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IN THE COURT OF APPEAL  
CRIMINAL DIVISION

Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

ON APPEAL FROM THE CROWN COURT AT CANTERBURY  
(MISS RECORDER WALTERS) [T20230018]

Case No 2024/01976/B5  
[2025] EWCA Crim 441

Tuesday 1 April 2025

**B e f o r e:**

**LORD JUSTICE WARBY**

**MR JUSTICE BRYAN**

**HIS HONOUR JUDGE ANDREW LEES**  
**(Sitting as a Judge of the Court of Appeal Criminal Division)**

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**R E X**

**- v -**

**VIDMANTAS BUTKUS**

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**Mr P Jackson** appeared on behalf of the Applicant

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**J U D G M E N T**  
**(Approved)**

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Tuesday 1 April 2025

**LORD JUSTICE WARBY:**

1. On 9 May 2024, following a trial in the Crown Court at Canterbury before Ms Recorder Walters and a jury, the applicant, Vidmantas Butkus, was convicted of one count of fraudulent evasion of a prohibition on the importation of drugs, contrary to section 170(2) of the Customs and Excise Management Act 1979.

2. He now renews his application for leave to appeal against his conviction after refusal by the single judge. The basis of the application is that the conviction is unsafe because of prejudicial comments made by the Recorder in summing up to the jury.

**The facts**

3. The facts may be shortly stated. The applicant is a lorry driver who originates from Lithuania. On the morning of 11 March 2023, he was driving a lorry to the United Kingdom via Dover Docks when he was stopped by officers of the UK Border Force. He was questioned and he said that he was carrying a load of wood, which he had picked up in France by swapping trailers with a colleague. He said that he had three cartons of cigarettes, but no other tobacco, and no drugs or other illegal items in the vehicle. A search of the vehicle revealed that the driver's cab had compartments containing 17 one-kilogramme parcels of cocaine. The applicant was arrested on suspicion of drug smuggling.

4. In interview, his account was that he had travelled to France the previous day to pick up a cargo of wood. He had swapped trailers with a colleague at a village in Belgium. At that point he had been approached by someone he did not know who had asked him to smuggle "pressed tobacco" in return for 300 euros. He said that he had smuggled one kilogramme quantities of

that product in the past for 20 euros and had agreed. He packed the parcels in his cab. The man then left.

### **The trial**

5. The indictment gave the following particulars of the offence, that on 11 March 2023 the applicant was:

"... in relation to certain goods, namely cocaine, knowingly concerned in a fraudulent evasion of the prohibition on the importation thereof under section 3(1) of the Misuse of Drugs Act 1971."

The trial turned on the words "knowingly concerned". The issue was whether the applicant had known that the product secreted in his cab was one the importation of which was prohibited.

6. The prosecution case was that it was obvious that the owners of the drugs would not have entrusted such valuable cargo to someone who was unaware of its true nature and in such circumstances as the applicant had described. The prosecution relied mainly on agreed facts about the applicant's movements, the finding of the cocaine, the applicant's admissions, the packaging of the drugs, some DNA evidence obtained from the packaging, the quantity of cocaine, and its value. The value was agreed at £28,000 a kilogram wholesale, with a street value of some £1.7 million.

7. The applicant's case was as he had stated in interview. He gave evidence maintaining that the person he met in Belgium was a complete stranger to him who had given him no instructions on where to drop off the packages. He was cross-examined about his account. The thrust of the challenge was that it was wholly implausible that he had been put in charge of cocaine

worth £1.7 million, without being told what it was, and without some plan for its return.

8. The evidence concluded on the morning of the second day of the trial. The Recorder then began her summing up. The first part was given immediately. It comprised legal directions and a route to verdict. In the legal directions the Recorder identified the issue for the jury in this way:

"Mr Butkus accepts that in doing as he did, he was concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, cocaine. The issue for you to decide is whether you can be sure that Mr Butkus was involved in that fraudulent evasion knowingly."

In the written version the word "knowingly" in this passage was set out in bold italics. The jury was also provided with a written Route to Verdict, in which the question to be answered was this:

"Are we sure that on 11 March 2023 when Mr Butkus was stopped at Dover and the cocaine was discovered he knew that the goods concealed on the vehicle were prohibited goods?"

