Neutral Citation Number: [2007] IEHC 150

THE HIGH COURT

2006 1638SS

IN THE MATTER OF SECTION 52(1) OF THE COURTS (SUPPLEMENTAL) PROVISIONS) ACT, 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

COMPLAINANT

AND

GERRY BUCKLEY

DEFENDANT

Judgment of Mr. Justice Charleton delivered on 8th day of May, 2007

1. The defendant was charged with one offence before Judge Constantine O'Leary in Cork. This alleged that on 31st January, 2005 at Hollyhill, in the city of Cork, he had cannabis resin in his possession contrary to ss. 3 and 27 (as amended by s. 6 of the Misuse of Drugs Act, 1984) of the Misuse of Drugs Act, 1977. Having part heard this case in May, 2005, the learned District Judge referred a question for the opinion of the High Court in the following terms:-

> "Whether the defendants' admission that the substance recovered from his pocket was cannabis is sufficient evidence that it was such… in the absence of a certificate of analysis from the Garda Forensic Science Laboratory confirming that the substance was in fact cannabis."

Facts

2. This question was raised as a result of a submission by the defending solicitor at the close of the prosecution case. Mr. Joseph Cuddigan submitted that there was no case for the defendant to answer because the Director of Public Prosecutions had failed to adduce into evidence a certificate of analysis that the substance found on the defendant was cannabis. For the purpose of this procedure, the learned District Judge has found a number of facts, to which I now turn.

3. The defendant was stopped on the street on the 26th May, 2005 in Ardcullen area of Hollyhill in the City of Cork by two members of An Garda Síochána. They searched the defendant according to the terms of s. 23 of the Misuse of Drugs Act, 1977, as amended, and as a result of this they found a small quantity of a brown substance, which was believed to be cannabis, in the defendant's back trouser pocket. This substance was shown to the defendant and he was cautioned that he was not obliged to say anything. Mr. Buckley was invited to the Garda Station for the purpose of a thorough search and, when he declined, he was arrested under s. 23 of the Misuse of Drugs Act, 1977, as amended. After being checked into Gurranebraher Garda Station under the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána stations) Regulations, 1987, a further search took place. The Gardaí found a knife in one Mr. Buckley's pockets and an item that has been described as a "hash pipe" and a balaclava. After caution, Mr. Buckley admitted that the brown substance was cannabis and he added that it was for his own use. He also accepted that the balaclava, the pipe and the knife were his property. Mr. Buckley was then released from custody but the relevant items were kept for the purpose of a prosecution. The cannabis was sent for analysis to the Forensic Science Laboratory, but it would seem that it never arrived back.

Consultative Case Stated

4. I am satisfied that the question asked by the judge is both sensible and pertinent. If, however, I baldly answer it without reference to the other facts which he has found I may be in danger of misleading him as to the appropriate law. It seems to me that the relationship between the District Court and the High Court in these cases is similar to that expressed by Finlay C.J. in *Dublin Corporation v. Ashley* [1986] I.R. 781, in relation to a consultative case stated from the Circuit Court to the Supreme Court, where this opinion was expressed at 785:-

> "The purpose and effect of a consultative case stated by a Circuit Court judge to the Supreme Court is to enable him to obtain the advice and opinion of the Supreme Court so as to assist him in reaching a correct legal decision. Having regard to that purpose and relationship which exists between the two courts, it would, in my view, be quite inappropriate for the Supreme Court, for any reason of procedure, to abstain from expressing a view on an issue of law which may determine the result of the case before the learned Circuit Court Judge."

5. It follows that for the purpose of assisting the District Court, this court must look at the whole of the case stated and give advice on the basis of what Laffoy J. in *National Authority for Occupational Safety and Health v. O'K Tools* [1987] 1 I.R. 534 at 541 called:- "the issue on which the District Court Judge requires guidance." Therefore, a question may be reformulated and an answer given in the light of the whole of the case stated provided this does not exceed the facts as found for this purpose by the learned District Judge; Collins & O'Reilly, *Civil Proceedings and the State* (2nd Ed., Dublin, 2004), and *The Director of Public Prosecutions (Comiskey) v. Traynor*, (Unreported, High Court, 27th July, 2005).

6. For this purpose, I accept that the trial judge has an obligation to have regard to relevant evidence, since the purpose of the criminal trial is to enquire as to whether the prosecution have adduced sufficient evidence to prove beyond reasonable doubt that the accused committed the crime. It has been argued, and I agree, that the public interest requires the acquittal of the innocent and, where the prosecution have discharged the burden and standard of proof, the conviction of the guilty.

