APPEAL COURT, HIGH COURT OF JUSTICIARY

2022 HCJAC 13
HC/2021/000228/XC

Lord Justice Clerk
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

PATRICK HATTIE

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: D Findlay QC; Paterson Bell, Solicitors, Edinburgh for Manini Belardo Matteo, Airdrie
Respondent: A Prentice, QC, Sol Adv, AD; the Crown Agent

2 February 2022

Introduction

[1] The appellant was convicted of 3 contraventions of section 4(3)(b) of the Misuse of Drugs Act 1971. All of the charges relate to the same supply operation which involved cocaine, cannabis and cannabis resin. The appeal relates to the adequacy of the judge's directions.

Background

[2] The appellant ran a body repair and paint shop in Airdrie which had been set up with financial help from his former co-accused and incriminee, Lawrence Phee. Phee did not work in the business, did not appear to profit from it, and there was no clear evidence as to why he had invested in the body shop. In addition, the appellant rented a large yard in Shotts. There was evidence that the appellant rented the yard, which he could ill afford, at the behest of Phee. On 28 November 2018, the appellant contacted Nicholl's Transport and arranged the transport of a compressor to a yard at Shotts, to be delivered to a company called "Kelly Compressors". The evidence indicated there was no such company operating from the specified address at Shotts. The "compressor" was later found to be a container packed with drugs. It seems that it had originally been delivered to the wrong address, but was then taken by Nicholl's Transport to the appellant's yard. Mr Nicholl identified the appellant as the individual who had asked for the compressor to be delivered to the yard, and who had given the business name "Kelly Compressors".

[3] On the morning of 1 December 2018 the appellant went with another co-accused, David Brown, to a van hire company. Brown hired a Mercedes van. The appellant gave him the money for the hire, having withdrawn it from an ATM. The thrust of his explanation to the police was that Brown had been in the transport business and the appellant wanted to help him get back on his feet. He thought that Brown was going to be delivering parcels and would be paid for it, so he would get his money back. There was evidence that the appellant's insurance documents were exhibited to the hirer by Phee to demonstrate that the appropriate insurance was in place for the hire. This had occurred on 22 November. The appellant denied knowing about this, denied being there at the time and indeed claimed that he did not know where his policy was. The police found it in a drawer in his office.

[4] Brown drove the hired van to the appellant's yard and watched as Phee loaded the container onto the van. There is no suggestion that the appellant was in the yard at the time. It was a reasonable inference from the evidence that the compressor delivered by Nicholl's Transport and the container later seized by police were one and the same. Brown drove the van to Cairnryan where he was stopped, and the drugs were seized by the police. Phee pled guilty to being concerned in the supply of drugs at the commencement of the trial. The appellant and Brown were convicted by verdicts of the jury.

[5] The appellant did not give evidence, but his police interview was played to the jury. In that interview he said that he had lent Brown £200 to hire the van. It was to help Brown get back on his feet. He understood him to have a delivery job driving. The appellant accompanied Brown to the hire place. The van was not ready and was to be delivered to Brown later. As to where the van went after it had been hired he had no idea. When told that when searching the van police found a large grey container with drugs inside, he said he had never seen such a container on any of his properties. Asked further questions about this he said "Honest to God, I don't know a thing about it … I don't know anything about that vehicle". All he knew was that Brown was going on a job for deliveries, parcel deliveries. Brown never told him a thing about that journey (ie the journey when the drugs were found). The jury were invited to consider that the appellant had been an unwitting and innocent dupe.

[6] In his Charge at page 24 the judge gave the usual directions about what the Crown had to prove for a charge of being concerned in the supplying of illicit drugs, viz, that the accused was knowingly involved in an operation to supply something and that it was in fact the drug or drugs involved. The Crown did not have to prove that the accused knew that the something was drugs.

The issues

[7] The Note of Appeal avers that in the circumstances the judge should have gone further and that the directions were insufficient. The Note of Appeal is not very well focussed, but the issue turns on whether the circumstances were such as to bring into play the statutory defences under section 28 of the 1971 Act, all under reference to *Aiton* v *HM Advocate,* 2010 JC 154. This in turn hinges on what the appellant said in his police interview. The arguments for the appellant developed the submission that the jury ought to have been directed that the Crown had to prove that either the appellant knew drugs were involved or, at the very least, that he was knowingly involved in some illegal activity. Given that the appellant did not give evidence the question of whether section 28 came into play turned on the contents of his police interview. This in turn raises the question of whether the trial judge gave adequate directions on this matter.

[8] A further matter which arises relates to the trial judge's use of the written directions and method of delivering initial directions to the jury at the start of the case. Associated with that issue is the judge's reference in those initial directions to concert.

[9] As matters developed, the Crown indicated that it could not support the conviction. It was not accepted that section 28 was a live issue, but it was accepted that the trial judge had completely failed to direct the jury on the use which could be made of the police interview with the accused. Whilst in some cases such a failure may not result in a miscarriage of justice that was not a tenable proposition in the present case. The court agreed with the advocate depute, and concluded that the appeal had to succeed, for the reasons which follow.

