



THE COURT OF APPEAL

[312/10]

Bill No. [CY 22/09]

The President

Hogan J.

Mahon J.

BETWEEN

THE PEOPLE (DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

AND

CHRISTOPHER WIGGINS

APPELLANT

**JUDGMENT of the Court delivered by the President on 31st July 2015**

**Background**

1. The appellant was one of three persons who were sailing the yacht 'Dances with Waves' on 5th November 2008, when it was boarded by Naval officers 150 nautical miles south west of Mizen Head outside of Irish territorial waters. At the time, the vessel contained cocaine weighing 1,504 kg. and valued at between €100 and €400 million.

2. The suspect vessel was identified as a result of confidential information supplied to the Irish Joint Taskforce on Drugs ("JTF") by the Maritime Analysis and Operations Centre for Narcotics (MAOCN) in Lisbon, Portugal.

3. On 5th November 2008, the Naval Service vessel 'L.E. Niamh' observed the vessel and confirmed its identity as the 'Dances with Waves'. A boarding party from the 'L.E. Niamh' boarded 'Dances with Waves' pursuant to Article 110 of the United Nations Convention of the Law of the Sea (UNCLOS) to ascertain its nationality. The occupants of the vessel were David Mufford, Philip Doo and Christopher Wiggins.

4. Philip Doo confirmed that the registration of the vessel had lapsed, but that he intended to re-register it at Liverpool.

5. A communication between the 'L.E. Niamh' and the JTF, and between the JTF and UK Customs clarified that the vessel had been de-registered by its previous UK owner in June 2008, and that it was not registered in any Convention state. Accordingly, on 6th November 2008, a decision was made to detain the vessel under s. 35 of the Criminal Justice Act 1994 ("the 1994 Act").

6. The appellant and his two companions, Phillip Doo and David Mufford, were arrested under s. 34 of the 1994 Act, for using a ship for drug trafficking and subsequently detained under s. 2 of the Criminal Justice (Drug Trafficking) Act 1996. All three cooperated fully with the Gardaí and admitted their part in the drug trafficking operation.

7. Each of the three pleaded guilty to an offence under s.15A of the Misuse of Drugs Act 1977, as amended, and were sentenced at Cork Circuit Criminal Court on 8th May 2009 to 10 years' imprisonment each. They were also charged with offences pursuant to s.15 of the Misuse of Drugs Act 1977, as amended, and offences pursuant to s. 34 of the 1994 Act, of using a ship for drug trafficking. A *nolle prosequi* was entered in respect of the latter two counts post-sentence. As will be seen, the central issue which arises on which this appeal is whether this Court should allow Mr. Wiggins to withdraw his plea of guilty and to permit him now to appeal against this conviction.

8. The appellant was originally refused leave to appeal the severity of the sentence on 8th May 2009, by the sentencing judge. The appellant and Mr. Doo subsequently made attempts to appeal their convictions, and it appears that the Court of Criminal Appeal informed them that they had to apply to the Court that sentenced them for leave to appeal. Accordingly, at a hearing on 26th April 2013, the sentencing judge was asked to grant leave to appeal the convictions of Mr. Wiggins and Mr. Doo. The prosecution's view was that it was a matter for the trial judge and did not oppose the application and the judge extended time granted leave as sought.

9. The appeals of Mr. Wiggins and Mr. Doo were listed for hearing before this Court on 11th May 2015, but Mr. Doo withdrew his appeal on the day of hearing. Mr. Wiggins proceeded with his appeal and represented himself.

**Grounds of Appeal**

10. The appellant argues two grounds as to why his convictions are unsafe:-

1. The Boarding of 'Dances with Waves' pursuant to Article 110 of the United Nations Convention on Law of the Sea (UNCLOS) was unlawful.

Article 86 of UNCLOS states, inter alia:

"The provisions of [Part VII] apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State."

This provision appears to extend to areas not included in

- (i) the territorial sea;
- (ii) the internal waters of a State and
- (iii) the exclusive economic zone.

Article 110 UNCLOS is contained within Part VII of the said Convention and thus is encompassed by Article 86. Furthermore, Article 57, UNCLOS states:

"The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."

