MC/CRIM/09/18

JUDGMENT

REGINA

v

SIMON NICHOLAS FAGAN

before
HHJ Clare Faulds

Given on
10th October 2018

Heard on
8th and 9th October 2018

Representation:

Mr Stuart Walker Crown Counsel, Prosecution

Mr Phil Axon Simon Nicholas Fagan

This judgment will be published indefinitely for this reason:

- *The judicial officer is of the view that indefinite publication of this judgment is appropriate.*

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CASE NO MC/CRIM/09/18

IN THE MAGISTRATE'S COURT OF THE FALKLAND ISLANDS

Courts and Tribunal Service
Town Hall
Ross Road
Stanley
Falkland Islands

Date: 10th October 2018

Before:

CLARE FAULDS (SENIOR MAGISTRATE)

- -

BETWEEN:

REGINA

and

SIMON NICHOLAS FAGAN

- -

Mr Stuart Walker (Counsel) for the Crown

Mr Phil Axon (Falklands Legal) for the **Defendant**

Hearing dates: 8th & 9th October 2018

- -

Approved Judgment

- -

1. The defendant faces 8 charges for drug offences alleged to have been committed on specific dates during a period of a little over 16 months, from 9th December 2016 to 21st March 2018. 7 charges relates to offering to supply cannabis or cannabis resin which is a Class B controlled drug. The eighth charge relates to an offer to supply cocaine which is a Class A controlled drug. All but one of the charges are against the Defendant alone but one charge is also jointly with Aaron Thomas. All the charges are brought under section 4(e) and Part 2 of the Schedule to the Misuse of Drugs Ordinance 1987.

2. The defendant has pleaded not guilty to all 8 charges. I must reach a verdict on each separate charge and to do this I must consider the evidence both as a whole and in separate parts or the elements of it relating to the specific charges. The prosecution must prove that the defendant is guilty. He does not have to prove that he is innocent. For the prosecution to succeed in proving that he is guilty I have to be made sure of his guilt after considering the evidence.

3. The defendant decided not to give evidence in court. It was his right to make this decision and he received legal advice before he made the decision. He was interviewed by the police and transcripts of two interviews have been submitted in evidence. It is open to me to draw such inferences as appear to me to be proper and to conclude that he did not feel he had an answer to the prosecution case that would stand up to cross-examination.

4. I have noted the defendant is a man of previous good character. This does not mean that he could not have committed the offences with which he is charged but it may mean that he less likely to have committed them.

5. I have received note of agreed facts and, in addition to the transcripts of the interviews, I have exhibits comprising 238 pages of communications data from mobile telephones and over 140 pages of data relating to messages on Facebook Messenger and WhatsApp Messenger. The contents of these exhibits have not been challenged. I have also seen the exhibited articles seized by the Royal Falkland Islands Police during a search of the defendant's room at the YMCA in the early hours of 11th May 2018.

6. The prosecution case is that through text and social media messaging the defendant concerned himself in the making of offers to supply controlled drugs.

7. The prosecution say that the defendant and the people with whom he was communicating tried to hide the fact that they were discussing controlled drugs. A form

of code was used between them with drugs being referred to as "DVDs" and "Movies" in an effort to conceal the true nature of the conversation. In addition different terms were used for different types of cannabis. Cannabis resin, for example, was referred to as "brown" and cannabis bud as "green" due to their respective colours. The code that was being employed was not standard and, depending on the person in communication with the defendant, the terms used differ. The prosecution case is that references to "kinder eggs", "cabbages", "bullets" and to "green" and "brown shoes" are all references to cannabis and cannabis resin. It is submitted by the prosecution that each encoded term was an attempt to conceal the true nature of the real subject of the conversation - illegal drugs.

8. The prosecution suggest that when the messages are looked at in detail it will be seen that the amount of money that is being discussed at the same time does not accord with the covering code word and shows that conversation cannot be taken at face value. For example, the prosecution says, "kinder eggs" may be a popular chocolate treat but they do not change hands for hundreds of pounds.

9. Also, at times the defendant and the people with whom he communicated were careless and allowed the code to slip and the true subject of the conversation, the subject of drugs, becomes clear. Messages referring to smoking joints and getting stoned show the true nature of the business in which the defendant was engaged.

10. The prosecution have referred the court to evidence that they say proves the charges. In the early hours of the morning on 11th May 2018 the Royal Falkland Islands Police executed a search warrant at the home address of the defendant. The defendant was arrested at that time and his address was searched. The prosecution make clear from the outset, in fairness to the defendant, that no controlled drugs were found there.

11. The prosecution point to evidence recovered from the defendant's room on 11th May 2018 and say that it helps to prove the alleged charges. There were:

    a) Cannabis grinders and cannabis pipes.

    b) A set of scales, cling film and small clear snap bags. This, say the prosecution, is equipment used for the weighing, wrapping and packaging of drugs.

    c) A number of pieces of paper containing lists of names with numbers written next to them were also discovered. Dealers lists, say the prosecution, recording drug deals made and money owing

12. I have done as Mr Axon urged on behalf of the defendant and looked at each message and each conversation as recorded. I agree with him that the threads are, at least at times, unclear but I do not accept his contention that if green and brown are references to cannabis, there is no explanation for 'red shoes'. In my trawling through the messages it is very clear that the defendant was trading, that is buying and selling, many items of different kinds from TVs and mp3 players through to clothing and this would include shoes. He appears to have been downloading and selling music and there are references also to cigarettes.

13. I have noted, too, that DS Allcock has not made absolute statements as to how the messages should be interpreted or as to the meaning of the words and phrases. He readily conceded 'anything is possible' but he also was firm in his conclusion that the messages relate to drugs.

