APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 60
HCA/2016-000515/XC

Lord Menzies
Lord Brodie
Lady Clark of Calton

OPINION OF THE COURT

delivered by LORD BRODIE

in

APPEAL AGAINST CONVICTION

by

DARRELL MITCHELL

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Paterson (sol adv); Paterson Bell
Crown: Borthwick AD; Crown Agent

18 August 2017

Introduction

[1] The appellant is Darrell Mitchell. His date of birth is 9 February 1973. On 22 August 2016 he went to trial, together with his former co-accused and nephew, David Buchanan, at Kilmarnock Sheriff Court on an indictment containing four charges of being concerned in

the supply of, respectively, cocaine, cannabis, cannabis resin and methylethcathinone. On 23 August, the second day of the trial, David Buchanan pled guilty to charges 1, 2 and 4. The appellant maintained his plea of not guilty to all charges. The appellant had lodged a special defence of incrimination against his co-accused. He had intimated his intention to attack his character.

[2] The trial continued against the appellant. The Crown led David Buchanan and other witnesses. One of these witnesses was Police Sergeant Kenneth Simpson who gave evidence under reference to a report entitled "Statement of Opinion" in relation to drugs and certain other articles which had been seized by other police officers in the course of their investigations ("the STOP report"). The STOP report was lodged as a Crown production. The appellant gave evidence on his own behalf. Other witnesses were led for the defence. On 26 August 2016, the jury, by a majority verdict, found the appellant guilty of charge 1 and by a majority found charges 2, 3 and 4 to be not proven.

[3] Charge 1 was in the following terms:

> "(1) between 8 November 2013 and 19 June 2015, both dates inclusive at Belleview Road, Kilmarnock and elsewhere you DARRELL MITCHELL and DAVID ROBERT BUCHANAN were concerned in the supplying of a controlled drug, namely Cocaine, a Class A drug specified in Part I of Schedule 2 to the Misuse of Drugs Act 1971 to another or others in contravention of Section (4)(1) of the aftermentioned Act; Contrary to the Misuse of Drugs Act 1971, Section 4(3)(b)."

[4] The sheriff adjourned the diet for the preparation of Criminal Justice Social Work Reports in respect of the appellant and his co-accused. On 20 September 2016 the appellant was sentenced to 30 months' imprisonment. His co-accused was sentenced to 37 months' imprisonment, discounted from 42 months' imprisonment to reflect his guilty plea.

[5] A note of appeal against conviction was lodged on 14 November 2016. Leave to appeal was granted in respect of two grounds, although Mr Paterson, who appeared before

us on behalf of the appellant, intimated that he intended only to argue the first ground. It was in these terms:

> "The sheriff misdirected the jury by failing to direct the jury about the use of opinion evidence. In particular how they should evaluate the evidence of a police officer, Kenneth Simpson and how it might be used in the determination of the issues in the case. The officer's evidence is summarised by the sheriff at page 26 line 17 to page 28 line 19 [of the transcript of the sheriff's jury charge]. The sheriff gave no directions to the jury about the opinion evidence, the directions on evidence run from page 1 line 15 to page 7 line 5. The opinion evidence was crucial in this case, it was disputed and was indicative of guilt. As a result of the failure to properly direct the jury there has been a miscarriage of justice."

Evidence at Trial

[6] A summary of the evidence led at trial is contained in the sheriff's supplementary note produced at the request of this court and dated 4 May 2017. The salient parts of that evidence are as follows.

[7] A number of police witnesses had carried out surveillance on David Buchanan, the appellant's nephew. They had seen Mr Buchanan at a particular location obtain a black bag from two men who were suspected of being involved with drugs. Mr Buchanan then drove off in his SAAB motor car towards his home but, as he was to explain when he gave evidence, on his approach to his house he noticed what he thought was an unmarked police vehicle and fearing that he was under surveillance he telephoned the appellant and drove his SAAB to the appellant's lock-up garage. The appellant drove there in his van. He and his nephew met. Photographs which were part of Crown production 5 lodged at trial show the SAAB and the van parked close to each other and in near proximity to the garage door.

