APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 78
HCA/2018/682/XC and HCA/2019/47/XC

Lord Justice General
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTES OF APPEAL AGAINST CONVICTION AND SENTENCE

by

(FIRST) SCOTT McGAW and (SECOND) ERIC PETER REID

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant (McGaw): A Ogg (sol adv); Paterson Bell (for Tod & Mitchell, Paisley)
Appellant (Reid): McConnachie QC; Paterson Bell (for David Kinloch & Co, Glasgow)
Respondent: A Prentice QC, AD; the Crown Agent

14 November 2019

[1] On 27 November 2018, at the High Court in Glasgow, the appellants were convicted of a charge that:

> "(2) between 26 May 2016 and 1 March 2017 ... at 47 Back Sneddon Street, Paisley, ... you ... while acting along with others, did intentionally produce a psychoactive substance, namely Etizolam tablets which you knew or suspected was psychoactive and which you intended to consume for its psychoactive effects or which you knew, or were reckless as to whether, would likely be consumed by some other person for

its psychoactive effects: CONTRARY to the Psychoactive Substances Act 2016, section 4."

[2] After the conclusion of the Crown case, a co-accused, namely Harry Ingle, had pled guilty to this charge and to an additional charge under section 5(1) of the 2016 Act; that is supplying, or offering to supply, a psychoactive substance. A fourth accused, namely Nicholas Conway, also pled guilty to a contravention of section 5.

The evidence

[3] Etizolam is a benzodiazepine similar to, but considerably stronger than, diazepam. It was specifically prohibited by the 2016 Act, which came into force on 26 May 2016. It was not disputed that, prior to that date, the appellants, along with Mr Ingle and others, had been involved in the production of large quantities of Etizolam tablets at the address in the libel. These premises had been rented by Mr Reid from September 2013. After that date, supplies of the substance were obtained from China. They would be processed at the premises by the addition of sundry adulterants and binding agents, which would be bought from suppliers in the United Kingdom, pressed into small blue tablets, by a substantial pill press capable of producing 200,000 tablets per hour, and packaged for sale.

[4] Mr Reid was a director of the Vitamin Supplement Co Ltd (VitSupCo), which was a vehicle for the production of Etizolam rather than vitamin supplements, as the name might otherwise suggest. Mr Ingle had some knowledge of chemistry. He described himself as the principal scientist in the operation, having charge of the day to day running of the premises. Mr McGaw was involved in the financial aspects, including the creation of a logo for the company and the purchase of the necessary chemicals, adulterants and binding agents from sources in China and the UK. On 17 February 2016, Mr Ingle video-recorded himself

complaining that Mr McGaw was spending the proceeds on liposuction and that he (Mr Ingle) would have to ask him for a greater percentage. CCTV images, dated 20 May 2016, showed Mr McGaw in the premises wearing a white suit, mask and glasses. He had spent some nine hours there.

[5] In terms of a sixth joint minute, orders were placed for blue (and other) pigments, which are used to colour the tablets. These were invoiced to Mr Reid at VitSupCo fairly regularly from April 2015 to February 2016. Contracts with Fed Ex related to deliveries of tools, colouring, triazolo and packaging materials from China to Mr Reid and/or his company from December 2015 to 23 May 2016. These were signed for by Mr Reid. Orders for scales, soundproofing and a variety of gloves, cleaners and protective clothing were placed by Mr Ingle from 20 April 2016 to February 2017 and delivered to Mr Reid.

