THE COURT OF APPEAL

[51/16]

The President.

Kennedy J.

Donnelly J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

DANIEL WYSE

APPELLANT

JUDGMENT of the Court delivered on the 15th day of July 2020 by Birmingham P

1. On 20th November 2015, the appellant was convicted following a three-day trial in the Circuit Criminal Court in Cork on a number of Misuse of Drugs Act offences, including an offence contrary to s. 15A of the Misuse of Drugs Act, 1977 (as amended). Subsequently, on 23rd February 2016, he was sentenced to a term of ten years' imprisonment on each count, the sentences to run from the date of conviction, but with the final 18 months of the sentences suspended. The appellant has appealed against both conviction and sentence. This judgment deals with the conviction aspects only.

2. The trial was concerned with events that had occurred on 15th February 2014. At that time, Gardaí had information linked to a specific vehicle. At about 11.30pm on the night of 15th February 2014, the appellant was driving a particular vehicle, a Vitara Jeep, the vehicle of interest to Gardaí. There was a front-seat passenger in the vehicle, a Mr. John Heaphy, who would become a co-accused. In due course, Mr. Heaphy, entered a plea of guilty. Gardaí attempted to stop and search the jeep driven by the appellant. The appellant was followed by Gardaí into a cul-de-sac. When Gardaí sought to block the road, the appellant made a U-turn and attempted to drive past the Garda patrol car by mounting an embankment at the side of the road. The vehicle hit a large rock and slid down and collided with the front right-hand side of the Garda patrol car. A package that looked like a small bowl or ball, completely wrapped in black masking or insulation tape, was located in the front passenger foot-well of the vehicle. When the substance within the package was later analysed, it was found to be some 248.5 grams of Diamorphine, with an estimated value of €37,275.

3. Four grounds of appeal, which appeared on the Notice of Appeal, have been argued. These relate to:

(i) A failure to accede to an application for a directed acquittal

[Grounds (i) and (ii)];

(ii) A complaint that the judge dealt inadequately with the fact that the case was a circumstantial evidence one [Ground (iv)]; and

(iii) An issue relating to the labelling/packaging of an exhibit, being the substance, which, on analysis, was established to be heroin [Ground (iii)].

4. Two other issues have been raised at various stages by way of Notice of Motion. These were, at one stage, a complaint of ineffective legal representation. The suggestion that this would be pursued resulted in the appeal not proceeding to a hearing when first listed, but ultimately, the appellant decided not to proceed with this complaint. However, there remains a further Notice of Motion dated 24th March 2017 which was before the Court when the appeal was listed for remote hearing. The application related to the fact that the judge did not accede to a request to assign second counsel. In a situation where that issue was not the subject of extensive submissions, it is convenient to address it at this stage and to deal with it as if leave to add and argue the extra ground had been given.

The Free Legal Aid Issue

5. The application for a second counsel was made on 3rd February 2015 by a leading member of the Junior Bar practising in the area of criminal law in Cork. He said that an application had already been made on a previous occasion and refused, but that the said application had been made before they had instructions from the appellant. Counsel indicated that the instructions now were that they had to seek documents from GSOC in relation to a complaint as to the circumstances of the arrest and charge. Counsel indicated that it was going to be fought fully, and that, as such, his client was in real danger of the 10-year minimum sentence being imposed in the event of a conviction. When the judge asked what the jurisprudence was to support that, counsel replied "well, you would get ten years on a fully-fought s. 15A. I suppose, they're so rare, you hardly ever see them, but I do recall fully-fought s. 15As getting ten years". The judge's response was to say that he saw no reason to vary the order already made.

6. Statutory Instrument No. 12/1965, the Criminal Justice Legal Aid Regulations 1965 states:

"[t]he court granting a certificate (other than a legal aid (District Court) certificate) for free legal aid may, if the person to whom it is granted is charged with murder or the case concerning him appears to present exceptional difficulty and is not an

appeal to the Circuit Court and the court is of opinion that the defence or appeal, as the case may be, cannot be conducted adequately without the assistance of two counsel, direct that two counsel be assigned to the person to act for him in the preparation and conduct of his case."

It seems to us that the information put before the Court scarcely provided the judge with a basis for exercising his discretion in favour of a second counsel. Certainly, no information was put before the Circuit Court which would have compelled the judge to exercise his discretion in a particular way so as to accede to the application. We recognise that there may well be drugs cases which appear to raise difficult legal issues surrounding the concept of possession, joint possession, control and knowledge where a cogent, and indeed, compelling case for a second counsel could be formulated. However, that did not happen in this case and the absence of a second counsel does not raise questions as to the fairness of the trial or an issue as to whether the trial was one in due course of law. Therefore, we will dismiss this aspect of the appeal.