The jury was directed that if the answer was "No", the verdict must be not guilty; if "Yes", the verdict must be guilty.

9. No complaint is made about these or any other aspects of the Recorder's legal directions. The application arises from, and is based on, the second part of the summing up. That came after counsel's speeches on the morning of the following day, when the Recorder reminded the jury of the evidence. It is accepted that the Recorder's summary of the evidence was accurate; but complaint is made about aspects of her introductory remarks identifying the issue for decision. In these remarks the Recorder made comments about "organised crime groups", "an

organised and sophisticated operation", and made reference to "criminal gangs" who she said had used the applicant to "get their drugs into this country".

### **The application**

10. The application has been argued both in writing and orally before us today by Mr Paul Jackson, who appeared for the applicant at trial, and to whom we are grateful. Mr Jackson tells us – and we accept – that the prosecution did not allege that the case had any links to organised crime or organised criminals, adduced no evidence to that effect, and did not put any such case to the applicant in cross-examination. Mr Jackson acknowledges that a judge is entitled to comment on the evidence. He submits, however, that it was "entirely improper" for the judge to make the comments we have outlined and that they render the conviction unsafe.

11. In summary, Mr Jackson submits:

(1) that there was no evidential basis for these comments;

(2) that they were repeated and emphasised;

(3) that the Recorder was wrong to go so far as to suggest to the jury that (in her words) "it is not in dispute" and that "we know" that what happened in this case was that an organised criminal gang used the HGV driven by the applicant "to get their commodity into the UK". That was not an agreed or established fact.

(4) The phrase "organised criminal gang" is highly emotive. The implication was that there was such a high degree of sophistication that it was extremely

unlikely that the applicant would, as he claimed, have been ignorant of what was inside the packages and where he was to drop them off.

(5) The defence had no opportunity to address these points, given the stage of the trial at which they were made for the first time; and

(6) these remarks undoubtedly had a significant impact on the jury in a case where (as Mr Jackson puts it) the evidence was not particularly strong.

### **Assessment**

12. It is well established that a judge is entitled to comment – and may comment forcefully – on evidential matters. However, there can be cases in which judicial comment is so unfair, unbalanced, improper or prejudicial as to imperil the safety of a conviction. The boundaries have been explored in a number of decisions of this court. Mr Jackson's written submissions referred us to *R v Cohen (Max)* (1909) 2 Cr App R 197, where the court observed:

"It is not wrong for the judge to give confident opinions upon questions of fact."

The court emphasised that

"When one is considering the effect of a summing-up, one must give credit to the jury for intelligence, and for the knowledge that they are not bound by the expressions of the judge upon questions of fact."

These propositions remain good law, albeit there has been a tendency in the more recent jurisprudence to look more critically at judicial comment.

13. More recently, in *R v Marchant* [2018] EWCA Crim 2606; [2019] 4 WLR 20, this court observed at [17] that, in assessing criticisms of the way a judge has conducted a trial, the court must stand back and assess the potential impact of any valid criticisms on the trial as a whole. The court went on:

"It is appropriate to ask: is there a real risk that the jury was materially impeded from considering the prosecution and defence cases fairly and reaching a just verdict according to the evidence?"

14. In addressing that question in this case, we think it is necessary first to recall the agreed position. In her legal directions, the Recorder identified three elements of the offence which were not in dispute:

"... firstly, the relevant goods were subject to a prohibition on importation; second, a fraudulent, by which is meant dishonest and deliberate, evasion had taken place in relation to those goods; third, the [applicant] was involved in that fraudulent evasion ..."

It was in that context that the Recorder went on to identify the single issue for the jury in the words that we have already set out.

15. Secondly, it is important to note other aspects of the Recorder's legal directions. She told the jury, conventionally, that they alone were the judges of the facts; that they should decide the case only on the evidence; and that they should avoid speculation. She also told them this:

"... if I appear to express any views concerning the facts, or emphasise a particular aspect of the evidence, do not adopt those views unless you agree with them ..."

16. Thirdly, the passages in the summing up of which complaint is made must be considered in their immediate setting. We should therefore quote in full the four paragraphs of the summing up in which the comments appeared, with emphasis on those of which complaint is made. In doing so, we draw on the very fair manner in which Mr Jackson presented his submissions in writing.