[6] On 1 March 2017, the police searched the premises. They were chaotic, unclean and had a thick layer of blue dust. Mr Ingle was outside. He was covered in that dust. Mr Conway was inside, weighing a large tub of the tablets. He was wearing a forensic suit and mask. The pill press was pumping out tablets of Etizolam. There were large amounts of adulterant and binding agents in the premises, coupled with a vast quantity of finished tablets with a street value of some £1.6 million. A note found in Mr Ingle's possession, read as follows:

> "1 Buy 15 holdalls:-
> Let Scott know we're gonna buy them/whe was the cheap place
> 2 · Make up mixes
> · Make, dc dust
> · Bag up.
> 3 Deliver ! · 5 Monday
> 4 Hire AK
> 5 Order seal
> 6 Nick: train

7 Payment
[overleaf]
Van
Heat
Bags
Back 11 am ideally
For Nick".

[7] In relation to evidence of the involvement of the appellants after the coming into force of the 2016 Act on 26 May 2016, there were sundry communications between the appellants and their co-accused and others on social media, notably WhatsApp. The messages were largely recovered from an Apple laptop computer used by Mr Ingle. Their content was agreed in a ninth joint minute. In June 2016, it appeared that Mr Ingle and Mr McGaw were planning a visit to Spain to look at factory premises. Shortly after midnight on 29 June 2016, Mr Ingle messaged Kane (a supplier in China) as follows:

> "Hi Kane, Can you let me know who to send cash to in Manchester, I have some for you. Scott is away. I want to send on Wednesday".

In the evening of the same day, Mr Ingle exchanged messages with Kane, as follows:

> "Kane are you still making Eti?
> Hi Harry".

[8] On 3 July, Mr Ingle exchanged messages with Mr McGaw:

> "... Said I wanna come over and oversee the building of clean room section etc. He's got some ideas but we wanna keep budget low so can spend a bit on a wee extractor if necessary.
> ☺ ☺ yes that would be handy.
> Ok, sounds good mate. Keeping budget low is key here. Don't want him making a slice at every chance he can from us.
> My thoughts exactly".

On the following day Mr Ingle exchanged messages with Mr McGaw:

"... Day ok was Fighting with the inverter programming. Overly complicated. Bob didn't programme. Will hopefully sort with E tomorrow morning.

Oh really, I can't think of anyone of hand. What time do you wanna meet today".

[9] On 5 July, Kane exchanged messages with Mr Ingle:

"Did u receive new 2kg ru? And what's your current stock?

Hi Kane, I will have to ask Scott. We still got some stock left I think but will be going soon we hope".

After a discussion about where he should send money, Mr Ingle messaged Mr Kane:

"I mean the amount we have send u over the years is 100's of K".

On 6 July, Mr Ingle sent Bob (in China), this message:

"Bob what did the worker programme the inverter.
Bob!!!!!".

After this, a rebate for the inverter problem was arranged. Mr Ingle subsequently messaged Mr Reid to advise him of this.

[10] The next morning Mr McGaw was planning to meet up with Mr Ingle. Later that day, Mr Ingle messaged Mr Reid:

"Looks like a yes with regard to the alt inverter for programming to have the touch screen working to run. Calling them Tomoz morning to sort out the finer points".

This later continued:

"Right fixed the tripping ... I recon there was some crossed contacts at the power in terminal, just took out and put back carefully. Great making mistakes is the best way to learn trust me I know lol.
Purring like a Cheshire Cat. Finally!
👍☺".

[11] The same message about the Cheshire Cat was sent by Mr Ingle to Mr McGaw.

Mr McGaw's reply consisted of several emojis and the words:

"Yay
F...ing yayyyyy
So we are back up and running?"

[12] On 11 July, Mr Ingle messaged Mr McGaw about certain technical details concerning the electrical equipment. Mr McGaw replied:

"Fantastic matey. Get sorted for wage on wed. So all steam ahead.
Be making doughnuts in no time".

[13] On 14 July, Mr Ingle exchanged messages with Mr Reid:

"Is it possible I could get rent this month? on the 18th if possible.
Yes mate.
Great, only needed when things aren't going out, next month should all be good.
No problem mate".

[14] On 20 July, Mr Ingle contacted Yang in China asking about Etizolam stock "at the moment". On 22 July, Mr Ingle was making certain purchases at Screwfix and arranging to meet with Mr McGaw.