[8] A number of police officers attended the appellant's lock-up garage (situated in a row of similar lock-ups). They saw both David Buchanan and the appellant. David Buchanan threw two bags, a black bag and a green and white carrier bag, into the

appellant's garage. It looked as though both men were moving things from the vehicles into the garage. The police intervened, detained Mr Buchanan and the appellant, and seized the bags and other items found in the garage and the appellant's van. The seizures included quantities of cannabis bud, cannabis resin, methylmethcathinone and cocaine. Cannabis bud weighing 985 grams was found in the boot of the SAAB. Twenty blocks of cannabis resin was found in the green and white carrier bag. Four smaller bags found in the green and white carrier bag contained, respectively, 497.05 grams, 497.84 grams, 332.16 grams, and 498.24 grams of methylmethcathinone.

[9] Among the drugs found in the green and white bag was 9.52 grams of cocaine in a plastic bag. Also within the green and white bag was 387.47 grams of benzocaine. Finger prints of the appellant were found within the green and white bag. A sieve, a plastic container and lid, a ceramic bowl and a roll of clear plastic bags, were found in the appellant's van. Trace amounts of cocaine were found on the sieve, plastic container and ceramic bowl. There were traces of cocaine on the first bag of the roll of plastic bags. Three finger prints and five palm prints of the appellant were found on the roll of plastic bags. Also recovered from the van were brown tape and packaging. A hydraulic press was found in the garage which had trace amounts of cocaine and benzocaine on the surfaces of one of its plates and within the metal mould unit. A plastic bag containing cocaine was found under the press. It contained 4.53 grams of cocaine.

[10] The Crown's position throughout the trial was that both the appellant and his nephew were concerned in the supply of drugs. When giving evidence, David Buchanan admitted that he had been concerned in the supply of cocaine, cannabis and methylethcathinone between 8 November 2013 and 19 June 2015. He explained that on

19 June 2015 he had picked up a black bag from a man he did not know. He was aware that the bag contained drugs. On noticing what he took to be an unmarked police car near his home, he panicked. According to Mr Buchanan, he then telephoned the appellant and asked him if he could put "something" in his garage for a "wee while". He did not tell the appellant what this "something" was but he accepted that his uncle would have a fair idea that it was drugs; certainly that it was something illegal. He then drove to the appellant's garage. The appellant was there with his van. He thought that the appellant opened the door of the garage. Mr Buchanan threw the bags into the garage. He was the only person who had touched the green and white bag that night. He did not know where he had got the plastic bag. He did not know who else used his uncle's garage. He did not have a key to the garage. He was asked if he had ever used his uncle's van for the preparation of cocaine or other drugs and he said no, he had never seen drugs in the van. He said that he did not know how there came to be drugs in the van and he said that they were not his drugs. He was asked about the sieve, ceramic bowl and clear plastic bags found within the van but he did not know anything about them. He was also asked about the hydraulic press found within the garage and denied that he used it for the preparation of drugs. He had no idea how drugs would get onto the hydraulic press. The press belonged to the appellant. Mr Buchanan denied knowing anything about the bag of cocaine found in the garage.

[11] Evidence was led of text messages received and sent by the appellant. Examples of the texts included a number of texts between the appellant and another person on 8 November 2013: "have you got 5 red ones", reply "no red ones, only green and blue, have more red in next week", "both banging, blue slightly better. 5 blue bud, give you a text." A text received on 23 May 2015 read "chomp, can you grab me ½ a quarter mate?" One

message sent from the appellant's phone was: "have you got snow?" A message received by the appellant's phone was: "can you get my drugs?" to which the response was: "no problem".

[12] As mentioned in the ground of appeal, evidence was also given by Police Sergeant Kenneth Simpson. He explained that he had been in law enforcement for 38 years and had gained experience in the values of drugs, how they are used and imported, and that he had provided information to courts on this in the past. No objection was taken to his evidence at any stage.

[13] Sergeant Simpson was shown a report relating to the appellant's phone which included the contents of certain text messages. He gave his opinion as to what the content of the various messages meant, for example, that the reference to "1/2 a Q" referred to an amount of either a powdered drug or cannabis resin, and that "have you got any snow" might mean cocaine. The officer suggested the messages were consistent with someone trying to source controlled drugs but could make no comment as to whether the drugs were for personal use from the content of the report.