11. Accordingly, as the evidence discloses that the 'Dances with Waves' vessel was boarded some 150 nautical miles from Mizen Head pursuant to Article 110 UNCLOS, it is submitted that the 'Dances with Waves' vessel was boarded within the State's exclusive economic zone. If this argument were correct it would mean that the Naval Service could not properly have invoked Article 110 UNCLOS and, by extension, the boarding purported to be effected thereunder was unlawful.

2. A s. 15A Misuse of Drugs Act 1977 charge could not have been levied on the facts

Section 33 of the 1994 Act(as amended) reads:

"(1) A person is guilty of a drug trafficking offence if the person does, on an Irish ship, a ship registered in a Convention state or a ship not registered in any country or territory, any act which, if done in the State, would constitute such an offence."

12. However, the term "drug trafficking offence" for the purposes of s. 33 is defined at s. 3 of the 1994 Act as, inter alia:

"...

(b) an offence under section 15 of that Act of possession of a controlled drug for unlawful sale or supply,

...

(f) an offence under section 33 or 34 of this Act."

13. The appellant argues that that, whereas the said provision purports to authorise the State to invoke s. 15 simpliciter, it cannot and does not engage the separate and distinct provision of s. 15A. It cannot reasonably be said that s. 15A is subsumed within s. 15.

#### **Preliminary Point**

14. There is, however, a preliminary issue: whether it is open to Mr. Wiggins, in all the circumstances of this case, to pursue an appeal against conviction his plea of guilty notwithstanding. The Director of Public Prosecutions challenged the appeal by Mr. Wiggins in circumstances where he had pleaded guilty and had had legal advice. Paras. 9 to 11 of the DPP's submissions are as follows:

"9. The respondent objects and submits that the appellant is not entitled to change his plea having admitted the offence charged in lieu of which the prosecution entered a *nolle prosequi* in respect of the remaining counts on indictment.

10. The submissions hereafter are without prejudice to the respondent's primary objection as to the appellant's lack of entitlement to change his plea at this remove.

11. It is assumed, therefore, for the purpose of argument, that the appellant is submitting that he was improperly advised to plead guilty and is seeking to overturn his plea of guilty on that basis."

15. Accordingly the first question this Court must investigate before embarking on an examination of the substantive grounds of appeal is the question of whether a guilty plea to the charge given some six years ago bars the appellant from now bringing an appeal against his conviction. The question of whether an appeal is barred is often intertwined with the substantive grounds of appeal. Why and in what circumstances was the guilty plea entered?

16. The appellant, by his own submission, pleaded guilty to a charge contrary to s. 15A of the Misuse of Drugs Act 1977 on foot of allegedly incomplete legal advices supplied by his previous legal teams. In this regard, the Court is invited to be cognizant of the fact that this matter was the first ever prosecution undertaken on foot of the enabling legislation which underpins the case and involves complex and unusual legal issues concerning aspects of both maritime and European law. It was submitted that the appellant ventilated his concerns and discontent at the earliest possible juncture by communicating same to his previous legal team and, later, to the State Solicitor for Cork.

17. It was submitted that, as the legal advice supplied to the appellant was incomplete and inaccurate, the said advice cannot reasonably be described as proper. Thus although the decision to plead guilty was that of the appellant alone, the decision to plead did not have its genesis in proper legal advice. Accordingly, the appellant's plea of guilty cannot reasonably be described as an uninformed plea, the existence of which renders his conviction unsafe.

18. Mr. Wiggins has nor sworn an affidavit or put before the Court any documentary material to substantiate his submissions.

#### **The Law on the Preliminary Issue**

19. Section 32 of the Courts of Justice Act, 1924, as amended by s. 3(6) of the Criminal Procedure Act 1993 provided:

"Leave to appeal shall be granted by the Court of Criminal Appeal in cases where the court is of opinion that a question of law is involved, or where the trial appears to the court to have been unsatisfactory, or there appears to the court to be any other sufficient ground of appeal, and the court shall have power to make all consequential orders it may think fit, including an order admitting the appellant to bail pending the determination of his appeal or application for leave to appeal."

