THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 133

Appeal No. 106/13

Peart J.
Mahon J.
Edwards J.
Between

The Director of Public Prosecutions

Respondent

- and -

Ghenadie Melenciuc

Appellant

JUDGMENT of the Court delivered by Mr. Justice Mahon on the 22nd day of June 2015

1. On the 14th December 2012, following a four-day trial at Wexford Circuit Criminal Court, the appellant was found guilty of five counts, namely:

> (i) Possession of a controlled drug, to wit, Cannabis resin, contrary to s. 3 and s. 27 (as amended by s. 6 of the Misuse of Drugs Act 1984) of the Misuse of Drugs Act 1977;
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> (ii) Possession of a controlled drug, to wit, Cannabis resin for the purpose of selling or otherwise supplying it to another in contravention of the Misuse of Drugs Regulations 1988/1993, made under s. 5 of the Misuse of Drugs Act 1977, contrary to s. 15 and s. 27 (as amended by s. 6 of the Misuse of Drugs Act 1984) of the Misuse of Drugs Act 1977;
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> (iii) Possession of a controlled drug, to wit, Cannabis resin for the purpose of selling or otherwise supplying it to another in contravention of the Misuse of Drugs Regulations 1988/1993, made under s. 5 of the Misuse of Drugs Act 1977, the value of the drugs amounting to €13,000 or more, contrary to s. 15A (as amended by s. 5 of the Criminal Justice Act 1999) and s. 27 (as amended by s. 5 of the Criminal Justice Act 1999) of the Misuse of Drugs Act 1977;
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> (iv) Importation of a controlled drug, to wit, Cannabis resin that has a market value that amounted to €13,000 or more in contravention of the Misuse of Drugs Regulations 1988/1993, made under s. 5 of the Misuse of Drugs Act 1977, contrary to s. 15B(1) of the Misuse of Drugs Act 1977 (as inserted by s. 2 of the Criminal Justice Act 2006) and s. 27 (as amended by s. 84 of the Criminal Justice Act 2006) of the Misuse of Drugs Act 1977;
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> (v) Importation of a controlled drug in contravention of s. 21(2) of the Misuse of Drugs Act 1977, as amended by s. 2 of the Misuse of Drugs Acts 1984, and contrary to the Misuse of Drugs Regulations 1988, made under s. 5 of the Misuse of Drugs Act 1977.

2. The appellant was sentenced on the 19th March 2013, to a term of ten years imprisonment in respect of the third count; ten years imprisonment in respect of the fourth count and five years imprisonment in respect of the fifth count, with the imprisonment terms to run concurrently. The first and second counts were taken into consideration. The appellant has appealed against his convictions, and against the severity of his sentence. This judgment is confined to the conviction appeal only.

The Facts

3. The appellant was stopped on arrival at the Europort at Rosslare in County Wexford on 22nd August 2011, after he and his vehicle had disembarked from the ferry. The vehicle was searched, and Customs Officers discovered cannabis resin to the value of €316,566. It was concealed inside the petrol tank of the vehicle.

4. The appellant maintained that he transported paint from Ireland to a site in Hungary for use in the renovation of a hotel for a fee of €800 towards the end of July 2011. He said he had been offered this work by a Romanian man in a nightclub in Swords, County Dublin. The appellant said that he left his vehicle at a location in Hungary while he went on to visit his home country of Moldova. He said he was asked to transport a consignment of returned paint back to Ireland in the vehicle, which he did, arriving in Rosslare on 22nd August 2011. He noticed the fuel gauge in the vehicle was not working on the return journey. The appellant maintained that he was unaware that the drugs were in his vehicle, and their discovery in Rosslare came as a complete surprise to him.

The Grounds of Appeal

5. The appellant's grounds of appeal, as identified in the notice of appeal and the written submissions to this Court, were as follows:

> • The learned trial judge erred in law in directing the jury as to the burden of proof and standard of proof in relation to the defence raised in s. 29(2) of the Misuse of Drugs Act 1977;
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> • the learned trial judge erred in law in failing to put, or to put adequately, the defence case to the jury and
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> • the learned trial judge erred in law in failing to put, or to put adequately, those facts to the jury which undermined the respondent's case.

