THE COURT OF APPEAL

[11/2016]

The President

Edwards J.

Kennedy J.

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

PETER IBEABUCHI

APPELLANT

JUDGMENT (Ex tempore) of the Court delivered on the 29th day of November 2018 by Birmingham P.

1. On 17th November 2015, the appellant, Mr. Ibeabuchi, was convicted in the Dublin Circuit Criminal Court of offences contrary to s. 15A and s. 15B of the Misuse of Drugs Act, that is to say, possession of controlled drugs for the purpose of sale or supply and the importation of controlled drugs in each case where the value of the drugs exceeded €13,000. Subsequently, on 17th December 2015, he was sentenced to a term of ten years imprisonment with the final three years of that sentence suspended. Mr. Ibeabuchi has now appealed. That he has appealed against conviction is clear. The position in relation to a sentence appeal is somewhat less clear cut and this is an issue to which we will return.

2. The background to the case is to be found in events that occurred in Dublin Airport on 15th April 2014. On that occasion, Mr. Ibeabuchi was stopped in Terminal 1 by Customs Officer, Paul Reinhart. Mr. Ibeabuchi had flown from Paris, but his journey had originated in Panama. Following interaction between Mr. Ibeabuchi and the Customs Officers, packages containing white power were found in each of the shoes that he was wearing. On analysis, that powder was established to be Cocaine and a value of €35,000 was placed on the Cocaine. Of note is that two other passengers on that Paris flight, whose journey had also originated in Panama, were also stopped, and their shoes, too, were also found to contain Cocaine. Similar charges were proffered against them and those charges have been processed through the courts.

3. Following his conviction and sentence, Mr. Ibeabuchi submitted a notice of appeal from prison. That notice of appeal is stamped as 'Received' in this Court on 6th January 2016. In the usual way, the pre-printed form begins 'I' and there is there inserted 'Peter Ibeabuchi'. "having been convicted of the offence", the details of which are not given, "do hereby give you Notice of Appeal to the Court of Appeal against my said [conviction] and/or sentence on the following grounds".

4. In a further development, grounds of appeal were received stamped as 'Received' in the Court of Appeal on 5th October 2016. Grounds 11 to 23 of that document deal with appeals against severity of sentence and that section of the document is headed 'In Respect of the Appellant's Sentence'. Interestingly, the final paragraph of the document reads:

> "As the Appellant's present Solicitor and Counsel did not represent him at trial or at his sentence hearing, the Appellant may require to bring a motion seeking liberty to enlarge the within grounds on receipt of the transcript of the Appellant's trial and sentence here."

The relevance of the fact that a section of the document deals with sentence is to be found in the fact that the Judge at the sentence hearing specifically addressed the mandatory presumptive minimum and concluded that there was no basis for departing from the mandatory presumptive minimum of ten years. But then, certainly on one view, having so concluded, proceeded to depart, in the sense that he suspended three years of the mandatory presumptive ten years. It follows, therefore, that if there is a sentence appeal before this Court, that it would seem likely that the Court will have to quash the sentence and proceed to resentencing. That gives rise to the very real prospect that the sentence will have to be increased.

5. Thereafter, submissions were received from the appellant in person. The receipt of those submissions is date stamped 10th April 2017 and there were also additional submissions. It must be said that those submissions and additional submissions were highly tendentious. By way of example, the appellant's submissions had alleged that the trial judge stated "Mr. Ibeabuchi, you must give evidence as to your second interview with the Gardaí at Raheny Garda station, alright? They will give you that statement to refresh your memory and I want you to recite it back to me. It will be very helpful, okay? There'll be no problem, alright? Mr. Ibeabuchi, you are required to give evidence, alright?".

6. As pointed out in the submissions on behalf of the DPP, that exchange is not at all reflected in the transcript. The DPP's submissions commented that it is perhaps unprecedented and particularly outrageous allegation that illustrates Mr. Ibeabuchi artful

and disingenuous approach to his own submissions. The DPP's submissions continue that he presents crass and dishonest attempts throughout his submissions to mislead the Court in order to misrepresent the truth. That they would make those observations is, in the circumstances, entirely understandable.