[15] On 20 August, Mr Ingle reassured Mr McGaw that he would be paid his share. Mr McGaw replied:

"Let's just get it over to yang asap ☺".

[16] On 23 August, Mr Reid exchanged messages with Mr Ingle:

"Hello mate how's u I'm on wikr talking to Scott about Kane do you still have the list of payments sent.
Yes of course
Can you send it to Scott does it include the 19 and 25 K that Scott was sending.
Yes it Does
Great send it to him please
Hoe much was it in total
178
$

F..k me serious amount of money".

[17] On 27 August, Mr McGaw exchanged messages with Mr Ingle:

"Did yang say had paymeny yet?
Hi mate, I think he's gonna check now. Do we have a figure of the total after exchange rate?
... 27500 yesterday
39300 before that
And first payment 91500
Cool
66,800 he's got so perhaps the first transaction from bank is till to arrive
Told him
Also need a iban from yang mate".

[18] On 6 October, Mr Reid exchanged messages with Mr Ingle:

"Part paid for and orderd it's 2, weeks lead time
Great ... 2 weeks really damn they said 8-10 in the email.
We need to unprogramme the screen mate to run through the inverter
Yes was thinking the same".

On 12 November, Mr McGaw apologised to Mr Ingle "for not giving him the cash".

[19] John Watson, the owner of the premises, gave evidence about the lease to Mr Reid, trading as Glasgow Commercials, which was a motor sale and repair business, in September 2013. Mr Watson had not heard of VitSupCo. Mr Reid had fitted a motorised shutter, without permission. Mr Watson initially said that he had not met Mr Reid until September 2016, when the renewal of the lease had come up for decision. This meeting had been pre-arranged by phone. Under reference to a prior statement to the police, Mr Watson said that he had visited the premises and met Mr Reid, for the first and only time, in May or June 2016. He had only gone so far into the premises. This was to "just beyond the toilet area". Exactly what that meant in terms of seeing what might be going on in the premises remained uncertain at the appeal hearing. Mr Watson did say that his "eyesight can see

towards the back of the premises" but he had not carried out a "full inspection". He saw two vehicles, which were under repair, but no equipment or machinery. The premises were tidy and "fairly clean". He did not see any tools of the motor trade or any machinery. Mr Reid had asked if he could sub-let the premises.

[20] On 24 January 2018 Mr McGaw was arrested. A typed letter from Mr Ingle to Mr McGaw was recovered from Mr McGaw's house. This included the following:

> "I was up the other day to see my Lawyer and go through all the evidence ... From what I've read through it seems like they've got very little on my Scottish co-defendant and I think [Mr Ingle's brother's] arrest is obviously an attempt to tighten the screws on me to talk. I suspect what will happen is that my Scottish co-defendant will go not guilty and risk the decision of the jury at which point they will call me as a witness to testify, I will decline to answer and will be held in contempt of court, which will mean more jail time ...".

The Scottish "co-defendant" was Mr Reid.

Charge to jury

[21] In his charge to the jury, the trial judge set out what was not in dispute. This was that Etizolam was being produced on the premises on 1 March 2017 and for some time before then and the appellants had been involved in its production prior to the coming into force of the 2016 Act. The judge explained that what was in dispute was whether the appellants had been involved in the production of Etizolam during the period libelled. He said that the production:

> "was not illegal, at least by virtue of that Act of Parliament, prior to [26 May 2016] and the criminal offence ... only became law on that date".

The judge stated that whether the appellants had been involved prior to that date "in illegal activity in connection with the production of Etizolam is not a matter of concern to you or

me". The issue was whether the appellants had contravened section 4 of the 2016 Act between the dates libelled. The judge continued:

> "But the Crown relies, and is entitled to rely, on evidence of what they say was occurring prior to that date in order to place the evidence of what they say occurred after that date into context and to assist in proving this charge against the accused."