6. In effect, the appellant's appeal was restricted to his first ground, namely, that the learned trial judge erred in law in directing the jury as to the burden of proof and standard of proof in relation to the defence raised under s. 29(2) of the Misuse of Drugs Act 1977.

7. Section 29(2)(a) of the Act of 1977 provides:

"2) In any such proceedings in which it is proved that the defendant had in his possession a controlled drug, or a forged prescription, or a duly issued prescription altered with intent to deceive, it shall be a defence to prove that—

(a) he did not know and had no reasonable grounds for suspecting—

(ii) that what he had in his possession was a controlled drug or such a prescription, as may be appropriate, or

(iii) that he was in possession of a controlled drug . . ."

8. It was submitted by the appellant that the learned trial judge misdirected and/or confused the jury in relation to the appellant's contention that he was unaware that he was in possession of the drugs in question, and more particularly, that he did not direct and adequately explain to the jury the provisions of s. 29(2) of the Act of 1977, and how the operation of that section might provide the appellant with a defence, and his acquittal in relation to the charges.

9. In the course of his charge to the jury, the learned trial judge brought the provisions of s. 29(2) to the attention of the jury, and, indeed, went into some detail in relation thereto. It was submitted by the respondent that the learned trial judge satisfactorily explained the correct meaning and operation of s. 29(2) in the context of this case, aided by references to extracts of the judgment in *DPP v. Smyth* [2010] IECCA 34, and did so to the extent that ultimately satisfied the appellant's counsel. In the course of his charge to the jury on 14th December 2012, the learned trial judge sought to explain the provisions of s. 29(2) to the jury, and how they should approach the evidence in the case, having due regard to that statutory provision. In the course of his charge, the learned trial judge referred to the appellant's denial of any knowledge about the drugs being in his vehicle in the course of his interview following the discovery of the drugs in his vehicle in Rosslare. (The appellant did not himself give evidence at the trial, nor was any oral evidence given on his behalf). Following a requisition by counsel for the appellant in relation to s. 29(2) after his charge to the jury, the learned trial judge recalled the jury and readdressed them in relation to this issue.

10. The learned trial judge referred to the necessity on the part of the prosecution to establish beyond all reasonable doubt that the appellant was in possession of the drugs before they could find him guilty of the relevant counts. He stated:

> *"But possession doesn't simply mean you have it in your pocket, or on your person, but you must exercise control over the substance, but equally true you must have knowledge of the substance as well. And this, in a sense, is the issue raised by the accused man in this case, that he didn't know of the existence of this in his car, he didn't know anything about it. So he raises that defence. Now under the Misuse of Drugs Act, the Court of Criminal Appeal has given us guidance in relation to its interpretation of this. And in the head note of a particular case called the DPP v. Kieran Smyth Senior and Kieran Smyth Junior, s. 29(2) of the Misuse of Drugs Act provides that 'in any such proceedings in which it is proved the defendant had in his possession a controlled drug, it shall be a defence that (a) he did not know and had no reasonable grounds for suspecting (i) that what he had in his possession was a controlled drug or (ii) that he was in possession of a controlled drug'. So it's a defence to a defendant that he did not know and had no reasonable grounds for suspecting that what he had in his possession was a controlled drug, or that he was in possession of a controlled drug. So the law puts an obligation on a defendant when he raises that defence then that it is a defence to prove that."*

11. He went on to say:

> *"But of course, it follows that if you accept that was the defendant has said, or the accused man has said, that he didn't know, then he hasn't had knowledge of the possession which is an ingredient in relation to possession, and that should end the matter as far as the accused man is concerned."*

12. The learned trial judge sought to explain the relevant part of the judgment in the Smyth case in the following terms:

> *"In other words, what the Court is saying is the same strong heavy emphasis is not on the defendant to establish a reasonable doubt as rests with the prosecution in proving the case beyond a reasonable doubt. It's a lower test in relation to him establishing the fact that he didn't know, is what the Court is saying."*

