, on 19th June 2018, on an application to refer that sentence as unduly lenient to this court by Her Majesty's Attorney General, leave was granted, the appellant's sentence was quashed and there was substituted an increased sentence of nineteen years' imprisonment, to run concurrently on each count.

4. It is unnecessary for present purposes to go into the details of the six co-accused. A man named Frank Eaton was originally indicted, but could not be tried with the others because he was not extradited from Belgium in time. He has subsequently pleaded guilty to counts 1 to 4 and has been sentenced.

5. In the present proceedings the appellant appeals against conviction with the leave of the full court granted on 11th October 2019.

6. The background can be summarised as follows. The case concerned the importation from Belgium into the United Kingdom of large quantities of Class A drugs (heroin and cocaine) and their onward distribution.

7. On 17th May 2017, a Heavy Goods Vehicle driven by Patrick Pipeleers of Clarey Transport was stopped at Hull Docks. Clarey Transport was a Belgian freight company run by Patrick Parthoens and his son Michael Gillan. Mr Pipeleers was employed by the company. His cargo documents stated that the destination for the goods was an address in Foston, Derby. The trailer of the vehicle was searched. 196 packages containing drugs were found inside the long steel extension beam of the trailer and inside a separate piece of agricultural machinery. The packages contained 58 kilograms of cocaine and 83 kilograms of heroin. The total value of the drugs was around £5 million, with a street value of over £66 million. The purity of the drugs was around 90 per cent.

8. Enquiries were made in relation to the destination address listed on Mr Pipeleers' documentation. It was discovered that the tenant of the address in Foston was Francis Eaton. Subsequent investigations established that some 39 trips had previously been undertaken by Clarey Transport vehicles entering the United Kingdom.

9. At the trial the prosecution case was that the appellant was part of a conspiracy to import and to supply Class A drugs. The weight and value of the drugs meant that they could only have been imported in this way if a number of people who trusted each other had worked closely together. It was alleged that Frank Eaton played a central role in the case, as he had substantial connections with the three Belgian males, as well as with the appellant and his co-accused. The appellant was alleged to have been a close associate of Eaton and to have helped him with the arrangements for the reception and onward distribution of the drugs.

10. Although this was the only occasion on which drugs were found, the prosecution alleged that, owing to the level of sophistication involved in the offending, it was highly likely that drugs had previously been imported via this system. To prove the case against the appellant, they relied upon the following:

(1) The appellant's admissions that he was regularly present at the Foston premises, had worked on the piece of agricultural machinery which was later found to contain Class A drugs, and the fact that he had met one of the Belgian men at the Foston premises;
(2) Evidence that Eaton had purchased a mobile phone for the appellant shortly before the importation on 17th May;
(3) Telephone evidence to show contact between the appellant and Eaton, as well as Eaton and others unconnected to the appellant, around the time of the various trips;
(4) Evidence of the close association between the appellant and Eaton, namely, the fact that he was trusted with a debit card and a key to the Foston premises;
(5) Bad character evidence (this is most relevant for present purposes) in relation to the appellant, namely the fact that he had been convicted in Belgium in 2011 of an offence of possession of cocaine and cannabis, and that on arrest he was found to be in possession of two small amounts of amphetamine.

11. The defence case was that the appellant was not responsible for the importation into the UK or the onward supply of Class A drugs. He gave evidence that he had a gardening business and did work at the Foston premises. He stated that he was

simply a handyman and gardener and that he was not involved in drugs with Eaton or with any of the other individuals named in the conspiracy. He accepted that there were a lot of calls between him and Eaton, but denied that they were to do with drugs.

12. The issue for the jury was whether the appellant was involved in the conspiracies to import and thereafter supply Class A drugs.

13. It is important now to mention some aspects of what happened both in the proceedings leading up to the trial and during the trial. The Crown made an application to adduce bad character evidence in relation to the appellant. We were informed that that was made on 2nd January 2018. In any event, on 7th January 2018, counsel then acting for the appellant made written submissions objecting to the Crown's application. He mentioned the factual background in relation to the Belgium conviction in 2011. The burden of his submissions was to the effect that the features of that conviction were very different from the multi-handed, sophisticated offences with which the appellant was now charged. He also submitted, in accordance with well-known authority, that bad character evidence should not be admitted to bolster a weak case. He submitted that its admission would give rise to satellite litigation which could distract the jury from a fair assessment of whether the Crown could prove their case on what he described as "the ambiguous circumstantial evidence in their possession". It is notable, in our view, that nowhere in those submissions was there any suggestion that the appellant was not guilty of the Belgian matter.