[14] Sergeant Simpson was then taken through the terms of the STOP report. He explained how drugs in powder form could be adulterated and then compressed into blocks of a particular weight, half a kilo being the most common. A hydraulic press is commonly used for this purpose. He was shown Crown label 27 which was agreed to be 4.5 grams of cocaine which was found on the floor under the hydraulic press (referred in his report as a "spillage" amount). He said that this drug's proximity to the hydraulic press meant, in his experience, that the press was being used to press blocks of cocaine. He was shown Crown label 15 which was agreed to be 387.4 grams of benzocaine. He explained that this is not a

controlled drug, but it is commonly used to adulterate cocaine. In his experience benzocaine would not be bought for personal use, it is usually used by dealers, particularly an amount as large as this.

[15] The sergeant was shown a photograph of Crown production 28, the hydraulic press. He said that in his experience, such presses were commonly recovered in large scale drug operations. There would normally be a base plate and a top plate. The handle activated pressure. The sergeant said that the press would be used for re-blocking cocaine for onward supply. He was shown the sieve and he stated that it could be used to sieve cocaine as the cocaine would come in hard form and then it would be broken up into powder, sieved into a bowl, and the adulterant added. The mixture would be put into a bag, then into a mould, then into the press. In Sergeant Simpson's experience personal users did not use such a press.

[16] The witness was shown a plastic tub with a lid. Cocaine had been found in the inside of the tub. In Sergeant Simpson's experience people stored drugs or mixed them in plastic tubs prior to the next stage in the process of supply. He was shown brown packaging tape and he stated that such tape could be used to wrap a block of pressed drugs to make the block stronger. He was asked, when considering all of the items found at the scene, what was his analysis of the situation. He stated that in his experience, the amount of cannabis, cannabis resin and methylmethcathinone, were supply amounts. The amount of cocaine found in the bag in the garage was not excessive and could be for personal use but its recovery in a position near the moulds and the press indicated to Sergeant Simpson that this was for onward supply, and was therefore not for personal use.

[17] In cross examination, Sergeant Simpson was tested on the extent of his experience. It was put to him that the fact that the hydraulic press had not been covered up and that the bag of cocaine was lying on the floor in open view would not indicate a supply operation. The officer agreed with the cross-examiner that the amount of cocaine found in the garage could be for personal use. He also agreed that if a press was being used, the cocaine would usually come in larger amounts within brown packaging, and that this would indicate a supply operation. He also agreed that brown tape and plastic bags were common household items.

[18] In the course of his cross-examination Sergeant Simpson was referred to the appellant's telephone records. The sergeant had not seen them before he came to court and they had not formed part of his consideration when preparing the STOP report. In his view, some of the text exchanges referred to drug transactions, but he could not comment on whether they related to larger amounts or to smaller amounts. It was accepted that in some of the exchanges it looked as if the appellant was the buyer. In reference to texts asking for an ounce of cannabis or cocaine, Sergeant Simpson said that an ounce of cannabis would be for personal use, but that an ounce of cocaine would not (its value would be £1200 to £1300). On re-examination, the officer's final position was that in his experience the text messages were not clear and they could refer to the recipient of the messages attempting to acquire drugs for his personal use.

[19] The appellant gave evidence. According to him it was his nephew who was responsible for all the drugs found at the scene. The appellant stated that David Buchanan had often borrowed his vehicle, and, therefore, could have used the bowl, the tub, and other items which had traces of cocaine on them. He had never seen them before. He explained

that he had used the garage for storage and held a key which was on the same key ring as the key to his van but he denied that the drugs found in his garage had anything to do with him, and, again, he blamed his nephew for their presence. Mr Buchanan had had use of the van a few days beforehand and therefore would have had access to the garage key. The appellant accepted that the hydraulic press was his, but said that he used it to press ball bearings. He had no explanation for the traces of cocaine found on the plates of the press. The appellant explained the text messages by stating that he was a user of ecstasy and cocaine. The text messages were instances of his sourcing drugs for his personal use. He accepted that messages had been received by his phone asking for drugs; however, he said these were all from David Buchanan's friends. His explanation was that he took them to be a wrong number and ignored them.