13. He continued:

> *"The burden of proof in all criminal cases rests on the prosecution from the beginning of the trial, the people who make the accusation. It is no different in this trial than any other trial. It normally never shifts to the defence to give evidence as to the existence of a reasonable doubt, or to make an argument that a reasonable doubt exists. And as Mr. O'Loughlin says to you, the accused man does not have to give evidence in this case. And the fact that he has decided not to give evidence in this case, you're not to draw any adverse inferences from that, that's the law."*

14. The requisition was raised in relation to this aspect of the judge's charge to the jury, on completion of his charge. Referring to the judgment in the *Smyth* case, Mr. O'Loughlin S.C., Counsel for the appellant, addressed the judge in the following terms:

> *"And I don't think that's quite what Judge Charleton says. It's not to prove beyond reasonable doubt; it's to prove that there is reasonable doubt."*

15. Mr. O'Loughlin also stated:

> *". . . I thought in summarising it you said that the accused must prove beyond a reasonable doubt but it's a lower standard than the standard on the prosecution. It's not that they must prove beyond a reasonable doubt, it's that they must, the defence must establish something which raises a reasonable doubt."*

16. The learned trial judge acceded to the application by Counsel for the appellant. He recalled the jury and addressed them in the following terms, specifically referring to s. 29(2):

> *"There is an onus on him, which is a lower onus than there is on the prosecution, to prove the case, but there still rests with him an onus to establish he knew nothing about the case."*

And,

> *"A burden is then cast on the accused to make out reasonable doubt in accordance with s. 29. So what the Court is*

saying, well the accused man simply just can't say no, he has a burden thrust on him also by virtue of s. 29, just can't say 'I knew nothing about it'. It says 'a burden is then cast on the accused to make out a reasonable doubt in accordance with s. 29'."

17. Counsel for the appellant indicated his satisfaction with the manner in which the matter was readdressed to the jury by the learned trial judge.

Discussion and decision

18. It is important to emphasise that while s. 19(2), where engaged, places an evidential burden on an accused with respect to the knowledge issue, that does not mean that the accused is obliged to go into evidence or actually adduce some evidence himself in respect of his state of knowledge. The starting point is that s. 29(2) creates an effective presumption that he had the requisite knowledge. However, that presumption may be rebutted but an evidential burden of proof is reversed on the accused in regard to that. He must be able to point to some evidence in the case, including the evidence adduced by the prosecution, that is potentially capable of raising a reasonable doubt as to whether he in fact knew or had reasonable grounds to suspect that the goods under his control constituted or contained controlled drugs. Once he does so, it is then a matter for the jury to consider whether the prosecution has proven beyond reasonable doubt that he knew, or had reasonable grounds to suspect, that the goods under his control were controlled drugs. If the jury has a reasonable doubt the accused is entitled to the benefit of that doubt. Accordingly, all the accused has to do is raise a reasonable doubt anchored to some piece of evidence in the case, though not necessarily evidence adduced as part of his own case.

19. In this case, the appellant had made a statement to the Gardai in which he claimed he had no knowledge of the drugs. That statement was adduced by the prosecution as part of their case. However, in circumstances where it formed part of the general body of evidence in the case the accused was entitled to rely on it as being sufficient to engage s. 29(2). Once s.29(2) was engaged he was required to raise a doubt in the mind of the jury in order to discharge the evidential burden of proof reversed on to him, and thereby rebut that which was effectively presumed. That burden would be successfully discharged unless the jury found themselves persuaded by the prosecution case to the standard of beyond reasonable doubt that he knew, or had reasonable grounds to suspect, that the goods under his control were controlled drugs. If having considered the evidence identified by the accused, and all of the other evidence in the case, the jury was left with a reasonable doubt on the issue as to his knowledge or reasonable grounds for suspicion it would follow that legal possession would not have been established, and the accused would have been entitled to be acquitted.