14. In a Ruling given on 5th February 2018, the judge granted the Crown's application in so far as it related to the Belgian matter. He did not allow it in relation to the amphetamine matter, although he revisited that Ruling for other reasons on 23rd February 2018. So far as propensity is concerned – and that is the only issue to which the present appeal relates – he allowed to be adduced only the evidence of the Belgian matter. In his Ruling he referred by way of summary to the facts of the Belgian matter in 2010, he noted that the appellant was stopped in a Heavy Goods Vehicle together with Frank Eaton. In the HGV were found over 16 kilograms of cannabis and over 7 kilograms of cocaine.

15. On 25th February 2011, the appellant was convicted in Belgium of possession of those drugs. The judge noted the objection which was taken to the admissibility of that evidence, but disagreed with submissions then being made by counsel. The judge said:

> "This is not such a weak case whereby the introduction of this evidence would be unfair … The question really is: does it relate properly to a matter of relevance, a matter in issue between the Crown and the [appellant] such as justifies its admissibility?"

In his judgment it plainly did. He said that the jury were concerned directly with facts which were very similar in many ways. He said that they would be directed very clearly as to the extent to which they could use the information but, in his judgment, it was relevant and admissible.

16. At the trial, the appellant gave evidence on 19th February 2018. We have seen a transcript of that evidence in full, including the cross-examination. The relevant matter was canvassed in the evidence in chief at pages 13-20 of the transcript. The appellant was asked by his own counsel various questions about the conviction in 2011 and the fact that he had then admitted being involved in the transportation of drugs. He said that it was Frank Eaton's van and that he was a passenger. He said that they were going to Lyon in France, or a village near Lyon, to deliver some furniture to an English family. "It was a genuine trip, just a legitimate trip." He was then asked by his counsel how the drugs came to be in the van. He said: "Well, they weren't at that time. It was on the way back. Frank received a call off somebody and said, 'We're making a detour'. We were on the way back home". He said that the detour was to go up to Holland. He could not remember where in Holland, but

there was a guy to meet and he had to bring something back for him. He was asked what was the thing that he was bringing back; what physically had the appellant seen? He said,

> "I physically saw a chap put two holdalls into the back of the van. He didn't hide them. There was nothing…
>
> Q. In the cargo area?
>
> A. In the cargo area.
>
> Q. Right. Did you see what was in the bags or not?
>
> A. No, no.
>
> Q. Did you … what was your state of knowledge as to what was in the bags?
>
> A. I'd got no knowledge. I wasn't actually interested, believe it or not."

After a couple of other questions, he was asked by his counsel:

> "Q. … the bag comes in, what did you believe was going on?
>
> A. Well, I thought that this guy was a … he looked like a builder, and I thought these were his bags that were full of tools or whatever.
>
> Q. I know you admitted involvement and …?
>
> A. Yes.
>
> Q. … and couriering drugs?
>
> A. Yes.
>
> Q. Why did you admit it?
>
> A. Well, because they actually found some drugs …
>
> Q. Yes?
>
> A. … in the back of the van, so, you know, I had to admit my part in it. That's what I was advised to do, I think, over there. It was a foreign language and it was the most, can I just say, the most horrific …"

At that point the judge intervened:

> "THE JUDGE: Can we just pause there? … The [appellant] pleaded guilty to possession of cannabis and cocaine.

COUNSEL: Yes.

THE JUDGE: So, is he now trying to say he was not guilty of it or …?

COUNSEL: I do not know.

THE JUDGE: I am not quite sure … I mean, I can understand exactly, you know, why you are asking the questions, but …

COUNSEL: Yes.

THE JUDGE: … the [appellant] did plead guilty and there has never been an application to vacate the plea or …

COUNSEL: No, no, that is why I asked the question about knowledge."