The Sheriff's Charge to the Jury

[20] The sheriff's charge to the jury included the following passages.

> At page 2 at line 13 to page 3 at line 4:
> "Two aspects to the evidence of any witness, ladies and gentlemen, that's credibility and reliability…You judge all the witnesses in the same way, whether they're lay people, police officers, scientists or the accused."

At page 26 at line 17 to page 28 at line 19:

> "Kenneth Simpson came in and he gave - he's known as a STOP officer, he gives a statement of opinion, he's the Crown expert. He's been in law enforcement for 30 years, and he went through the various number of Crown productions with you, and you'll remember his evidence, ladies and gentlemen. His conclusion was that the drugs found at the garage were of a substantial value. He'd referred you [to] the hydraulic press and the white powder found on the press. The white powder on the plastic bags on the sieve and in the ceramic bowl and his conclusion was, taking all these together, it was a large scale drugs operation. He explained to you what benzocaine is, and it's used as an additive. He used the word 'adulterant', and that mixes it with cocaine and thins it out so you can get more for it. It was his view that's that what the hydraulic press was used for. He explained what cannabis bud

> is and its value, cannabis resin and its value. His view was that the drugs were not for personal use. He explained [what] methylmethcathinone is and that it, too, could be used as an adulterant. He concluded that the presence of drugs in the hydraulic press and plates was indicative of it being used to press drugs. His final position was the amount of drugs found, namely, cannabis, cannabis resin and methylmethcathinone could of themselves indicate supply. In relation to the cocaine, the amount found in the garage was not an excessive amount and, indeed, it could be personal but in the circumstances of the recovery in the proximity of the press with white power in a bag under the press, it's his opinion that it indicated supply of cocaine. In cross-examination, it was put to him that one ounce of cannabis is a personal amount, and he agreed, and it was put to him that an ounce of cocaine could be personal, but he disputed that. This was due to the value, he said, when it's split. Indeed, he went to say that 100 grams of pure cocaine is a dealer's amount. He'd been referred to the text, the i-messages and he explained these were open to various interpretations and he gave you some examples."

At page 31 at lines 1 to 11:

> "So, ladies and gentlemen, that's all of the evidence. You consider all of the evidence the Crown relies on, the submissions made by the procurator fiscal. Give your equal consideration to the defence case and in reaching your verdict, you assess the quality, strength and effect of the evidence and you decide if the case against Mr Mitchell in each charge has been proved or not. It's your decision what conclusion you reach."

Submissions

[21] On behalf of the appellant, Mr Paterson submitted that the sheriff had failed to direct the jury about the use of opinion evidence. She had identified what was meant by direct evidence and circumstantial evidence but she had said nothing about opinion evidence. In particular, she had failed to direct the jury as to how they should evaluate the opinion evidence of the STOP officer, and how his evidence might be used in the determination of the issues in the case.

[22] Mr Paterson submitted that the function of expert testimony in a case such as this is to assist the jury when considering whether they can draw the inference of supply from all the evidence led. In any case, it is generally necessary for the sheriff to explain to the jury

how they are to evaluate expert or skilled evidence, and how it might be used in the determination of the issues in the case: *Morrison* v *HM Advocate* 2014 JC 74, 2013 SCCR 626 at para [37]. Sergeant Simpson had stated that this was a large scale drugs operation, and that his conclusion was that the presence of the drugs on the hydraulic press and plates was indicative of it being having been used to compress blocks of cocaine adulterated with benzocaine. Whilst the amount of cocaine found in the bag in the garage could be a personal amount, Sergeant Simpson had stated as his opinion that given its recovery in proximity to the press, the finding of the bag indicated supply of cocaine. The officer's evidence did not provide corroboration, nor did it add weight to the Crown case: *Robertson* v *HM Advocate* [2016] HCJAC 57 at para [11]. The evidence of Sergeant Simpson was simply available to assist the jury in considering the other evidence led in the case. However, the jury were not directed to that effect, as they should have been. This failure was material and, Mr Paterson submitted, had led to a miscarriage of justice.