Direction Stage

7. The issue before the trial judge at direction stage, on the close of the prosecution case, whether he or she is sitting with the jury or is the sole tribunal of fact, is whether the prosecution have adduced sufficient evidence which might enable a safe conviction to occur on a full consideration of that evidence by the tribunal of fact. *In The People (The Director of Public Prosecutions) v. O'Shea* [1983] I.L.R.M. 592, Finlay P. had this to say at 594:-

> "One of the functions of a trial judge in a criminal trial is to reach a decision at the conclusion of the evidence tendered on behalf of the prosecution as to whether there is evidence which if accepted by a jury could as a matter of law lead to a conviction. This may frequently occur in practice in cases where there is a gap in the evidence tendered on behalf of the prosecution and where some vital link in the chain of proof is missing. It also arises in my view, however, and not infrequently, in cases where an apparent link in the chain of proof is so tenuous that it would clearly be perverse for a jury properly directed as to the onus of proof upon the prosecution to act upon it."

8. The test to be applied, therefore, revolves around whether the tribunal of fact, be it judge or jury, on full consideration and having heard speeches or submissions on both sides, could properly convict on the evidence. It is the trial judge's duty, at that point, to stop the trial if that evidence is absent. The trial judge must bear in mind, however, that it is the fundamental duty of the jury, or the

trial judge as tribunal of fact, to decide facts and, in that regard, to apply reason and commonsense to the evidence. It is their task to weigh the importance of the individual pieces of evidence in determining the issue as to whether the prosecution have discharged the burden and standard of proof. It is not the function of the trial judge at direction stage to weigh the evidence. His or her function, at that stage, is to see whether the requisite proofs to establish the case have been adduced in evidence, bearing in mind that there can be cases where an apparent link in the chain of proof is so tenuous that it would clearly be perverse for a properly directed jury to act upon it. This approach accords with the law as set out in England in *R. v. Galbraith* [1981] 1 W.L.R. 1039 where at p. 1042, Lord Lane C.J. gave this description as to the duty of a trial judge where there has been an application for a direction:-

> "How then should the judge approach the submission of 'no case'?
>
> (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The Judge will of course stop the case.
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> (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.
>
> (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
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> (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

9. Issues of credibility are therefore not part of the trial judge's function at the direction stage of a criminal trial. Issues as to the absence of evidence clearly are. This case is a good example of that principle and I therefore now turn to the question posed by the learned District Judge.

Proof of a Controlled Drug

10. The Misuse of Drugs Act, 1977 did not allow for the proof of the presence of the controlled drug, an essential element of the charge, by any other means than the calling of oral evidence. This meant that for the seven years prior to the implementation of the Misuse of Drugs Act, 1984, a forensic scientist had to be called in evidence to give the results of the analysis of the substance in question. In Charleton *Controlled Drugs and The Criminal Law* (Dublin, 1986) the following passage appears at page 93:-

> "The prosecution must prove that the substance that the accused possessed is, in fact, a controlled drug. This is almost always done by a forensic examination of the substance. Section 10 of the 1984 Act now allows the result of such a test to be given in evidence by means of a certificate signed by an officer of the Forensic Science Laboratory. Such a certificate can specify, as a result of testing or analysis that a substance proved to be a certain controlled drug. It would also be proper to prove by certificate the percentage purity of such drug and, if necessary, to identify any impurities and their percentage presence in the substance. The section does not allow evidence to be given by certificate as to such matters as the medicinal dosage for such a drug or the usual quantities in which such drugs are sold at street level. That is a matter for expert evidence gleaned by experience, not analysis, and therefore does not come within the scope of the section. Section 10 therefore should only be used in relation to charges of simple possession. The existence of a controlled drug may also be proved by an admission by the accused to that effect; *R. v. Chatwood* [1980] 1 W.L.R. 874, [1980] 1 All E.R. 467, 70 Cr. App. Rep. 39. Such an admission will be given more weight where the accused is experienced in using or dealing with the drug; *The State v. Babatunde* (1982) (1) N.C.R. 243. A court of first instance in England has however held that an analysis report should always be produced in drugs prosecutions; *R. v. Lang and Evans* [1977] Crim. L.R. 286."

11. In *Bird v. Adams* [1972] Crim. L.R. 174, the issue was whether an admission by the accused took possession of LSD, made after caution, and to the effect that he had supplied the drug to five or six people, was sufficient evidence. The High Court, on a case stated, following the conviction of the accused, advised as follows:-

> "There are many instances where an admission made by a defendant on a matter of law in respect of which he was not an expert was really no admission at all, e.g., a defendant could not know in a bigamy case whether a foreign marriage was valid, and there were cases where an admission of fact was valueless because the circumstances were such that a defendant could not possibly have the necessary knowledge, but here the defendant admitted that he had in his possession a dangerous drug and had been peddling it. The defendant certainly had sufficient knowledge of the circumstances of his conduct to make his admission at least *prima facie* evidence of its truth which was all that was required at this stage in the proceedings when the submission of no case was made and accordingly, the justices, had correctly ruled that there was a case to answer."