Counsel then said that it was for a purpose and could he ask the question again. The judge permitted him to do so, and so he continued:

"Q. If you pleaded guilty …?

A. Yes.

Q. … or admitted involvement …?

A. I couldn't see.

…

Q. What was your state of knowledge about drugs in the vehicle?

A. I didn't have knowledge that they were in there, but I had to admit it because they'd found drugs. I couldn't … I was in the van and they'd found drugs in the back of the van.

Q. Right. Well …?

A. So, I couldn't see how I could possibly … you know, I was caught, if you like, red-handed.

…

Q. Yes. But to be guilty of possession, you have to know …?

A. Right.

Q. … there are drugs, you see?

A. Okay, yes.

Q. So, that is why I am asking you these questions?

A. Right.

Q. So, what did you know about the drugs being there?

A. I didn't know anything about the drugs until we were stopped on the border by douane [customs], who were searching the van. They said they were looking for tobacco, and they've opened up these holdalls and they've found the drugs inside these holdalls.

Q. Right. Well, are you disputing the conviction or are you accepting that you were rightly convicted?

A. Well, I've, I've got to accept it. I served eight months in prison for it."

Counsel pointed out that a sentence of two years' imprisonment had been imposed, together with a substantial fine. The period of imprisonment in fact served was eight months.

17. Finally, counsel asked about the terms of the appellant's release from prison in Belgium. The appellant said:

"I had to sign something on my release, that I couldn't return to Belgium for ten years.

Q. Right. So, you accepted that?

A. I did, yes. I told them at the time they could make it 50 years. I never wanted to go back there."

18. So far as the evidence in chief was concerned, the matter rested there. It was briefly returned to in cross-examination by counsel for the Crown, who was then, as now, Mr Ford, at page 240 of the transcript. In relation to the Belgian matter, the following exchange took place:

"Q. Are you telling us, or the jury, that you did not actually do anything wrong then?

A. I didn't do anything wrong?

Q. Hmmm?

A. Where, in Belgium?

Q. In Belgium?

A. I didn't say that. They weren't my words.

Q. Well, you said you just took, I think, a bag, did you, and that you did not know what was it in?

A. No, I didn't say that either.

Q. Right, well, remind us, what is it exactly you are saying you did in Belgium?

> A. Listen, I got a job with Frank. He was going to pay me £50 to go over. It was something that we'd done hundreds of times before completely legitimately. The job he got was a legitimate job, going to Lyon with some furniture for an English family that had moved out there. On the way back, Frank got a telephone call, I don't know who from. He said, 'We're making a detour', right? When we got there to wherever it was in Holland, somebody has thrown a couple of bags onto the van, not tried to hide anything, no secret compartments, they were just chucked into the back of the cargo hold. I didn't know what were in them. I was just a passenger on this trip, and that's, that's all I'm saying on that.
>
> Q. So …?
>
> A. And when we got stopped by the douane, they opened the holdalls up and there was the drugs, and I got …, I paid the price, I got put in prison.
>
> Q. You apologised out there as part of the proceedings?"

That was a reference, as we shall see, to a statement of the appellant's interrogation in Belgium, from which counsel for the prosecution was quoting. After the appellant had queried what he meant by "apologised", counsel explained in the following way:

> "Q. Right. Well, if there was a record of that which says you did, would you take it from me that it is accurate?
>
> A. Well, yes, I'd have to.
>
> Q. [Quoting] 'I've been very naïve, I'm sorry this happened', is what you said …?
>
> A. Okay.
>
> Q. … in those proceedings?
>
> A. Right."

That is how matters were left. The subject was not returned to in re-examination.

19. In his summing-up, the judge summarised the appellant's evidence at the trial (at pages 29 to 31 of the transcript). He said that the appellant knew Eaton, having met him at a party in 2007. He continued:

> "He and Eaton had music in common. They liked the same thing. Eaton would sometimes go with him in the days when he was driving and later on he would go with Eaton over to the continent. About £50 a day [would] change hands for that but essentially it was derived from their friendship with one another and was nothing sinister, nothing to do with the drug trade."

The judge summarised the evidence which the appellant had given about his gardening activities and what he had said about the meadow cutter, which was a topic at the trial, because drugs were said to have been in it.