[23] The Advocate depute conceded that there had been a misdirection by way of an omission to say anything about the function of expert evidence. However, there had been no miscarriage of justice. There had been ample evidence implicating the appellant as being concerned in the supply of cocaine. In any event by the time the case went to the jury the issue was not whether there had been an operation for the supply of controlled drugs, including cocaine, rather it was whether the appellant was concerned in that operation. The case was very much in line with the situation described in *Morrison* v *HM Advocate* at para [37]: there had been a failure to give an appropriate direction but the failure was not material. It could not be said that the appellant had suffered prejudice.

[24] When asked what direction the sheriff should have given, the Advocate depute replied that she should have given a direction to the effect that an expert is to be treated in the same way as any other witness; that the function of an expert witness is to provide information to the jury about an area of knowledge which is outwith their everyday experience; and that they are free to accept it or reject it as they see fit.

Decision

[25] It is convenient to begin with some general observations about the sort of evidence of which that given by Sergeant Simpson was an example.

[26] The sergeant testified to his considerable knowledge and experience of the illicit market for controlled drugs in Scotland and how that market operates. The sheriff reports that that experience was tested by questioning during cross-examination; it would appear without it being undermined. Sergeant Simpson had therefore established himself as being in a position to furnish the jury with general information which was likely to be outside their experience and yet was necessary if they were to understand the significance of the whole of the evidence led and so reach a sound conclusion. From that perspective he was an expert witness (*Wilson* v *HMA* 2009 JC 336, Lord Wheatley at para 58). Accordingly, his evidence about the general features of the illicit market for drugs and the behaviours typical of users and suppliers was admissible. As the Lord Justice General (Carloway) observed in *Robertson* v *HM Advocate* [2016] HCJAC 57 at para 10, the practice of leading such evidence as to the "received wisdom" from the realms of drug enforcement is long-established (see *Wilson* v *HM Advocate* 1988 SCCR 384 at 385). As noted by the court in *Johnston* v *HM Advocate* 2016 SLT 42 at paras [5] and [6] the practice has to an extent been formalised with

the establishment of a Statement of Opinion ("STOP") unit, the officers of which are available to give evidence on the manner in which controlled drugs are sold and used and their values on the illicit market. Sergeant Simpson is a STOP officer. The Scottish practice is not very different to that followed in other jurisdictions (*Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 59 at para 42 under reference to *Myers and Ors* v *R* [2016] AC 314).

[27] As is very familiar, as well as giving evidence as to fact (either general in the sense of the state of knowledge within his field, or particular in the sense of observations or investigations specific to the case before the court), an expert may give his opinion as to matters necessary for the proper resolution of the dispute. That is in contrast to the position of other witnesses who are limited to giving direct evidence as to what they have seen, heard or otherwise experienced. Opinion evidence will very often be of the nature of an inference or series of inferences from the primary evidence which, because of his special knowledge and experience, the expert is able legitimately to draw, whereas someone without that knowledge and experience, such as a member of the jury, is not.

[28] What will often be an issue in cases of which the present is an example is the significance of the quantity of controlled drugs found in the possession of an accused person. Where the quantity is relatively large the prosecution will argue that that permits the inference that the accused is concerned in the supply of the drug and therefore guilty of contravention of section 4 (3) (b) of the Misuse of Drugs Act 1971. Where the quantity is relatively small the defence will argue that this fact points to nothing more than the drugs being for the personal use of the accused with the result that he is only guilty of the lesser offence of having a controlled drug in his possession in contravention of section 5 (2) of the 1971 Act. Whether a particular quantity of drugs is to be regarded as indicative of a supply