20. Section 31(c) of the Criminal Procedure Act 2010 substituted a new s. 32 of the Courts of Justice Act 1924 - with effect from 1st

September 2010 (S.I. No. 414 of 2010). This now provides that

"32.— The Court of Criminal Appeal shall have power to make any order it may think fit, including an order admitting the appellant to bail, pending the determination of his appeal."

21. All jurisdiction which was vested in or capable of being exercised by Court of Criminal Appeal is now vested in this Court following its establishment by virtue s. 7A of the Courts (Supplemental Provisions) Act 1961 as amended by s. 8 of the Court of Appeal Act 2014.

22. It is clear that this Court has a jurisdiction to permit an appeal against conviction even following a guilty plea. Thus, in *DPP v. Geasley* [2009] IECCA 22, Fennelly J. delivering the judgment of the Court of Criminal Appeal referred to s. 32 of the Courts of Justice Act 1924, as amended by s. 3(6) of the Criminal Procedure Act 1993. Fennelly J. held "that this section is broad enough to encompass a right to appeal, or apply for leave to appeal, notwithstanding a guilty plea, in an appropriate case".

23. The Court of Criminal Appeal considered this question in the cases of *DPP v. Lynch* (Unreported, 27th July 1999) and *DPP v. B.* [2002] 2 I.R. 246. Both cases were concerned with how the advice of counsel had influenced the accused in making his decision to plead guilty. In each case, the Court heard evidence of the circumstances surrounding the decision to plead. In the first, the appeal was allowed; in the second it was dismissed. These cases establish the principle that, in an exceptional case, a plea of guilty is not an insuperable bar to an application for leave to appeal against conviction. The advice of counsel was central to the argument in the two cases.

24. In *DPP v. Lynch* (Unreported, 27th July 1999) the defendant argued that his decision to plead guilty was made as the result of improper pressure placed upon him by his legal advisors. Barron J. found the fundamental issue was whether the appellant should in all the circumstances be allowed to change his plea and obtain a trial on the merits. The Court held that it had jurisdiction to consider the point, although on the facts the Court held, in dismissing the appeal, that counsel had behaved properly and had given correct advice.

25. In *DPP v. B.* [2002] 2 I.R. 246, the defendant pleaded guilty to charges of rape, sexual assault and unlawful carnal knowledge arising out of an admitted incestuous relationship he had with his half-sister. At the time he entered his pleas of guilty, both he and his Senior Counsel, on whose advice he acted, were unaware of a number of statements which were not in the original book of evidence and also of one important exhibit, namely a form of diary kept by the complainant. The defendant sought to set aside his guilty plea in respect of the count of rape and the count of sexual assault, although he had already served his sentence in respect of the latter. The Court of Criminal Appeal held the convictions to be unsafe and ordered a retrial on the count of rape. It was held that in this unique case where, had Senior Counsel seen the documents, he would have advised differently and the applicant might have pleaded not guilty and have been acquitted, it would be unsafe to allow the conviction to stand. Giving the Court's judgment, Geoghegan J. stated ([2002] 2 I.R. 246,251):-

"However, in the light of the undoubted fact that he had strongly expressed the wish to plead not guilty to Senior Counsel, we think it is quite probable that, had advice been given to him as to all the pros and cons of a plea, in the full knowledge of the facts, he may have pleaded not guilty."

26. In *DPP v. WG* [2004] IECCA 43, the defendant sought to appeal where he had been in receipt of legal advice which was incomplete and inaccurate, and also that he was not given sufficient time to consider whether to plead guilty. Despite some worrying practices, which the Court commented upon, McCracken J. ultimately found at p. 12:-

"This Court is satisfied that the correct test in cases such as this is that set out in *DPP v. Lynch* that 'ultimately what this court has to ascertain is whether it is fair to deny the appellant even at this late stage a trial on the merits'. This Court is satisfied that, on the basis that the advice given was proper advice and the decision was that of the applicant alone, the applicant has not made out any case of unfairness or injustice."