20. Earlier in his summing-up, the judge had dealt with bad character evidence, both as a matter of law and by way of summarising what the jury had heard about the facts in relation to the various defendants to whom this related.

21. It is clear to us, from a reading of the summing-up as a whole, that, in accordance with good modern practice, the judge provided the jury with written legal directions. We have no reason, nor does Mr Harries QC who appears for the appellant today, to doubt that he would have followed the usual practice of permitting counsel to comment on those draft directions before he gave them. Further, it is clear from the summing-up that the judge adopted the good modern practice (in an appropriate case) of giving a split summing-up. He gave some of his legal directions to the jury before counsel's closing speeches. He gave further directions after speeches, and he then summarised the factual evidence that they had heard.

22. At page 11 of his summing-up, the judge gave the jury directions in relation to bad character. He said:

> "The prosecution has put before you evidence relating to other matters outside this particular case because they say that the convictions and their underlying facts will help you to decide this case which you are now trying. The prosecution says that these previous convictions display a propensity, that is a tendency, to involve themselves with large amounts of drugs and in respect of [the appellant] and Bailey, to import them, and in respect of [the appellant] to commit drug offences with Frank Eaton, and you have heard as follows and when you retire you can look it up in the agreed facts, [the appellant] was convicted in February 2011 in Belgium of offences described as being 'possessor controlled drug'. The drugs concerned were cannabis and cocaine. He committed those offences with Frank Eaton.
>
> The brief facts of the case were that they had travelled from the United Kingdom to Europe in a van to deliver some furniture before returning to the UK. On the Dutch/Belgium border they were stopped and searched and were found in possession of a bag in which was 16.64 kilograms of cannabis and 7.316 kilograms of cocaine."

23. On page 12 of his summing-up, after referring to other defendants and their previous records, the judge said:

> "What should your approach be to these previous matters which the prosecution contends show those propensities I have listed above? Plainly, your principal task in respect of them will be to decide in the light of all you know about the case whether they do prove the propensities which the prosecution claim. In consideration of this you may well wish to consider that whilst there are arguably some similarities between those matters and this case, there are also some differences.
>
> The similarities and differences. In 2011 [the appellant] offended partly in relation to Class A drugs, cocaine, and partly in relation to cannabis, a controlled drug of Class B, and it was offending with Eaton and it related to drugs which, although discovered in Europe, were apparently destined for the UK, with [the appellant] and Eaton in the van. That having been said, there was no heroin and the drugs were not in fact imported into the UK, and it was seven years ago."

It is worth pausing there to observe, as the Crown have submitted to us, that, if anything, the judge there pointed out differences between the 2011 matter in Belgium, which the jury could take into account, as compared with the alleged offences that the appellant now faced. It is also right to observe, as Mr Harries has pointed out to us, that later on the same page, in relation to other co-defendants, at least in brief terms the judge reminded the jury of what the relevant defendant had said. By way of example, in relation to one of the co-accused (Solomon), the judge reminded the jury:

> "Solomon says he was only a custodian for someone else; it was thirteen years ago."

24. The judge continued with his legal directions at the bottom of page 12:

> "Bearing in mind those similarities and differences and the points which the prosecution and defence put to you, ask yourself whether in respect of any one of those defendants, those other matters do actually show the propensities which the prosecution claim and which I have summarised above … If you conclude that they do not, then you will ignore them as they would be of no further interest or importance. If you conclude that they do show those propensities, then you may, if you think it right to do so, use them as additional support for the prosecution case against that particular defendant to whom they apply. You must not find a defendant guilty wholly or mainly on account of those previous matters; they may amount to additional support for the prosecution case."