operation as opposed to being merely "personal", is a question for the jury having regard to the amount of the drug which has been found and its likely cost, but also to the whole circumstances. While this is a jury function, it is not one that can be carried out without some guidance from a witness with experience in the habits of drug users and the market in which they operate, hence the admissibility of general evidence about the amount of a controlled drug which a user would normally consume, or indeed carry (see *Robertson* v *HM Advocate* at para 10; also *White* v *HM Advocate* 1986 SCCR 224, Lord Justice-Clerk (Ross) at 225 and *Ul-Haq* v *HM Advocate* 1987 SCCR 433 at 436, as discussed in *Johnston* v *HM Advocate* at paras [7] to [9]). However, prosecutors and defence representatives do not always confine themselves to questioning as to purely factual matters "about the amount of a controlled drug which a user would normally consume, or indeed carry", to borrow the description used by the Lord Justice-General in *Robertson*. They may ask the witness to give his opinion as to whether the amount of drugs found in the particular case before the court was or was not such as to indicate personal use rather than supply. Now, it could be said that that is to invite a witness to give an opinion on an issue which it is for the court to determine, and for that reason is objectionable (see *Hendry* v *HM Advocate* 1987 JC 63 at 69 to 70); also *Galletly* v *Laird* 1953 JC 16 at 27, and *Kelso* v *HM Advocate* 1990 SCCR 9) but the eliciting of just such evidence has generally escaped adverse comment by the court (eg *Ul-Haq*, *Bauros and Farns* v *HM Advocate* 1991 SCCR 768). It may therefore be regarded as admissible. As is explained in *Kennedy* v *Cordia (Services) LLP* at para [49] "on occasion in order to avoid elusive language the skilled witness may have to express his or her views in a way that addresses the ultimate issue before the court".

[29] As can be seen from the extract from the sheriff's charge to the jury quoted above Sergeant Simpson was asked (both by the procurator fiscal and the defence agent) to give his opinion as to whether the amounts of the various drugs found at the garage were such as to indicate supply or personal use. However, the sheriff tells us in her supplementary note of 4 May 2017 that the procurator fiscal went somewhat further in that:

> "[Sergeant Simpson] was asked, when considering all of the items found at the scene what was his analysis of the situation. He stated that in his experience the amounts of drugs, cannabis, cannabis resin, methylethcathinone, were supply amounts. In relation to the cocaine, however, the amount was not excessive, so it could be personal, but given the circumstances of the recovery, near the moulds and the press, it indicated to him that this was for onward supply of controlled cocaine, and was, therefore, not for personal use."

[30] That was a step too far. Asking the sergeant what was "his analysis of the situation" was an objectionable question. The witness's function was to help the jury to analyse the situation as presented in the evidence by explaining matters which were within his general experience but which would be likely to be outwith the jury's experience and, by doing so to enable the jury to form their own independent judgment by an application of that explanation to the facts proved in evidence (cf *Davie* v *Magistrates of Edinburgh* 1953 SC 34 at 40). His function was not to carry out that analysis and make a judgment himself. A witness cannot supplant the jury's role as ultimate decision-maker (cf *Kennedy* at para [49], under reference to *Davie* and *Pora* v *R* [2016] 1 Cr App R 3). However, the question to Sergeant Simpson was not objected to and accordingly, subject to any direction that the sheriff might give, his answer, together with the answers given to all the other questions he was asked, was available for consideration by the jury as part of the evidence in the case.

[31] We turn then to the complaint made in the ground of appeal that the sheriff failed properly to direct the jury on the use of opinion evidence.

[32] In support of the ground of appeal Mr Paterson referred to what was said in *Morrison* v *HM Advocate* at para [37]: "Where opinion evidence has been led from a skilled witness, it is generally necessary to explain to the jury how they are to evaluate such evidence and how it might be used in the determination of the issues in the case."

[33] We would reiterate what was said in *Morrison*. Opinion evidence is sufficiently distinct from evidence as to fact as usually to require a judge to draw the jury's attention to that distinction and explain such consequences as it might have for their consideration of the case. The nature of the explanation which is necessary will depend on the nature of the expert evidence in question, the extent to which it was challenged and the basis of any such challenge, the issues to which the evidence is relevant and the ways in which the parties seek to use it to address these issues. We do not suggest that there is one form of words which will always suffice. It is to be borne in mind that the purpose of jury directions is to address the actual issues which have been raised by the evidence in the case and the submissions of parties in relation to them with a view to assisting the jury in dealing with these issues.