[22] The trial judge said that the evidence of what had happened after 26 May 2016 came from several sources, *viz.*: the content of the joint minutes; the physical evidence of what was found on the premises on 1 March 2017; the opinion evidence of what that physical evidence represented; and the WhatsApp messages passing between the appellants and Mr Ingle. The judge directed the jury that the messages could only constitute evidence against the sender or receiver of the particular message, although they could be used as proof of continued production at the premises as at their particular dates; and finally, a combination of all the facts and circumstances.

[23] During the course of the police investigations, Mr Ingle and Mr Conway had answered questions when interviewed. The appellants had exercised their right of silence. The judge directed the jury that what either the police or Mr Ingle and Mr Conway had said during these interviews was not evidence against the appellants.

[24] The trial judge rehearsed some of the content of the joint minutes and the WhatsApp messages, referring to the Crown's reliance on them to demonstrate the appellants' involvement in a continuing operation after the 2016 Act had come into force. He paraphrased the advocate depute's speech as follows:

> "She points to the messages passing between Mr McGaw and Mr Ingle prior to the 26th May, showing his continuing association with Harry Ingle and indeed with Mr Reid and she asks you to infer from that, that Mr McGaw was at the top level of this operation in terms of hierarchy, giving direction and instruction to Mr Ingle, and that the involvement was primarily in the financial aspect of this operation. And she relies on the CCTV evidence from the 20th May 2016 where you were said to see him

> dressed in a white suit, mask and gloves, for some considerable period during that day. So, you are asked to look at this evidence and bear it in mind when examining the evidence that impacts after the 26th May 2017 (2016?). You were asked to look at the efforts made by him to move the operation to Spain. Those efforts are said not to have been successful and, indeed, we do know that the operation was continuing at Back Sneddon Street on 1st March 2017. And, I think the inference there is that you are asked to draw is that he, Mr McGaw, wouldn't walk away from the operation at Back Sneddon Street before the Spanish operation was in place. Again, it's a matter of inference for you. She relies on, of course, the messages relating to the problems with the fixing of machinery after 26th May 2016 and ... in particular, ... the response by Mr McGaw to efforts, apparently successful, by Mr Ingle in fixing a piece of machinery which was 'purring like a Cheshire Cat' and Mr McGaw's response was, 'Yeah, f...ing yeah'. And the third one is, he's asking on the 11th July, apparently, about how things are going and Mr Ingle tells him he's working on the old extractor, to which Mr McGaw comments, 'be making donuts in no time'. And the Crown rely on his continuing interest and participation in the financial side of the operation after May 2016 and I think up to November 2016."

The trial judge set out Mr McGaw's position, as it had been described in the defence speech, albeit that Mr McGaw had not given evidence. This was that the messages did not demonstrate continuing involvement after the 2016 Act had come into force. They related to the move to Spain or to outstanding bills. The evidence of Mr Watson was relied on.

[25] The trial judge went through a similar exercise in relation to Mr Reid. He pointed out that the Crown relied upon Mr Reid's involvement prior to May 2016 and the use of his company, namely VitSupCo, as a front. Mr Reid was the tenant of the premises up until 1 March 2017. He continued to be responsible for the payment of rent and services. Various purchases were sent to him at different premises. The Crown pointed to his involvement with the equipment and the money as disclosed in the WhatsApp messages of 26 May and 23 August 2016. Mr Reid's position, as disclosed in the defence speech, was covered. This included the evidence of the landlord that, when he visited the premises sometime in May to July 2016, there was no pill making operation in progress. In that connection, the judge said that the effect of that evidence "depends on your view of the credibility of Mr Watson upon

that matter". He had, at the outset of his charge, used Mr Watson as an example of a witness whose credibility and reliability was "an issue".