He then returned to the case of the appellant in the following way:

> "You have also heard that when he was arrested, [the appellant] was found to be in possession of two ounces of amphetamine, which is a controlled drug of Class B, together with bags which tested positive for amphetamine or caffeine powder. He was an amphetamine user. Amphetamine is, as I say, a controlled drug of Class B.
>
> The prosecution does not say that this amphetamine usage and possession shows that [the appellant] has a propensity to commit offences of the type with which he is charged in this case. Why have you heard about them? You have heard about these matters relating to [the appellant], the amphetamine possessing and usage, because in his evidence he said of his previous conviction in Belgium in 2011 that, 'It had rocked me to my core', and said that if he had thought Eaton was involved in drugs in this case he would not have involved himself with Eaton at all at Roston, Foston or Boylestone. Those answers might have created the impression that in the wake of his imprisonment in Belgium and being rocked to the core by it, he had divorced himself completely from drugs and in the light of that it is right that you should hear of the amphetamine possession to balance the picture and redress what, if that impression was in your view the one he thus created, would have been a false one."

25. Finally, we observe that just before the judge began to summarise the evidence to the jury, at the top of page 14 of the summing-up he gave the following direction:

> "This is your territory, not mine. You are in charge of the facts, not me. If I appear at any stage to express a view one way or the other, if it chimes with the view you have, fine, adopt it; if not, ignore it. Whatever view I may have of the facts is irrelevant."

26. The original grounds of appeal have now fallen away. Leave to advance them was refused by the single judge, and refused again on the renewed application before the full court on 11th October 2019. Leave was, however, granted by the full court on one new ground: that the judge erred in summing up the case to the jury in that he failed sufficiently to remind the jury of the appellant's evidence in relation to his previous conviction in Belgium.

27. The prosecution lodged a Respondent's Notice and advanced grounds of opposition in which it is submitted that the judge did not err in his summing-up to the jury; that he gave a full resumé of the appellant's case in his summing-up and was not required to include any of the further detail, as set out in the new ground of appeal; and point to the fact that trial counsel did not raise any issue with the summing-up demonstrated that it was entirely appropriate in the light of the facts of this case.

28. On behalf of the appellant, Mr Mark Harries QC (who was not trial counsel) advances the single ground of appeal for which leave was given by the full court. He submits that the trial judge erred in that he failed to remind the jury in his summing-up of the appellant's explanation given in his evidence at the trial for the Belgian conviction of a drugs offence which had been ruled admissible by the trial judge as bad character evidence on 5th February 2018, pursuant to section 101(1)(d) of the Criminal Justice Act 2003 .

29. We should also refer to the terms of section 74(3) of the Police and Criminal Evidence Act 1984 ("PACE"), which provides:

> "In any proceedings where evidence is admissible of the fact that the accused has committed an offence, if the accused is proved to have been convicted of the offence by or before any court in the United Kingdom or any other Member State [of the European Union] … he shall be taken to have committed that offence unless the contrary is proved."

The words "unless the contrary is proved" permit a defendant to challenge a conviction. The burden of proof lies on the defence; and the standard of proof is the balance of probabilities.

30. Mr Harries submits that the underlying basis of the Crown's application to adduce the evidence of the Belgian conviction was to show that the appellant had a propensity to commit offences of the kind with which he was now charged. In other words (and breaking down the elements of the factual allegations), (a) the appellant had knowingly involved himself in the drugs trade in the past; (b) his involvement was with Frank Eaton; (c) it was importing wholesale quantities of drugs; (d) it was from Belgium; and (e) it was by vehicle. Mr Harries further submits that this propensity simply could not be established

if, on the balance of probabilities, the jury accepted that the appellant did not, in fact, know of the existence of the drugs in the holdalls in the van in December 2010. He submits that it is immaterial for this purpose whether such knowledge amounted to a defence in Belgian law, or whether the appellant perceived that he had no defence in Belgian law. He submits that the fundamental question is a factual one: whether the appellant had been a knowing party to drug trafficking in December 2010. He submits that the appellant resolutely maintained in his evidence that he was not, both to the Belgian authorities (see the Statement of Interrogation at the time) and to the jury at his trial.

31. The fundamental complaint which Mr Harries makes is that in his summing-up the judge made no reference at all to this aspect of the appellant's evidence. We have already set out the material parts of the summing-up. Furthermore, Mr Harries submits that whether previous convictions in fact show a propensity to behave in a certain way is strictly within the province of the jury; they should be directed that they must take into account what the defendant has said about his previous convictions: see the well-known decision of this court in *R v Hanson [2005] EWCA Crim 824; [2005] 1 WLR 3169* at [18], in the judgment of the court delivered by Rose LJ.