The Application for a Direction

7. On Day 2 of the trial, the prosecution closed its case. At that stage, the defence did not make an application for a direction, but proceeded to call evidence, in particular, evidence from an engineer who had examined the scene where there was the encounter between the vehicle driven by the appellant and the Garda car, and a forensic scientist from England. At that stage, counsel applied for a direction. The application was based on a contention that the case against Mr. Wyse was based, essentially, on speculation and that there was no rational evidence supporting the Director's case. The strength of the overall evidence did not get beyond speculation, or, perhaps, suspicion. Counsel for the Director responded by saying that the prosecution had clearly made out a prima facie case in respect of the counts on the indictment. Counsel said there were a number of items of circumstantial evidence: the fact that the appellant was the driver of the car in question and that the package was found in the car, found in the front passenger foot-well. The judge intervened to ask a question about what he described as the Northern Ireland case, clearly a reference to the case of R v. Whelan [1972] NI 153. Counsel said that that was a completely different scenario, and that in this case, they had circumstantial evidence outside of the direct evidence of possession. Counsel pointed to the conduct of the accused in terms of his driving, that he had accelerated after making a U-turn, and that he was attempting to escape. She referred to aspects of the memoranda of interview which she suggested showed that the appellant had been untruthful.

8. The judge's response was to say to counsel for the appellant that while there was no direct evidence of his client handling the package, no direct evidence of fingerprints or DNA attaching to the drugs package, there was undoubted evidence that drugs of a quantity in the region of €30,000 were found in a car driven by his client. Further Gardaí had not been in Mallow to go to the races; they were there to stop this vehicle in relation to drugs and the vehicle was driven by the appellant. There was evidence which, at its

high point, if the jury accepted it, indicated that there was an effort to escape detention, a refusal to stop, and a collision with a Garda patrol car. The judge referred to the fact that the appellant had not maintained his right to silence, but had spoken during interviews, and in the course of those interviews, had committed himself to being at locations in Shannon, which Gardaí say they could establish he had never been near. The judge said that at the height of the case, it might be that the jury would not find the appellant guilty, but that nonetheless there was surely a prima facie case to go to the jury.

9. In the view of the Court, the decision of the judge to permit the matter to be considered by a jury was a perfectly proper one. The appellant was the driver of the vehicle in which the drugs were found. The drugs were not in a closed compartment or in the boot of the car, but were located in the passenger compartment of the car. The appellant's response in attempting to evade Gardaí through the manner in which he drove along with the explanations given that were later contradicted by the evidence of Gardaí provided a basis on which a jury could conclude that the appellant was aware of the nature of the substance in his car and that he was in possession and control of that substance. As the judge said, while this might not have been a case where a conviction was inevitable, it was certainly a case where a properly directed jury could choose to convict. In our view, the case was properly left to the jury and this ground of appeal is rejected.

Circumstantial Evidence

10. The next ground relates to "failure to warn of the dangers of convicting on circumstantial evidence". We regard this formulation, which was taken up by the prosecution, as an unfortunate one. There is no general requirement to warn about dangers of convicting on circumstantial evidence. The situation is not at all comparable to the warnings given to juries in relation to accomplice evidence and which used to be required in cases involving sexual offences and the evidence of children, and where warnings are still occasionally given as a matter of discretion. There is no general practice of warning a jury about or against circumstantial evidence. Rather, in a case significantly or wholly dependent on circumstantial evidence, the jury will be guided by the trial judge as to how to approach their consideration of whatever circumstantial evidence is available. A direction will draw the jury's attention to the fact that what is in issue is the cumulative effect of the individual pieces of evidence. In R v. Exall [1866] 176 ER 850, Pollock CB, speaking in relation to circumstantial evidence, said:

> "[a] combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion, but . . . taken together, may create a conclusion of guilt . . . with as much certainty as human affairs can require or admit of."

11. The charge in this case did not contain the usual references to strands of a rope or a bundle of Golly Bar or Choc Ice sticks, as would often be found in a circumstantial

evidence case. However, this was not at all a classic circumstantial evidence case. The prosecution case was that Mr. Wyse was caught in the act, driving a vehicle in which drugs were found in the passenger compartment, not in the glove compartment or underneath the spare tyre or anything of that nature. Yes, the prosecution pointed to the circumstances in which the appellant was arrested and, in particular, the drugs seized, as well as to answers given in interview, which were subsequently the subject of a Lucas direction. This not being a classic circumstantial evidence case, one would not expect to find all the elements of a charge that would be appropriate for a classic circumstantial evidence case. The judge dealt with the issue as follows:

"[n]ow, the essence of the case before you -- there are…four charges, and all of them involve -- the nub of this case is whether or not the accused had possession of drugs. So it's important that you understand what the legal concept of possession is. Possession certainly means that he knew the package was there, that he knew and accepted that that was there and he was transporting it either from Limerick or Shannon to Cork. So knowledge is very important, and how do you establish or how does the State establish knowledge? The knowledge, in this case, the State say you are entitled to infer that from all the circumstances of the trip; the placing of it, where it was in the car, the timing. They say you are certainly entitled to infer it from the manner of the driving in the cul-de-sac and they say you are also entitled to infer it from the answers. Remember now, I told you, you're entitled to keep your mouth shut. Nobody can complain about that. But if you answer questions then obviously the questions become part and parcel of the evidence and you, the jury must look at those, and you have to look at them and say, "Are these persuasive? What does the man tell me in that?" He says he went to Limerick for Chihuahua papers. Now, is he consistent? Is he vague and evasive? Did he make phone calls? Is there any record of them? Did he give an account of his timing? Is that consistent? So you've got to look at -- I mean his statement is a very fundamental part of the case and it's actually fundamentally relied on, curiously enough, by both the prosecution, to try and convict him, and by the defence, to raise a doubt. So it's very important from both of their perspectives, and how you evaluate the statement is not for me. It is a matter entirely for you to look at it and establish whether it goes to his guilt or whether it raises a doubt as to his innocence. So, the question of control is important to the possession -- knowledge; how did he have control or did he have control? Was this merely in the wagon with somebody else over which he says he had no knowledge and no control and he was not bringing this drug back to Cork because he did not know of the package, he did not know of the drug and he did not in any way consent to bringing this back to Cork."

In the Court's view, the charge was not an inappropriate one for a case of this nature. We note and regard it as significant that the approach taken by the judge in his charge was not the subject of requisition by either side. It seems that those who had heard the evidence in the case and participated in the case felt that the judge's charge put the issues before the jury in a proper manner. Accordingly, we are not prepared to uphold this ground of appeal.

Chain of Custody

12. The final issue raised on the appeal relates to the labelling/packaging of an exhibit. Apparently, it is an issue to which the appellant attaches considerable attention. The issue arises in these circumstances. The vehicle which the appellant was driving was intercepted by Detective Garda Sheedy, who was accompanied by Detective Garda Michael O'Halloran, the driver of the Garda car, and Garda Jamie O'Riordan. A suspicious object was noted in the passenger foot-well section of the vehicle. In the Garda car were a number of self-sealing plastic bags. The evidence at trial was that the suspicious object was placed into one such self-sealing evidence bag. That self-sealing plastic bag was placed in the locker of Detective Garda Sheedy, which was locked, in the office of the Drugs Unit at Anglesea Street Garda station. The evidence was that the package was shown to each of the two occupants of the car that had been stopped in the course of interviews at Bridewell Garda Station and Gurranabraher Garda station. The interviews with the appellant, Daniel Wyse, were at Gurranabraher.

13. The evidence of Detective Garda Sheehy was that following his return to Anglesea Street Garda station, the suspicious item that had been found in the car that was stopped, was placed in a tamper-proof evidence bag. The tamper-proof bag was marked JS1, these being the initials of Detective Garda John Sheedy, and at trial, the evidence was that the tamper-proof evidence bag bore the numbers M00190678. However, Detective Garda Sheehy told the Court that, when preparing his statement, he made an error, in that he referred to the tamper-proof bag as No. M00186678. However, he was adamant that he only labelled one bag as exhibit JS1. This error made by Detective Garda Sheehy between 86 and 90, fed into the evidence. Garda Jamie O'Riordan explained that when he came to make a statement, he asked for the exhibit bag number, was given a number by Detective Garda Sheehy and included that in his statement. The same mistake, referring to M00186678 was made by Garda Fergal Ashcroft who was tasked with delivering the item to the Forensic Science Laboratory.

14. In the Court's view, however interested the appellant may be in the issue, there is absolutely no room for doubt about the fact that that the object first seen in the passenger foot-well area of the car was the same object as was brought to the Forensic Science Laboratory on 17th February 2014 by Garda Fergal Ashcroft, and handed over by him to forensic scientist, Carol Downey, and was there analysed and determined to be heroin.

15. In summary, none of the grounds argued or sought to be argued have caused us to doubt the fairness of the trial or the safety of the verdict. In those circumstances, we dismiss the appeal against conviction.

16. In a situation where an appeal against sentence remains live, the matter will appear in the next List to Fix Dates with a view to fixing a date for the sentencing hearing, if that is in fact proceeding.