Submissions

Mr McGaw

[26] Mr McGaw's first ground of appeal was that the trial judge erred in repelling the no case to answer submission. The judge erred in holding that the evidence of Mr McGaw's activities, prior to the coming into force of the 2016 Act, could form part of a circumstantial case against him and provide the necessary corroboration of the messages sent after that date. The only source of evidence of Mr McGaw's involvement after that date was the messages, concerning the working of machinery, money and moving to Spain. That was a single source. The messages did not fall into the same category as real evidence (cf *Gubinas* v *HM Advocate* 2017 SCCR 463 and *Shuttleton* v *Orr* 2019 SCCR 185; *Smith* v *McDonald* 1984 SCCR 191 at 193). The judge erred in failing to take account of Mr Watson's testimony. This demonstrated a gap, during which there was no sign of any operation. It had not been suggested to Mr Watson that he had not visited the premises, or that he had not seen what he said he had seen.

[27] The second ground was that the trial judge erred in directing the jury that they were entitled to rely on the evidence of what had occurred before the coming into force of the 2016 Act in proving the charge against Mr McGaw. Given the evidence of Mr Watson, it could not be said that there was an ongoing operation before and after the coming into force of the Act. The judge ought to have directed the jury to ignore the evidence of operations prior to the relevant date.

[28] Mr Ingle had pled guilty at the close of the Crown case (22 November 2018). At the diet of sentence, Mr Ingle's counsel disclosed that his pleas of guilty had been arranged on the first Friday of the trial (16 November). Despite the pleas having been agreed, the Crown had led evidence of Mr Ingle's involvement before and after the relevant date. This had been "prejudicial against" Mr McGaw. It included WhatsApp messages in which Mr McGaw was mentioned, or referred to, in an incriminating way but which did not constitute competent evidence against him. Evidence was led of the video featuring Mr Ingle, prior to the relevant date, in which complaints were made about Mr McGaw spending all the money on liposuction. There was evidence of the note, which was found in Mr Ingle's possession, in which reference was made to the appellant. At the time when the advocate depute led the incriminating and prejudicial evidence against Mr McGaw, agreement had already been reached about Mr Ingle's plea of guilty (see *Beacom* v *HM Advocate* 2002 SCCR 33).

Mr Reid

[29] Mr Reid also submitted that the trial judge had misdirected the jury in relation to the relevance of the production of Etizolam prior to the coming into force of the 2016 Act. The Crown had led no evidence that the prior actings had been unlawful, yet the judge allowed the "spectre of prior illegality" into his charge. Such a suggestion was prejudicial, since it raised a matter of which the appellant had been given no notice. It tended unfairly to cast his admitted prior actings in a sinister light. The evidence relating to the pre and post 2016 actings was unfairly characterised by the trial judge. Mr Watson had given evidence that he had leased the premises to Mr Reid, but that, on going to the premises in May or July 2016, there was no production facility. This evidence was central to the appellant's defence. In his

charge, the judge introduced a challenge to the credibility of Mr Watson, which bore no relevance to evidence taken from the witness.

[30] The second ground related to the conduct of the Crown, given the timing of the plea agreement with Mr Ingle's counsel. This allowed the Crown to lead evidence which served no necessary purpose in relation to Mr Ingle and resulted to prejudice to Mr Reid. This included telecommunications and other contact between Mr Ingle and other accused through whom the Crown sought to derive proof of Mr Reid's guilt. It included the letter from Mr Ingle to Mr McGaw. Had the plea arrangement been known, objection could have been taken to Crown's course of action.