32. Mr Harries also contrasts the approach, as we have said, to the bad character evidence against two other defendants at the trial, Solomon and Rawlings. Although Mr Harries does not accept that those references were adequate, he observes that there was at least some reminder given to the jury of the evidence of each of those defendants on the topic.

33. Mr Harries submits that in order to direct the jury properly on this issue, the trial judge should have expanded his directions to include the following three matters: (a) a summary to the jury of the appellant's evidence as to his lack of knowledge of the cannabis and cocaine, the subject of the Belgian conviction, rehearsing some, but not necessarily all, of the evidence which we have sought to set out above; (b) a direction should have been given to the jury that the Belgian conviction was capable of proving that the appellant committed that offence, unless the jury were satisfied, on the balance of probabilities, that the appellant had proved that he did not commit the offence; and (c) a direction to the jury that in the circumstances of this case, if they were satisfied, on the balance of probabilities, that the appellant had proved that he did not know of the drugs, then the propensity contended for by the Crown could not be established and the evidence must be disregarded.

34. Finally, Mr Harries submits that this defect in the summing-up is so fundamental that it renders the convictions unsafe, despite other circumstantial evidence which was before the jury. In that context, Mr Harries submits that the propensity issue would have had such an effect on the appellant's credibility in the eyes of the jury that it would also have tainted the other circumstantial evidence and how they viewed it as against the appellant. He therefore submits that this matter cannot be insulated from the other circumstantial evidence on which the prosecution rely.

35. In the course of his oral submissions before this court, Mr Harries made it clear that he does not criticise as part of his appeal the conduct of trial counsel or the legal team then acting for the appellant. That, in our view, as will become clear, is highly material to how this court must view the only ground of appeal which is advanced with the leave of this court. This is not one of those appeals, which the court sometimes has before it, where criticism is made as part of the grounds of appeal of the conduct of trial lawyers acting for a defendant, including counsel when appropriate.

36. Secondly, we observe that Mr Harries made it clear at the hearing before us that he does not know what the elements of the offence in Belgian law were. In particular, he does not know whether knowledge is required as an essential element before a person could be convicted in Belgian law of the offence to which the appellant pleaded guilty. He accepts, as is clearly correct as a matter of law, that since a question of foreign law in this country is a question of fact, to prove that matter one way or the other would have required expert evidence to be adduced. There is no such evidence. He submits, however, that the fundamental point is that, even accepting that knowledge is an element of the offence in Belgian law, it is not relevant

because the evidence of the appellant amounted to a denial of the underlying facts, in particular his knowledge of the drugs in the holdalls at the time.

37. A skeleton argument was filed at the court's direction by Mr Ford on behalf of the Crown. In the result, we did not need to call upon Mr Ford, although we are grateful to him for attending the hearing before us. He submits that the judge's directions on the bad character aspect of the appellant's evidence were not deficient. In the alternative, he submits that they were not so deficient as to render the conviction unsafe in the light of the other evidence which was before the jury. He summarised that evidence at paragraph 35 of his skeleton argument. It is unnecessary for present purposes to rehearse that in full. We note, by way of example, the following matters:

(a) That the appellant had a close and historic association with Eaton;
(b) That he had a regular and physical role at Foston (the remote destination);
(c) That he was supposedly "gardening" there, and yet the bulk of the active conspiracy period when the wagons were bringing in the drugs was winter;
…
(f) That he had worked physically on the actual piece of agricultural equipment (the meadow cutter), in which a cavity had been mechanically created to hide kilograms of drugs. It is submitted that this brought him very close to the evidence and would "cover" him in the event of forensic evidence emerging.
…
(j) Eaton trusted the appellant with a debit card and with a key to the drugs delivery destination.