12. In *R. v. Chatwood*, [1980] 1 W.L.R. 874, [1980] 1 All E.R. 467, 70 Cr. App. Rep. 39, the only evidence against the accused men was that they had admitted after caution that they had been injecting themselves with heroin. By this stage the evidence was, for that reason, missing. One of the accused persons went into evidence and said that he had been injecting himself with flour. The Court of Criminal Appeal, per Forbes J., applied the judgment of Lord Widgery CJ in *Bird v. Adams* and stated at 472:-

> "… it is apparent that the statements of the accused in this case, either orally to the police officer or when reduced to writing, was sufficient to provide *prima facie* evidence of the nature of the substance which had been in their possession. One of them, Proctor, as I have indicated, gave evidence, but what I have said about his statement to the police and the fact that he was found guilty by the jury indicates quite clearly that the jury disbelieved his explanation that it was flour and believed his earlier statement to the police that he knew it was heroin.
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> The court is of the view that the statements of the accused provide, having regard to the circumstances of this case, prima facie evidence of the identity of the substance. As that is the only point on the appeals against conviction, the appeals against conviction are accordingly dismissed."

13. In *R. v. Bagshaw* [1995] Crim. L.R. 433, an issue as to whether an untested substance was or was not cannabis was resolved by the prosecution adjourning the case and arranging for a test to be carried out at a laboratory next to the court. Defence counsel

then admitted that the drug was cannabis resin. In *City of Sunderland v. Dawson* [2004] E.W.H.C. 2796, the issue was whether a charge of selling alcohol to an underage person was made out. The defence submission at the close of the prosecution case was that there had been no proof that the bottle sold in the off-licence to the child contained anything other than coloured water and consequently that there was a fatal absence of a certificate of analysis to show that it was alcohol. Thomas L.J. stated:-

> "The analogy of requiring an analysis for controlled drugs taken, as appears from the case stated, was manifestly absurd. It is of course true that courts do have evidence of analysis of drugs such as cannabis, cocaine or heroin. They are not sold as labelled products and, unless there is an admission as to the substance, it is often necessary to prove what it is."

Conclusion

14. In considering, at the close of the prosecution case, whether sufficient evidence has been adduced to allow the case to proceed to the defence case, or to submissions, a trial judge should be concerned to see whether the proofs necessary to make out the charge have been adduced in evidence. At that stage, the trial judge is not concerned with issues of credibility or with sufficiency of proof but with the technical nature of the elements of the offence and whether these have been reflected in evidence by proof. There can be exceptional cases where the nature of a necessary proof is found to be so tenuous that a trial judge would be compelled to make a conclusion that any consequent conviction would be unsafe. In those very rare cases the issue as to conviction might be withdrawn from the jury, or from the judge acting as the tribunal of fact.

15. Cases proceed on the basis of direct evidence and circumstantial evidence. Here, there was both. The admission by the accused that he was in possession of cannabis constituted an admission against interest and was therefore admissible against him. A piece of direct evidence should never be divorced from its factual background. Instead, it should be considered in the light of all the other relevant evidence in the case. The possession of a pipe and a knife could therefore be weighed with the admission to provide it with context.

16. In considering an application for a direction the court should not weigh the evidence but simply consider whether it is present or not. The admission, in this context, seems to me to be no different to a statement by someone who is familiar with the qualities of an item in question. If, therefore, on the charge of serving alcohol after hours in a licensed premises, the smell and appearance of beer and wine before customers can, in the ordinary knowledge of people in the community, provide sufficient evidence that alcohol, as opposed to lime cordial or cranberry juice, was being served. The qualities of cannabis are not now so unusual as to put it in a different category so that expert evidence of its presence is always required. An accused who admits a substance is cannabis can be, but not necessarily must be, relied on to know what he is talking about.

17. It should be borne in mind, however, that if the prosecution choose to weaken their case by not adducing a certificate of analysis in circumstances where the nature of the substance is at the core of the charge, that applications to dismiss the charge may be expected. I would advise, that in all the circumstances of the case, that there was sufficient *prima facie* proof through the admission of the accused, coupled with the pipe and the knife, that the substance in his back trouser pocket was the relevant controlled drug.

18. Finally, there have been incidents of trickery in Dublin and in other cities, whereby a substance looking like a controlled drug, such as cocaine or heroin, is sold at mass gatherings such as rock concerts. The customers have sometimes later found, to their benefit, and to their monetary cost, that what they have purchased is cleaning powder. When, therefore, the judge or jury are considering the ultimate issue as to whether the prosecution has proved their case beyond reasonable doubt, this possibility should be borne in mind. When the prosecution adduces evidence only of an admission, the issue for the judge, at direction stage, is whether the circumstances show that the accused can be relied on to have sufficient knowledge to allow that admission to be safely relied on; *The People (The Director of Public Prosecutions) v. McHugh* [2002] 1 I.R. 352. When the issue of guilt is being considered, that issue must be tested in the light of the burden and standard of proof in criminal cases.