Respondent

[31] In relation to the appellant's first ground of appeal, concerning evidence relating to his involvement prior to the coming into force of the Act, no objection was taken to its admissibility during the trial. Mr McGaw had been seen on CCTV a matter of days before the production of Etizolam had become illegal. He had been dressed in a manner which indicated his involvement in the production. The evidence showed that he had a financial interest in the operation. The business had not moved to Spain. Mr Ingle had not branched out on his own. The appellants had neither dissociated themselves nor severed their links with the business. The WhatsApp messages were not the equivalent of a confession. They were evidence of the crime taking place and the appellant's involvement in it (*O'Shea* v *HM Advocate* 2015 JC 201). Whether a message or a series of messages alone will be sufficient proof of a crime will depend on their content. The Crown case had been based upon circumstantial evidence. The involvement of the appellants prior to the coming into force of the Act was available as part of the circumstantial case (*Megrahi* v *HM Advocate* 2002 JC 99,

paras [31]-[36]). The jury would have been entitled to draw the inference that Mr McGaw's financial involvement and Mr Reid's lease were such that they would not walk away from the production of Etizolam after the coming into force of the Act. Mr McGaw's presence, and the manner in which he was dressed, on 20 May were further adminicles.

[32] Similar considerations applied in relation to Mr McGaw's second ground of appeal. Whether there was a break in production and, if so, whether it had any effect on the assessment of Mr McGaw's guilt was a matter for the jury. The Crown's position had been that Mr Watson had not walked into the rear area and that cleaning of the premises prior to his visit was not impossible.

[33] On Mr McGaw's third ground and Mr Reid's second ground, the evidence related both to Mr Ingle and Mr McGaw. It was competent and relevant against Mr McGaw. The Crown was not precluded from leading evidence about the activities of a co-accused who had pled guilty, where it is otherwise relevant and admissible in relation to another accused. Mr Ingle's position had been that Etizolam was a medicinal product. He was not willing to plead guilty until it was proved otherwise. Although the advocate depute had intended to lead a witness from the Medicine and Healthcare Regulatory Agency at an early stage in the trial, that had not proved possible because of travel difficulties. It was following the evidence of a police officer on the nature of the Etizolam production that Mr Ingle had indicated his willingness to plead guilty and that the witness from the MHRA was not needed. This was confirmed after the close of evidence on the first Friday of the trial. By that time the prosecution had already led evidence implicating Mr Ingle and had embarked upon the WhatsApp messages. It had always been intended to lead evidence of Mr Ingle's involvement in order to place the communications between Mr Ingle and Mr McGaw in context. Otherwise they would not have made any sense. *Beacom* v *HM Advocate* (*supra*) was

distinguishable. It involved the content of a co-accused's police interview. Had Mr Ingle been found not guilty or a plea to that effect accepted, that would still not have precluded the leading of evidence about his activities and his communications with the appellate (*Howitt* v *HM Advocate* 2000 SCCR 195). The trial judge directed the jury that the fact of Mr Ingle's conviction had no relevance to the onus upon the Crown to prove the case against the remaining accused.

Decision

[34] The scale of the admitted operation prior to the coming into force of the Psychoactive Substances Act 2016 was relevant to the proof of a continuing operation on the same scale as was apparent when the premises were searched on 1 March 2017. Having regard to the other circumstantial evidence, the jury would have been entitled to infer that the same operation, involving the same personnel, had been conducted before and after the relevant date. No objection was taken to the evidence which related to the pre-Act involvement and which was libelled as some form of culpable and reckless conduct in the docket attached to the indictment.

[35] The trial judge correctly directed the jury that the production of Etizolam was not illegal, at least by any Act of Parliament, prior to the relevant date and had become a criminal offence only on that date. He clearly focused the jury's mind on the critical issue of whether the appellants had contravened the 2016 Act between the dates libelled.

[36] There was sufficient evidence against each appellant. Proof of the exchange of WhatsApp messages formed part of the case against each appellant. These messages were not in the same category as evidence of the hearsay of one accused after the commission of a crime and outwith the presence of another accused. The messages were part of the

commission of the offence; ie *res gestae*. They were capable of incriminating all of the accused, whether or not the particular accused sent or received the message. They were pieces of evidence which were capable of demonstrating what was going on and who was involved (see generally Dickson: *Evidence* (Grierson ed) paras 254).