38. As part of his primary submission, Mr Ford makes the following points:

(1) The appellant was not, in the final analysis of the evidence he gave at the trial, disavowing himself of responsibility for the Belgian conviction;
(2) There was no absolute obligation on the trial judge to remind the jury of everything which the appellant had said about his previous conviction; nor does the decision of this court in *Hanson* say so;
(3) The judge's omission to include the appellant's suggested lack of knowledge of the contents of the previous packages was not so significant as to be fatal to his direction on bad character;
(4) The direction which was given was tailored to the facts of the case. It was legally sound and was arguably more beneficial to the appellant than a confusing one would have been which catered for the appellant's acceptance of the correctness of his conviction, but somehow also covered his denial of knowledge of the contents of the holdalls.
(5) The direction proposed by the appellant in his skeleton argument does not bear scrutiny given the comments of this court in *R v C [2010] EWCA Crim 2971; [2011] 1 WLR 1942* . In particular, Mr Ford reminds this court of what Lord Judge CJ said at [14]:

> "In our judgment it is essential that the defendant should provide a more detailed defence statement in which, quite apart from setting out his case in relation to the offences with which he is presently charged, he should identify all the ingredients of the case which he will advance for the purposes of discharging the evidential burden of proving that he did not commit the earlier Huntsman offences. That may enable the prosecution to prepare draft admissions of fact, and also to collate the necessary evidence. The bare assertion that the defendant did not commit these offences is inadequate."

39. Mr Ford submits that in the light of the appellant's answers, when the judge had been sufficiently concerned to ask questions to clarify the matter, the issue fell away and assumed no further significance in the case. Mr Ford reminds us that the burden of proof under section 74(3) of PACE lies upon the defence. He submits that once it had become clear that the appellant was not, in truth, disavowing responsibility for the previous Belgian conviction, the duty of the trial judge was to

give a clear direction on propensity, and that is what he did. He submits that it was more important for the judge to tailor the direction to the facts of the present case. He submits that what the judge in fact did was to highlight the positive factual differences between the allegation in the present case and the previous Belgian conviction. This was not only appropriate, submits Mr Ford, it was helpful to the appellant. We respectfully agree.

40. Finally, as we have mentioned, Mr Ford submits that, leaving aside the whole question of bad character evidence, there was sufficient evidence to convict the appellant and that his convictions are not unsafe: see the items of evidence summarised at subparagraphs (a) to (k) of paragraph 35 of his skeleton argument.

41. In our judgment, the fundamental difficulty with this appeal lies in the terms of section 74(3) of PACE. As we have said, that provision makes it clear that the fact of a conviction, either in the UK or in another EU Member State such as Belgium, is, without more, proof of the fact that someone did commit the offence of which they were convicted. It is not conclusive; but a presumption is created. The burden of proof then lies on the defence to prove that the offence was not, in fact, committed. That is on the usual standard of proof, where the law imposes a burden on the defence, rather than on the prosecution, namely, the balance of probabilities: see *R v Carr-Briant [1943] KB 607* .

42. The proposed directions which Mr Harries submits had to be given, which we have summarised earlier, in truth included what would have been required by way of a section 74(3) direction. However, the reality on the facts of the present case is that the appellant did not, in fact, challenge his guilt at all. Nothing had been raised about this, whether at the stage when an application was made by the Crown to adduce bad character evidence and when counsel then acting for the appellant made written submissions objecting to that application, or at any other stage. The appellant's own evidence at trial raised a possible question mark over this. That led to the intervention of the judge fairly to clarify the position. The appellant did clarify the position and everyone then moved on.

43. The second difficulty for the appellant is that he was represented throughout by counsel. We note, as we have said, that the judge gave a split summing-up. Many of his directions of law were given before closing speeches. Those directions were set out in writing. Counsel who represented the appellant at the time did not ask for any direction to be given about section 74(3) of PACE, or for the standard directions on bad character to be modified. The judge gave those directions, as we have cited at some length. Nor did defence counsel ask the judge to expand on what he had said in summing up the evidence prior to the retirement of the jury. In our view, the judge was entitled to summarise the evidence in the concise way in which he did. There was no requirement on him to repeat every detail of what each defendant had said in his evidence. In our judgment, the judge fairly put the issues before the jury and summed the case up to them in a balanced way.

44. Finally, there was, in any event, a great deal of other evidence which pointed to the appellant's guilt. We have sought to summarise that evidence (by way of example only) earlier in this judgment. In the circumstances of this case, even if there had been any error, which we emphasise we conclude there was not, it does not affect the safety of these convictions.

45. For those reasons, this appeal must be dismissed.