20. The issue as to how a trial judge should address s. 29(2) to a jury was considered in detail in *The People (Director of Public Prosecutions) v. Smyth* [2010] 3 I.R. 688 . It was again addressed, also in some detail, and more recently, by this Court in the case of *The People (Director of Public Prosecutions) v. Tuma* [2015] IECA 63 (Unreported, Court of Appeal, 27th March 2015) in a judgment of the Court delivered by Edwards J.

21. In the Smyth case, the following was stated by Charleton J.:

"20. The fundamental principle of our criminal justice system is that an accused should not be convicted unless it is proven beyond reasonable doubt that the accused committed the offence. The legal presumption that the accused is innocent, until his guilt is proven to that standard, operates to ensure objectivity within the system. It is a matter for the Oireachtas to decide whether on a particular element of the offence an evidential burden of proof should be cast on an accused person. Of itself, this does not infringe the constitutional principle that the accused should be presumed to be innocent until found guilty. Reasons of policy may perhaps require that any reversed element of proof cast on the accused should be discharged as a probability. That should either be stated in the legislation or be a matter of necessary inference therefrom. The construction of a criminal statute requires the Court to presume that the core elements of an offence must be proven beyond reasonable doubt; otherwise the accused must be acquitted. A special defence, beyond the core elements of the offence, may carry a different burden; insanity and diminished responsibility are examples of such a defence which casts a probability burden on the accused. Where, however, in relation to an element of the offence itself, as opposed to a defence, a burden is cast upon the accused, the necessary inference that the accused must discharge that burden on the balance of probability is not easily made. The Court notes that bearing the burden of proving a defence as a probability could have the effect that in respect of an element of the offence an accused person might raise a doubt as to his guilt, but not establish it as a probability. This might lead to a situation where the charge was not proven as to each element of the offence beyond reasonable doubt, but nonetheless the accused could be convicted. That would not be right. Proof of a guilty mind is integral to proof of a true criminal offence, in distinction to a regulatory offence. In s. 29 of the Misuse of Drugs Act 1977, as amended, the normal burden of proving the mental element of possession of a controlled drug is removed from the prosecution and the accused is required to prove that it did not exist.

21. In consequence, the Court considers that an evidential burden of proof is cast on the accused by s. 29 of the Misuse of Drugs Act 1977, as amended, which is discharged when the accused proves the existence of a reasonable doubt that he did not know, and had no reasonable ground for suspecting that what he had in his possession was a controlled drug. This is not a burden merely of adducing evidence. It is legal burden discharged on the lowest standard of proof, namely that of proving a reasonable doubt. This has consequences for the trial of charges based on possession of a controlled drug. The prosecution must prove possession as against the accused. They must also prove that the substance in question was a controlled drug as defined in the Misuse of Drugs Act 1977, as amended. Regulations may need to be proven by handing in an official copy of them. These elements must be proven by the prosecution beyond all reasonable doubt. A burden is then cast on the accused to make out a reasonable doubt in accordance with s. 29. This may be done by pointing to a weakness in the prosecution case, by reference to a statement made to the gardai, or by the accused himself giving evidence. Because this is a legal burden of proof, the decisions as to what evidence on that issue will be sufficient so as to raise a reasonable doubt are for the accused. He must decide if he has put sufficient evidence by way of proof to raise a reasonable doubt before the jury. This carries practical consequences. Once the prosecution have proved possession of a controlled drug, the accused cannot make an application of no case to answer at the close of the prosecution case based upon any failure on their part to prove that he did not know, and had no reasonable ground for suspecting that what he had in his possession was a controlled drug. In terms of making out the defence on the standard of showing a reasonable doubt, it is a decision for the accused as to whether he gives evidence or not. The prosecution may argue in closing submissions to the jury that the particular defence is not made out so as to show a reasonable doubt."