[37] The content of the messages was agreed by joint minute. The messages did not constitute a "single source of evidence" which required to be corroborated. They had to be taken as having been proved. It was then a matter of what the jury was prepared to infer from their content. Some of the messages incriminated each appellant. In both cases the appellants' responses to the Cheshire Cat were particularly damning. Mr McGaw's replies to Mr Ingle on 11 July and 20 and 27 August, and those from Mr Reid on 14 July, 23 August and 6 October, were highly incriminating. The ground of appeal based upon an insufficiency of evidence falls to be rejected.

[38] It was a matter for the jury to decide whether or not to accept Mr Watson's evidence. Although the Crown did not directly attack his credibility, choosing instead to suggest that he had not gone far enough into the premises to see the operation, it was open to the jury to reject Mr Watson's evidence as not believable because it was inconsistent with the other evidence in the case which demonstrated the existence, at the time of his visit, of an ongoing operation involving significant pieces of machinery. Irrespective of the positon of the advocate depute, the jury could have taken the view that a landlord would be unlikely to testify that he had been aware of illegal drug production on his premises. Alternatively, the jury may not have thought his evidence showed anything of value, if he had been visiting the premises having given advanced notice of his intention to do so. The trial judge's directions were correct and this ground of appeal is also rejected.

[39] In the circumstances of this case, until Mr Ingle had pled guilty, the Crown were entitled to lead such evidence of his guilt as was deemed appropriate. The Crown have explained the reasons why Mr Ingle had not pled guilty at the start of the trial. Even though counsel at the appeal hearing were unable to confirm the position, it seems clear from his letter to Mr McGaw and the timing of his ultimate plea, that Mr Ingle intended only to tender a plea after the conclusion of the Crown case, in order to avoid being called by the Crown as a witness. From the Crown's viewpoint, irrespective of what assurances may have been given, if the Crown did not lead evidence to prove Mr Ingle's guilt before concluding the Crown case, it would have been open to Mr Ingle to adhere to his not guilty plea. Even if Mr Ingle had pled guilty at the start of the trial, proof of his involvement would have remained relevant to that of the appellants, given that it consisted partly of both appellants communicating with him about the ongoing operation.

[40] It may have been different if it could be said that the Crown had deliberately not accepted a plea of guilty in order to lead evidence which would not have been competently adduced in a trial involving the appellants. That is not the position here. All of the evidence, including the note and the letter, was competently led. The letter may not have been competent against Mr Reid, but the trial judge gave the jury a strong direction, if a partly erroneous one in relation to the WhatsApp exchanges, that messages which were not made by or sent to an appellant could not constitute proof of that appellant's involvement. There is nothing of substance in the letter from Mr Ingle to Mr McGaw to incriminate Mr Reid. Mr Ingle's video was in the period before the coming into force of the 2016 Act. It related to involvement which was not disputed. This ground also falls to be rejected. The appeals against conviction are refused.

Sentence

[41] Mr Reid appealed against the sentence of 5½ years. The trial judge reports that he considered Mr Reid to have been involved from the beginning and throughout the operation. It was his company that had fronted the operation. He was the tenant of the premises and paid the rent. The others, the judge inferred, deferred to him. He had sentenced Mr McGaw to 5 years, because his role had been restricted to the financial side of the business. Mr Ingle was also sentenced to 5½ years on each of the two charges and Mr Conway to 3 years.

[42] The contention was that there was no basis for distinguishing between the appellants. The evidence suggested that it was to Mr McGaw that Mr Ingle reported. Mr Reid's involvement concerned the machinery and taking delivery of the products required for the manufacture of the tablets. He had a good work history, running a garage. His previous convictions were road traffic offences.

[43] The trial judge heard the evidence and was best placed to assess whether any distinction ought to be made between the appellants which was based upon their level of involvement or place in any management hierarchy. Although the scale of the differentiation was surprisingly small, it was one which the judge was entitled to make, especially given Mr Reid's position as tenant. The appeal against sentence is refused.