14. I have drawn an inference that the defendant's silence is because he did not have an answer to the prosecution case that would stand up to cross-examination.

15. I must consider the law that I must apply. The offence has certain elements. First of all, looking at 'being concerned in', the prosecution and the defence have helpfully referred me to the commentary in Archbold 2018 and also to the cases cited there *R v Martin and Brimecome* [2015] 1 Cr App R 11 CA and *R v Blake,* 68 Cr App R 1, CA and *R v Hughes(R)* 81 Cr App R 344CA. It establishes that section 4 of the Misuse of Drugs Ordinance 1987 has been particularly widely drawn so as to involve people who may be at some distance from the actual making of an offer. When it comes to considering 'being concerned in' it means exactly that. There is nothing peculiar about the interpretation of the words.

16. The offer to supply is not, in this context, the same as we would have to consider were we looking at suing for a debt, for example, where contract law comes into it. The offence here lies in making an offer to supply a controlled drug. There is the case *R v Mitchell* [1992] Crim LR 723 CA which assists in understanding what an "offer" means in this context. It may be made by words or conduct. If it is by words, one must judge from the words whether it is an offer to supply a controlled drug. If by conduct, such as to hold a package in one hand and in the other hold a placard saying £20, there it might be relevant to ask what was in the package. Was it a controlled drug or not?

17. Having dealt with the first two elements, those being 'being concerned in' and 'making an offer to supply', I have to look at the meaning of 'supply' and it includes distributing. There is strong case law as to the meaning of it, and without wishing to read out of a text book which is of little purpose here, I have to simply apply the law as to whether there is, in this instance, the element which is covered by the word 'supply'.

18. As I hope has become clear being concerned in an offer to supply something other than a controlled drug is not what I am concerned about at all. What else the defendant was

trading in is not a matter for this court at all. I am only concerned as to whether the activities meet the criteria that is covered by the Misuse of Drugs Ordinance 1987, that is if the supply relates to a controlled substance.

19. I am satisfied that the various elements of being concerned in an offer to supply are met in the way that the defendant conducted his transactions in relation to the items and instances which the prosecution say relates to controlled drugs. I have given careful consideration to the suggestion that a code has been used to conceal the true nature of the object or substance for sale. I accept this suggestion. I can find no other plausible interpretation for the communications. I find at times the communications are very clear as to the simple transactions, the ordering of a sandwich for example. Where they are unclear, or perhaps simply strange rather than unclear, I find that the use of a code is the only possible common sense answer and I am sure that all factors pointed to by the prosecution from the price and inconsistencies and the correlation between the colour used and the types of cannabis are such as to confirm this and to make me sure. I have looked carefully at each conversation. It has taken some time and I have given particular attention, of course, to those conversations which the prosecution have drawn my attention as proving each charge, but I have considered those particular conversations in the context of the whole of the communications. It leaves me with no doubt. Accordingly I find the defendant guilty on all counts.

20. For the record therefore;

Charge One
Simon Nicholas Fagan, on the 9th day of December 2016, was concerned in the making of an offer to supply a controlled drug of Class B, namely cannabis or cannabis resin, to another.
Contrary to section 4(e) and Part 2 of the Schedule of the Misuse of Drugs Ordinance 1987
I find the defendant Guilty

Charge Two
Simon Nicholas Fagan, on the 3rd day of January 2017, was concerned in the making of an offer to supply a controlled drug of Class B, namely cannabis or cannabis resin, to another.
Contrary to section 4(e) and Part 2 of the Schedule of the Misuse of Drugs Ordinance 1987
I find the defendant Guilty

Charge Three
Simon Nicholas Fagan, on the 26th day of January 2017, was concerned in the making of an offer to supply a controlled drug of Class B, namely cannabis or cannabis resin, to another.
Contrary to section 4(e) and Part 2 of the Schedule of the Misuse of Drugs Ordinance 1987
I find the defendant Guilty

Charge Four
Simon Nicholas Fagan, on the 4th day of February 2017, was concerned in the making of an offer to supply a controlled drug of Class B, namely cannabis or cannabis resin, to another.
Contrary to section 4(e) and Part 2 of the Schedule of the Misuse of Drugs Ordinance 1987
I find the defendant Guilty

Charge Five
Simon Nicholas Fagan, on the 6th day of February 2017, together with Aaron Thomas, was concerned in the making of an offer to supply a controlled drug of Class B, namely cannabis or cannabis resin, to another.
Contrary to section 4(e) and Part 2 of the Schedule of the Misuse of Drugs Ordinance 1987
I find the defendant Guilty

Charge Six
Simon Nicholas Fagan, on the 16th day of May 2017, was concerned in the making of an offer to supply a controlled drug of Class B, namely cannabis or cannabis resin, to another.
Contrary to section 4(e) and Part 2 of the Schedule of the Misuse of Drugs Ordinance 1987
I find the defendant Guilty

Charge Seven
Simon Nicholas Fagan, on the 8th day of January 2018, was concerned in the making of an offer to supply a controlled drug of Class B, namely cannabis or cannabis resin, to another.
Contrary to section 4(e) and Part 2 of the Schedule of the Misuse of Drugs Ordinance 1987
I find the defendant Guilty

Charge Eight
Simon Nicholas Fagan, on the 21st day of March 2018, was concerned in the making of an offer to supply a controlled drug of Class A, namely cocaine, to another.
Contrary to section 4(e) and Part 1 of the Schedule of the Misuse of Drugs Ordinance 1987
Guilty
I find the defendant Guilty

Dated: 10th October 2018 *Senior Magistrate*