"It is not suggested by the prosecution in this case that Mr Butkus is the person responsible for planning and arranging this entire enterprise. **It is obvious, you may think, that an importation of this quantity of class A drugs is linked to organised crime and to organised criminals.** There must obviously have been people who were involved in the organisation of this importation and its proposed onward transmission far beyond the involvement, or potential involvement, of this defendant.

Not only is there the simple quantity and value of the cocaine which might lead you to that conclusion but we know that there was DNA from at least – from up to four other people besides the defendant on the packaging of the drugs; you have got that in your agreed facts. And we have heard and seen, for example, about the way the drugs themselves were packaged and labelled with different logos which Mr Brown [a prosecution witness] has told us suggested that they were destined for different customers. **What you may think are hallmarks of an organised and sophisticated operation.**

**But organised criminal gangs need routes by which they can get their drugs into this country and in this case, again, it is not in dispute that the route that they employed was via Mr Butkus and his heavy goods vehicle.** Heavy goods vehicles such as those driven by Mr Butkus have a legitimate reason for travel between the UK and continental Europe. They carry legitimate loads and they have opportunities for concealment within the load and the cab. **That, you may think, makes them attractive to organised crime groups looking to get their commodity into the UK and, again, we know that that is what happened in this case.**" (Our emphasis)

17. In the next two paragraphs of her summing up, the Recorder went on to say this:

"The issue for you, of course, to decide is, was Mr Butkus a



knowing part of that criminal enterprise to import class A drugs. In brief, was he the unwitting tool of criminals who deceived him about the nature of what he was carrying, as the defence have told you he was, or, as the prosecution would say, did he decide to take a risk to use his knowledge and experience of travelling into and out of the country to involve himself in bringing in what he knew to be a prohibited substance, and has he, as the prosecution suggest, now given you a false story to try and cover up his involvement which, they say to you, simply does not stand up to scrutiny.

You have already from me in your legal directions the direction on the burden and the standard of proof. Before you could convict Mr Butkus, you have to be sure that the prosecution case is the correct one, and sure that Mr Butkus' explanation is incorrect."

18. Assessing the comments complained of in the full context that we have now identified, we do not consider it arguable that those comments materially impeded the jury's task of deciding the case fairly on the evidence.

19. The agreed background to this trial was that a person or persons unknown had devised a scheme to import into the United Kingdom 17 kilogrammes of cocaine, prepared for sale in labelled packages, each of which had a street value of £100,000. The plan was to smuggle these packages into the country by hiding them in an HGV. In our judgment, it was realistic and fair to comment that the jury might conclude that a plan such as this involved serious criminality. It was realistic and fair to suggest that it must have been organised. It was a legitimate inference from the evidence that it involved a group or gang.

20. The single judge observed that it might have been wiser not to make some of the comments of which complaint is made. We agree. It would have been better not to use terms such as "we know". But we do not think that the turns of phrase used by the Recorder deserve the weight attached to them by counsel. We do not accept that the use of such language in this case carried the dangers identified by Mr Jackson. The agreed facts did not fall far short of the position as

outlined by the Recorder. In the passages complained of, the Recorder was commenting on the evidence. As we have shown, she repeatedly used the phrase "you may think" in the passages of which complaint is made. The jury must be assumed to have followed the Recorder's clear directions about the approach they should take to any such comments. We do not think it can sensibly be said that the Recorder was removing a factual issue from the jury.

21. In any event, we do not think that any real significance attaches to whether the fraudulent importation scheme was or was not devised by an organised criminal gang properly so-called. There was, as the Recorder emphasised, no suggestion that the applicant was involved in the planning of this scheme. His role was that of the driver of the HGV that had been chosen to implement the plan. In our view, the overall effect of the way the Recorder put the matter appropriately reflected the agreed fact that the drug importation involved serious criminality in which the applicant had become "concerned", and to focus the jury's attention on the single, critical question for their decision, namely whether the prosecution had made them sure that the applicant became involved and played his limited role "knowingly".

22. In our judgment, therefore, the applicant's conviction is not arguably unsafe, and the renewed application must be refused.

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