THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 112

Birmingham J.
Sheehan J.
Edwards J.
121/12

The People at the Suit of the Director of Public Prosecutions

Respondent

v

Gary Hanley

Appellant

Judgment of the Court (ex tempore) delivered on the 20th day of March 2015 by

Mr. Justice Sheehan

1. On the 13th December, 2011, the appellant was convicted of the offence of possession of cannabis resin contrary to ss. 3 and 27 of the Misuse of Drugs Act 1977 (as amended) and possession of cannabis resin for the purpose of selling or otherwise supplying it to another contrary to ss. 15 and 27 of the Misuse of Drugs Act 1977 (as amended). The cannabis was deemed to be worth €7,310.40. The appellant was sentenced to six years imprisonment with the final two years suspended. This is an appeal against conviction on the ground that the trial judge failed to withdraw the case from the jury upon an application by the defence that there was no case to answer.

2. In order to consider this ground of appeal, it is necessary to set out briefly the background to the offence.

Background
3. On the 10th April, 2009, Garda Rowe entered the Alfie Byrne apartment complex and searched a large wheelie refuse bin in the central courtyard of those premises. The appellant and others were present at a distance of approximately 10 to 15 meters away from the wheelie bin. On searching this bin, Garda Rowe saw a blue holdall bag which was zipped closed. On removing the bag, he opened it and saw a yellow Dunnes Stores plastic bag which was empty. Underneath that bag he observed a clear plastic bag made of a heavy-duty type of plastic. The bag was either torn or cut open. Inside were five bars of cannabis resin. There was a further similar empty plastic bag in the holdall, together with a yellow shirt.

4. Both heavy plastic bags were of a vacuum-sealed type and there was evidence that the cannabis resin bars took up a large portion of the opened bag. The second bag was vacuum-sealed but empty. A fingerprint was found on the inside of the flap of plastic where the bag containing the cannabis had been opened. The fingerprint was confirmed to match a fingerprint of the appellant taken during his subsequent detention and arrest.

5. This case essentially is based on two pieces of circumstantial evidence, namely the fingerprint on the inside of the flap of the plastic bag and the appellant's proximity to the wheelie bin where the drugs were found. The appellant contends that the evidence in this case was not sufficient to allow the case to go to a jury and highlights, in particular, the following matter which relates to an exchange between defence counsel and the fingerprint expert at the trial. When asked whether the fingerprint was consistent with a finger just taking the flap and pushing it to one side the expert stated: *"Well I have no other evidence to say it was handled in any other way"* and then that such *"was a fair assessment"*. When asked whether the fingerprint would be consistent with somebody pushing the flap to one side and having a look at what was inside as opposed to lifting it or grabbing it he stated: *"Well it is a possible scenario, yes*". He agreed that it was impossible to actually say how recently a fingerprint was actually placed on a bag, stating that there was no scientific way of aging a fingerprint *per se*, except to state that the only indication was that the bag was ripped and that the bag would have had to have been ripped before the fingerprint was made as it was vacuum sealed but he could not say when the bag was ripped or how soon beforehand it was ripped.

6. Counsel for the appellant submitted that the forensic evidence in this case, along with the surrounding facts, leads to a rational hypothesis consistent with innocence whereby the bag was touched when it was in the wheelie bin. It was further submitted that the background facts and the manner in which the fingerprint was on the tear supported an innocent explanation, whereby the outside layer over the drugs could have been handled by the appellant in an innocent manner while in the wheelie bin. It was the submission of counsel that the evidence was consistent with someone taking a finger and moving the flap to one side.

7. The respondent, on the other hand, rejects the appellant's suggestion that this is a case in which innocent rummaging is a possible explanation for the fingerprint and contends that that explanation is not supported by the finding of any other fingerprints of the appellant, for example, on the shopping bag that was also found within the zipped bag. The respondent also submits that this particular submission of the appellant ignores the fact that the plastic bag was clear and transparent and the contents were visible to anyone looking at the bag so that there was no need to open it to see what was there.

8. The approach to be adopted by a Court on an application of no case to answer is set out in the seminal case of *R v. Galbraith* [1981] 1 WLR 1039 and has been adopted in this jurisdiction in several cases including *The People at the Suit of the Director of Public Prosecutions v. M.* (Unreported, Court of Criminal Appeal, 15th February, 2001) and more recently in *The People at the Suit of the Director of Public Prosecutions v. McManus* (Unreported, Court of Criminal Appeal, 12th April, 2011) and *The People at the Suit of the Director of Public Prosecutions v. Finnegan* [2011] IECCA 47.

9. With regard to the application of the test in *R v. Galbraith* to cases of circumstantial evidence, this Court agrees with the view contended for by counsel for the respondent who relied, in furtherance of his submission, upon an extract from Blackstone's Criminal Practice (2015 Ed) at para. D 16.65, p 1778 which stated the following: - *"On the proper application of the test in R v Galbraith [1981] 2 All ER 1060, the prosecution are not required to show that the jury could not reasonably reach any alternative inference contended for. The question is whether it is properly open to the jury to reach the inferences contended for by the prosecution."*

10. This is not a case of a fingerprint on a movable object or a case where the fingerprint was found on a bag in circumstances where one cannot connect with certainty the fingerprint to the material in the bag. In this case the evidence establishes that the appellant's fingerprint came into contact with the sealed bag when the cannabis was in it and the Court agrees with the submission of the respondent that there was no need to open the flap to see what was in the bag.

11. The presence of the appellant close to the bin is supporting evidence, although in itself not very strong. However, given that a valuable commodity was in the bin it is highly unlikely to have been there for any length of time and equally highly unlikely that it was not being protected.

12. This Court concludes that the circumstantial evidence in this case was of such weight that it was open to the jury to accept the inferences contended for by the respondent. The trial judge was therefore correct in allowing the matter to go to the jury.

13. Accordingly, the appeal is dismissed.