22. Charleton J. went on to state the following:

> *"22. In directing the jury on this issue, trial judges should in future, in the view of the Court, give the ordinary direction as to the burden and standard and proof and the presumption of innocence. In stating the burden and standard of proof, however, a trial judge should point out that the prosecution are obliged to prove the elements of possession of the substance, and that the substance is a controlled drug, beyond reasonable doubt. A trial judge should then tell the jury that the burden of proof shifts to the defence to prove the existence of a reasonable doubt that the accused did not know and had no reasonable ground for suspecting that what he had in his possession was a controlled drug. It should be clearly stated that this burden cast on the accused is discharged if the defence prove a reasonable doubt, and no more than that, on that issue.*
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> *23. Finally, we should add that there is nothing improper in the prosecution seeking in their case to show evidence whereby that defence, of not knowing or having no reason to believe that what the accused had in their possession was a controlled drug, could be argued by them not to have been made out by the accused . ."*

23. In the *Tuma* case, this Court reiterated the views expressed in the *Smyth* judgment, and referred extensively to extracts from the judgment in that case. In the *Tuma* judgment, the understandable difficulties which trial judges have in effectively communicating to a jury the correct concept of s. 29(2) was acknowledged. Edwards J. commented as follows:

> *"6. Accordingly, this is yet another case concerned with the conceptually difficult reverse burden of proof in a case involving possession of drugs. It seems that the correct understanding of s. 29(2)(a) of the Act of 1977, and the need to effectively explain and communicate to a jury how it is to be applied in practice, is continuing to cause difficulty for judges and legal practitioners alike."*

24. In this case, and fully acknowledging the difficult task with which the learned trial judge was faced in explaining the meaning of s. 29(2) and the manner in which it was to be applied, this Court is satisfied that the learned trial judge's interpretation of the meaning of the section, as conveyed to the jury, was wrong. He incorrectly advised the jury that it was for the defendant to prove the absence of knowledge or reasonable grounds for belief to the standard of beyond reasonable doubt. He also erroneously informed the jury that the burden borne by the defence was *"a lower level of reasonable doubt than exists for the State to prove"*. He was also incorrect, when he stated (having opened, accurately, an extract from the *Smyth* judgment) *"in other words, what the Court is saying is the same strong heavy emphasis is not on the defendant to establish a reasonable doubt, as rests with the prosecution in proving the case beyond a reasonable doubt. It is a lower test in relation to him establishing the fact that he didn't know, is what the Court is saying"*. The jury should have been advised, and have been left firmly with the view that all the defendant had to do was to raise a doubt as to whether he knew or had reasonable cause to suspect that the drugs in question were in his possession or under his control, and that he did not have to affirmatively establish anything.

25. The expression of satisfaction with the learned trial judge's remarks to the jury following his requisition in relation to the s. 29(2) issue does not, in the circumstances, undermine the criticisms of same subsequently made on behalf of the appellant, and the basis of this appeal. Given the complexity of the reverse burden concept, and the repeated attempts by the learned trial judge to explain it to the jury in as plain a language as possible it was understandable that the appellant's legal team would, having had time to consider the judge's remarks in their entirety, conclude that the jury had been incorrectly advised as to the true meaning and effect of s. 29(2), or were confused in relation thereto by the time they finally retired to consider the verdicts.

26. While it is a matter for individual judges to address juries as they deem appropriate and in a manner and a style with which they feel comfortable, the judgment of this Court in the Tuma case helpfully provides a template (at paras. 60 and 61) for a charge to a jury in relation to s. 29(2) which is likely to prove useful in trials involving this issue.

27. With the exception of the s. 29(2) issue the learned trial judge's charge to the jury was fair, reasonable and comprehensive. The contention (insofar as is made) that the defence case was not adequately put to the jury, or that such facts as may have existed to undermine the respondent's case were not put to the jury, is rejected by this Court.

28. For the reasons stated, this Court will allow the appeal and will quash the conviction of the appellant. Although s. 29(2) of the 1977 Act refers to the possession of a controlled drug and is therefore strictly relevant only to the first three counts in respect of which guilty verdicts were returned by the jury in this case, this Court is satisfied that the guilty verdicts in respect of the fourth and fifth counts, relating to the importation of a controlled drug, also should fall, in that there was, in practical terms, an inextricable link as between the five counts, in that they all related to the same consignment of drugs.