27. In *Geasley* [2009] IECCA 22, no complaint was made of legal advice given prior to the guilty plea. The submission was rather that erroneous rulings by the judge in the course of the trial caused the accused to enter a guilty plea to conspiracy to obtain a cache of weapons and ammunition for unlawful purposes. His guilty plea was entered after rulings that allowed evidence to be admitted of certain telephone conversations. He claimed his trial lacked the fundamental attributes of a fair trial so that he was left with no option but to plead guilty. The Court of Criminal Appeal set out the relevant test at para. 19 of the judgment:-

"In the view of the Court, an applicant such as in the present case must show that his decision to plead guilty followed on an erroneous ruling or material irregularity of a fundamental kind, such that proceeding with the trial would have been pointless. The court should not allow tactical use to be made of the plea of guilty to obtain a new trial in more favourable circumstances."

28. This issue also arose in *DPP v. Stuurman* [2013] IECCA 19. This case involved a defendant who, notwithstanding his plea of guilty, appealed his conviction for possession of 58 half- kilo packages of Diamorphine on the basis that two of the rulings made by the trial judge in the course of trial were incorrect. It was, in substance, only as a result of those adverse rulings that a plea of guilty was entered.

29. Having accepted the test set out on in *Geasley*, the Court, in the judgment of Clarke J., found that the case fell outside the scope of the exceptional cases where a party can properly be permitted to appeal against conviction notwithstanding a plea of guilty, because even taken at its height, any such error in the trial judge's rulings regarding the points raised could not be described as being a fundamental error of law. The Court of Criminal Appeal accordingly dismissed the appeal.

## **The Substantive Grounds**

### **United Nations Convention on the Law of the Sea –UNCLOS**

30. The chronology of events is described in the evidence of Detective Sergeant Foley at the sentence hearing and also in the book of evidence in the case to which the parties have referred. Relevant dates and times appear to be as follows in relation to the arrest and detention of the vessel and of Mr. Wiggins and his confreres:

5th November 2008, 9.47pm: The Naval Service boarded the vessel

6th November 2008: Some time shortly after midnight the vessel was detained.

7th November 2008, 9.30am: 'Dances with Waves' arrived in Castletownbere under arrest and then being manned by the Naval Service assisting Mr. Doo to bring the vessel into harbour. Mr. Wiggins was on board the Naval Service vessel.

31. Article 110 of UNCLOS is entitled 'Right of Visit' and the relevant elements are as follows. Under the first of five paragraphs, it is provided that "a warship which encounters on the high seas a foreign ship is not justified in boarding it" unless there is reasonable ground for suspecting one of a number of things, of which the apt one here is (d), namely, that the ship is without nationality. The point that arises that the Naval Service boarded the vessel in the first instance and then ascertained that it had been deregistered so that in effect it was without nationality at the time. It is not clear, however, that the Naval Service officer who boarded harboured the suspicion prior to boarding that the vessel was without nationality. Instead, it appears to be the case that the Naval Service were alerted by the MAOCN in Lisbon, the international agency that is coordinating efforts to suppress drug trafficking, that this vessel was on its way from the Caribbean, or that a vessel answering this description was on its way. The 'L.E. Niamh' personnel located the vessel and suspected that this was the one, but in order to confirm their suspicions they had to board the vessel. The question is whether they were entitled to board it in the first place. The Director submits that Article 110 of UNCLOS justified the actions of the Naval Service.

#### **The Relevant Legislation**

32. The relevant law is contained in the Criminal Justice (Illicit Traffic by Sea) Act 2003, and sections 33 and 34 of the Criminal Justice Act 1994. Section 33 of the 1994 Act as originally enacted, was in the following terms:-

"Anything which would constitute a drug trafficking offence if done on land in the State shall constitute that offence if done on an Irish ship."

That was replaced by a new s. 33 inserted by s. 28(b) of the Criminal Justice (Illicit Traffic by Sea) Act 2003, as follows:

"33-(1) A person is guilty of a drug trafficking offence if the person does, on an Irish ship, a ship registered in a Convention state or a ship not registered in any country or territory any act which if done in the State would constitute such an offence.

(2) This section is without prejudice to s. 34 of this Act."

33. The definition of drug trafficking offence which is contained in s. 3 of the 1994 Act, is as follows so far as relevant to the case:

"(b) An offence under s. 15 of that Act of possession of a controlled drug for unlawful sale or supply"

the Act in question being the Misuse of Drugs Act 1977.

34. A drug trafficking offence, as defined in s. 3(1) of the 1994 Act, was amended by s. 7 of the Criminal Justice Act 1999 to include an offence under s. 15A of the Misuse of Drugs Act 1977 (as amended).