7. In the ordinary way, submissions having been exchanged, the matter came into a List to Fix Dates and was listed for hearing. It was listed before a differently constituted panel. At that stage, Mr. Ibeabuchi was appearing in person and the panel agreed to put the case back in order that Mr. Ibeabuchi would have the opportunity of obtaining legal advice. That happened, and in recent days, further additional supplementary submissions have been lodged on his behalf. On this occasion, those submissions are signed by both junior and senior counsel. Those submissions address two issues. They are addressed by reference to grounds that have been identified in the earlier submissions. This morning, the Court sought and received clarification from Mr. Colgan, Senior Counsel on behalf of Mr. Ibeabuchi, that two grounds and two grounds only were being relied on, these being the two grounds that had featured in the additional supplementary submissions date stamped as received on 28th November 2016. Mr. Ibeabuchi himself intervened to confirm that the position was as stated by Mr. Colgan SC. The first ground, as recited in the supplementary replying submissions, is as follows, "Judge ruled a hearsay evidence of so-called co-accusers to be led before the jury". However, it is clear that in fact the substance of the complaint is a contention that the jury should not have been allowed hear a word about the fact that two others on the plane who had commenced their journey from Panama and travelled to Dublin via Paris were wearing similar shoes and the similar shoes also contained Cocaine.

8. Quite a number of years ago, Baron J. in the case of BK, memorably commented that the rules of evidence should not be allowed offend common sense. It seems to the Court that the submissions that are being advanced in this regard are at risk of offending common sense. The issue of the admissibility of the fact that there were two others on the plane, also in possession of Cocaine in their shoes, was the subject of a voir dire.

9. At the conclusion of the case, the Judge ruled on the matter and he concluded that the probative value of the evidence was such that the evidence should be admitted. He acknowledged that the evidence was prejudicial in the sense that it strengthened the prosecution case, but he was of the view that it was relevant and probative.

10. The Court is in no doubt that the evidence was relevant and clearly so and that it was admissible. It was, in effect, a piece of circumstantial evidence which could assist in the drawing of inferences as to the state of knowledge. Therefore, this ground of appeal fails.

11. The second ground is described as 'Admitting Inadmissible Evidence as to the Value of the so-called Drugs'. The position here is that the investigating Garda, a Garda from Dublin Airport, was asked about the value of the drugs and said that it was a valuation of €35,000. He went on to say that they had got a drugs Sergeant, an experienced drugs Sergeant, to calculate the value of the drugs for use. The point was made late in the day that this was inadmissible hearsay evidence. However, it is clear from the transcript that there was in fact specific agreement between prosecution and defence that one guard would be permitted to provide the evidence in relation to a number of topics. Prosecution counsel sought confirmation that there was such an agreement and such agreement was confirmed. It would appear that a tactical or strategic decision was taken by the defence that they would focus their attention on what was the main plank of the defence case which was that the appellant as unaware of what was in his shoes, believing that his shoes contained, not Cocaine, but rather, money.

12. In any event, where there was no challenge to the admissibility of the evidence of Garda Devoran, the investigating guard, where there was no cross-examination, and where it appears there was a specific agreement as to how the issue should be treated, the Court cannot allow that issue be readdressed. Accordingly, the Court dismisses that ground of appeal.

13. The Court, therefore, has no hesitation in dismissing the appeal against conviction and instead, upholding the conviction.

14. The Court, therefore, turns to the question of sentence.

15. The appellant's position today is that he had not lodged an appeal against sentence and that if there is in fact an appeal against sentence before the Court, that he wants to withdraw it. The Court's position in that regard is that it looks with disfavour on any attempt to have an a la carte approach to these issues. In the ordinary course of events, the appellant will have to suffer the consequences of his decision to proceed, despite the difficult situation in which he found himself being brought to the attention of his counsel.

16. However, the Court has regard to the fact that the two others who travelled from Panama via Paris were dealt with, with very considerable leniency by the courts. The female co-passenger was dealt with, it appears from the sentence hearing of the appellant, by way a sentence of five years imprisonment with four years suspended. It was, it would appear, in effect, a time served order or something close to that. The male co-passenger was dealt with on the basis of a sentence of seven years imprisonment with four years of that sentence being suspended.

17. If the Court takes the view that the sentence appeal is before it and has to address the sentence appeal and is obliged to quash the sentence, as would appear inevitable, and was to resentence and take the same position as the trial judge, that there was no basis for departing from the mandatory presumptive minimum, then that would see a sentence imposed that would be radically and dramatically different to the way in which the co-passengers were dealt with.

18. In the circumstances, and with considerable reluctance, the Court will accede to the application to withdrawn the sentence aspect of the appeal.

19. In summary, the Court dismisses the conviction appeal and permits the withdrawal of the sentence appeal.