[34] What was particularly required in the present case, given the matters on which Sergeant Simpson had been encouraged to give an opinion, was a pointed direction to the effect that the decision as to whether it had been proved beyond reasonable doubt that the accused had been concerned in the supply of any of the controlled drugs referred to in the charges was for the jury to make and not for any witness. Now, to an extent the sheriff can be said to have done that. Towards the end of her charge, at page 31 and line 10 of the transcript, she said: "It's your decision what conclusion you reach" but the context for that sentence was the sheriff's exhortation to give equal consideration to the prosecution and

defence cases. The sheriff accepts that, other than instructing the jury to treat all witnesses in the same way, "whether they are lay people, police officers, scientists", she gave no specific directions as to expert evidence. In the result the jury was left with no guidance as to what they were entitled to make of the apparently authoritative opinions of Sergeant Simpson on the various matters in respect of which he was invited to express a view. We see that as an error on the part of the sheriff.

[35] What was required was a relatively brief explanation of the nature and purpose of Sergeant Simpson's evidence and the distinction between his function as a witness and the jury's function as decision-makers. The following points should have been made about the sergeant and his evidence: his function was to provide general information based on his special knowledge and experience of matters with which the jury would not be familiar with a view to assisting the jury in assessing the primary evidence led in the case; he was to be treated in the same way as any other witness in the sense that it was for the jury to assess his evidence in order to determine whether they believed his evidence and whether they found it reliable; because of the sergeant's special knowledge and experience (if accepted by the jury) he might be asked to give an opinion as to what might be inferred from the primary evidence; the jury were however free to accept or reject such an opinion, or indeed anything else said by the witness; and, while the jury were entitled to have regard to what the witness had to say, the decision as to whether it had been proved beyond reasonable doubt that the accused had been concerned in the supply of any of the controlled drugs referred to in the charges was for the jury and for the jury alone. The sheriff did not make these points.

[36] If the sheriff did not give adequate directions to the jury, what then? The question for this court, when considering an appeal against conviction, is whether there has been a

miscarriage of justice. While conceding that there had been a misdirection the Advocate depute submitted that there had not been a miscarriage of justice. We agree.

[37] Here the issues before the jury were relatively clear. Having rehearsed the police officer's evidence, the sheriff told the jury that it was their decision as to whether a charge had been proved. In the circumstances of this case, where there was no competing expert testimony, no dispute as to the accuracy of the factual matters spoken to by Sergeant Simpson and the issue had come to be not whether there was an operation for the supply of controlled drugs (including cocaine) but whether the appellant was concerned in that operation and in respect of what drugs, the sheriff's failure to give a direction on the STOP officer's evidence was not material.

[38] There was an abundance of evidence before the court for the jury to draw the necessary inference that the appellant was involved in supply, and their verdict was discriminating in that the appellant was only convicted of the charge of concern in the supply of cocaine; he was acquitted of the charges relating to the other controlled drugs. A number of highly incriminating items were found in the van owned and driven by the appellant and the garage which he rented and for which he held the key. They included a sieve, a plastic container and lid, a ceramic bowl and a roll of clear plastic bags, which were in the appellant's van. Traces of cocaine were found on all of these items. Three finger prints and five palm prints of the appellant were found on the roll of plastic bags. Also recovered from the van were brown tape and packaging. The finger prints of the appellant were found within the green and white bag brought by Mr Buchanan. There was a hydraulic press in the garage such as could be used to compress blocks of powder. There were trace amounts of cocaine and benzocaine on the surfaces of one of the plates of the

press and within the metal mould unit. A bag found under the hydraulic press contained 4.53 grams of cocaine. In his evidence Mr Buchanan accepted that he was concerned in the supply of controlled drugs including cocaine but he denied any association with the press, the cocaine found next to it or the contents of the van. There was also evidence of text messages sent to and from the appellant's Iphone which are open to the construction that requests for the supply of drugs had been directed to the appellant and responded to positively. One such request was "can you get my drugs?" to which the response was "no problem". It is not possible to say that there has been a miscarriage of justice.

[39] The appeal is accordingly refused.