35. Section 34 applies to, inter alia, a ship not registered in any country or territory. The section makes it an offence for a person to be on a ship to which the section applies and have a controlled drug in his possession or to be knowingly concerned in the carrying or concealing of a controlled drug on the ship. Where the person knows or has reasonable grounds to suspect that the drug is intended to be imported or that it has been exported contrary to regulations which may apply to the law of this State and any other State. There is a mode of proof by certificate of the relevant law of another State if that arises. A person guilty of an offence under s. 34 is liable to a maximum term of imprisonment of seven years. This is one of the matters to which Mr. Wiggins refers because he was sentenced to ten years, namely, the presumptive minimum term of imprisonment for possession of drugs over €13,000 contrary to s. 15A.

36. Under the First Schedule of the 1994 Act, enforcement powers in respect of ships are listed and they apply to a member of the Naval Service which is the relevant personnel here. Under Article 2 of this Schedule, an enforcement officer may stop a ship boarded, and if he thinks it necessary, require it to be taken to a port in the State and may detain it there. Sub-paragraph (2), that is Article 2(2) refers to a situation where an enforcement officer is exercising his powers with the authority of the Minister for Foreign Affairs in accordance with s. 35 of the Act – to which I will turn – the officer may require the ship to be taken to a port in the Convention state in question or to another country nominated by that State. The Schedule goes on to give further powers in respect of searching and obtaining information and dealing with suspected offences.

37. Turning now to s. 35, sub-section (1) confers the powers in the First Schedule on an enforcement officer (which includes an officer in the Naval Service) to be exercisable in relation to a ship to which sections 33 or 34 apply. For the purpose of this case, that is a ship not registered in any country or territory. The other applications are to an Irish ship or a ship registered in a Convention state. The troubling part for the DPP in this case is s. 35(2) and (3) the provisions of which may be summarised as follows. First Schedule powers cannot be exercised outside the landward limits of the territorial seas of the State in relation to a ship registered in a Convention state except with the authority of the Minister for Foreign Affairs and then only if the registration state has requested assistance and authorised it. That does not seem to apply in this case because 'Dances with Waves' was not registered in a Convention state and was not, in fact, registered anywhere because according to the evidence it had been deregistered by its previous owner.

38. To draw these provisions together in relation to the case, the situation is as follows. The Naval Service had reason to suspect that Mr. Wiggins and his co-accused were in possession on the vessel 'Dances with Waves' of a quantity of controlled drugs at a location outside the territorial waters of the State. Under s. 33 of the 1994 Act (as inserted by s. 28(b) of the 2003 Criminal Justice (Illicit Traffic by Sea) Act), a person is guilty of a drug trafficking offence if he does any act which, if done within the State would constitute an offence, on a ship not registered in any country or territory. The Naval officers who boarded the ship had powers under the First Schedule to stop and search the vessel and to arrest without warrant anyone whom they had reasonable grounds for suspecting was guilty of an offence mentioned in s. 33 or s. 34 of the Act. That meant that he suspected that the person was guilty of something that, if done in the State, would constitute an offence – see s. 33(1) as newly inserted. The restriction in s. 35(2) of the 1994 Act does not apply because 'Dances with Waves' was not a ship registered in a Convention state.

39. In light of this discussion and, having regard to the inclusion of s. 15A offences, in the definition of drug trafficking offence, it is clear that Mr. Wiggins's second point could not succeed if his appeal were to be entertained.

40. In regard to the boarding of the vessel, the position is obviously a matter of some complexity. It appears to be at least arguable that issues arise, including whether the boarding of the yacht was in breach of UNICLOS Article 110; whether the Naval Service was authorised to board the vessel before it had a suspicion in respect of non-registration; whether the Navy's suspicion, insofar as it was a different one from what is provided under Article 110, invalidated the boarding and subsequent events including the arrest of Mr. Wiggins, and whether any such irregularities were necessarily fatal to the prosecution or did the trial Court have a discretion.

## **Discussion and Conclusion**

41. The sentence hearing was on 8th May 2009 at the Circuit Criminal Court, Cork.

42. Relevant to this appeal is an exchange that appears at p. 19 of the transcript when counsel for Mr. Wiggins asked the following questions and was answered by Detective Sergeant Foley as follows:

"Q. And he's 43 years of age and had reached that stage of his life without getting into any difficulty at all. Just in relation to the saving to the State, Detective Sergeant, by virtue of the plea entered by Mr. Wiggins and Mr. Doo and Mufford, I think, as Mr. Creed as fairly outlined, this is novel legislation. It has never been used before. Nobody has been prosecuted to date in this jurisdiction based on the State's extraterritorial jurisdiction deriving from the Convention and the Criminal Justice Act 1994, and it was open to the accused to run various technical challenges, for instance, in relation to the boarding of the vessel under the United Nations Convention and perhaps in relation to the legislation and whether it is a perfect fit with the Conventions, but it has saved the State considerably that the accused haven't taken that course and have decided to own up to their guilt. Would you accept that there is a saving to this?

A: Yes, My Lord, there most certainly would be. Yes. It would have involved a long trial with a significant number of witnesses.

Q: I think you saw earlier an apology to the Irish State that Mr. Wiggins has drawn up, and I'll in due course be handing that into the judge but you wouldn't have any comment to make, I think, one way or another on that?

A: No. No, My Lord."

43. It is clear, therefore, that leading counsel for Mr. Wiggins was alive to the issues and that "it was open to the accused to run various technical challenges, for instance, in relation to the boarding of the vessel under the United Nations Convention and perhaps in relation to the legislation, and whether it is a perfect fit with the Conventions, but it has saved the State considerably that the accused have not taken that course and have decided to own up to their guilt" and it must accordingly be assumed that he was also aware of those matters. He thus sought and obtained the benefit of pleading guilty and made the case that his plea had added value because he was foregoing his chance of being acquitted.

44. The reference by counsel to a letter written by Mr. Wiggins to the State, in which he expressed his apology for the behaviour that led him to his position before the Court for sentence on this serious charge, is also relevant to the circumstances in which he came to plead guilty.

45. *In Geasley* [2009] IECCA 22, Fennelly J. said that:

"The court should not allow tactical use to be made of the plea of guilty to obtain a new trial in more favourable circumstances."

46. People plead guilty for many different reasons, including shame; guilt; wanting to have the trial process finished or hoping to get a lighter sentence than they would if convicted after a full trial. In this case, the accused, Mr. Wiggins, wrote a letter of apology to the Irish State and he and his confederates were grateful to the Irish Navy for rescuing them from the danger they were in because of rough seas with a damaged boat. By pleading guilty, he gave up the possibility of being acquitted at trial. It was a complex case with many things that might have gone wrong for the prosecution. There might well have been an issue of law in relation to the boarding of the vessel and the arrest of the sailors. The legislative labyrinth was going to be difficult to explain to the jury. There was the normal chance of a generous, sympathetic or even perverse verdict of not guilty.

47. These things did not give Mr. Wiggins any right to re-open the case and have a re-trial. In order to be permitted, at this long remove from the trial and his plea to resile from the formal and public acceptance of guilt that he expressed, Mr. Wiggins had to show by evidence some circumstance whereby his decision to plead guilty is invalidated by erroneous advice that he was given about the law or that was based on a mistake of fact and that such error would have made a material difference and that it would be unfair to deny him, even at this late stage, a trial on the merits. There is, however, nothing in the case to meet these criteria. It is not shown that he was given advice that was wrong in law or that there was any factual material that was misstated to him or any material circumstances that meet the requirements.

48. Mr. Wiggins has failed to demonstrate that by reason of being materially misled or misinformed as to facts or law such that he did something that he would not otherwise have done. This threshold is obviously high and Mr. Wiggins has not surmounted it. Of the two substantive points he puts forward, one is unfounded. The other could potentially have substance, but the matter was expressly referred to by his counsel in the course of the sentence hearing by way of mitigation.

49. This Court cannot now allow Mr. Wiggins to re-open his decision to plead guilty in circumstances where with full knowledge and appropriate legal advice he took that particular course in May 2009 and obtained the benefit of a reduced sentence following a plea in mitigation. It follows that Mr. Wiggins's appeal must accordingly be dismissed.