Section 28

[10] We agree with the advocate depute that on the basis of the appellant's police interview no question arose of a statutory defence under section 28. As the Lord Justice General (Rodger) noted in *Salmon* v *HMA* 1999 SLT 169 (at p178 J-K), a case fought on the basis that the Crown seeks to draw inferences of knowledge from the circumstances of the case, where the defence is that the accused knew nothing about the drugs and had nothing whatever to do with any supplying, does not involve consideration of section 28. See also Lord Johnston at p 185 J-K; and Lord Bonomy at p188 H-K. This was essentially such a case. The very nebulous remarks of the appellant to the effect that he thought Brown had a job making deliveries were not such as to make this defence one of anything other than pure denial. The directions given by the trial judge in relation to section 4(3)(b) therefore were adequate to cover the situation and nothing more was required.

[11] In his supplementary report the trial judge states that he took the view that the general Jury Manual direction on section 4(3)(b) had been worded so as to cover the terms of section 28. This is puzzling, given that those directions are followed by a section giving additional directions and headed "if defence raises section 28(2) (accused thought container held something which could not be associated with drugs", and a similar section regarding section 28(3).

The appellant's police interview

[12] In his opening remarks to the jury, in the course of his pre-trial directions, the trial judge said "evidence of what an accused person was heard to say is evidence in the case, and again I will direct you about that matter if it arises." Nothing further was said on the matter, either in the opening directions or in the subsequent charge. The position is made

worse by the fact that in the charge he explained that there were certain exceptions to the rule against the admission of hearsay evidence, such as statements made by a witness to the police, or the use of prior inconsistent statements, but omitted any mention of statements by the accused. In fact, apart from the few exceptions which he illustrated, he indicated that other than that the general rule was "that it is what a witness says in court which matters". In addition there was of course reference to the evidence given by the co-accused, along with directions of how that evidence might be used by the jury. All of this contrasts with the position of the appellant, whose police interview was not mentioned at all by the trial judge. The pre-trial direction did not make reference to the appellant's police interview, and seems in any event more to be directed towards statements made by an accused person in ordinary conversation. The appellant's police interview was played to the jury. He did not give evidence, and the whole substance of his defence was contained in the police interview. The jury were given no guidance on the matter at all. In our view the advocate depute was correct to say that, in the circumstances of this case, this was a material misdirection which could not be cured. A verdict returned on the basis of such a serious omission can only be considered to amount to a miscarriage of justice.

Concert

[13] In his opening remarks the trial judge made reference to concert. He should not have done so. The only charges before the jury involving more than one accused were charges under section 4(3)(b). In *Salmon* v *HMA* and *Clark* v *HMA* 2002 SCCR 675 the court doubted the application of concert to this section. The matter was put beyond doubt in *Barclay* v *HMA* 2020 JC 175 which clearly states that the concept of art and part guilt has no part to play in establishing guilt on a charge brought under section 4(3)(b) of the Act. This is made

clear in the Jury Manual, which refers to all three of these cases. In his charge the trial judge did not refer to concert, but nor did he tell the jury that the concept had no application. This was unfortunate since (a) at no stage either did he direct the jury that they had to consider the case against each accused separately – the highest it came was to tell them that they required to deliver separate verdicts against the two accused; and (b) he opened his remarks about how the jury could assess the issue of being concerned in the supplying by lumping the accused together: "the Crown say that the evidence shows that they were knowingly part of the distribution chain".

Written Directions

[14] Since the restarting of High Court trials following the initial interruption occasioned by the pandemic it has been the practice to provide the jury with written and oral directions to help them understand the process of the trial upon which they are about to embark. This involves two main elements: pre-instruction of the jury by the judge; and written directions on these matters. The pre-instruction directions are in three parts: the first relates to the functions of judge and jury, assessment of evidence and the like; the second covers basic principles such as the burden and standard of proof; and the third covers issues such as multiple accused, concert, special defences and other common issues. The latter may or may not be required, depending on the nature of the case. The material provided to the jury should not deal with issues which are not expected to arise in the case. In this case both the written directions supplied to the jury and the pre-instruction by the judge (which were not the same) made reference to concert.

[15] The issue of written directions is addressed in the Jury Manual, and this is supplemented by the much greater detail which is provided in the "Amalgamated Briefing Paper on Restarting Solemn Trials" which should be consulted along with the Jury Manual.

[16] Judges are very strongly encouraged, and advised, to use the specimen pre-instruction directions. The specimen written directions are prepared in a clear, concise manner designed to be easily read, digested and understood. Their origin was explained by Lord Turnbull in giving the opinion of the court, comprising also the Lord Justice General and Lord Menzies, in *SB* v *HM Advocate* [2021] HCJAC 11 at paras 49 and 50 (emphasis added):

> "49. The second matter concerns the recent introduction of some quite radical changes to the way in which instruction is delivered to juries by judges. In discussion between the Lord Justice General, the Lord Justice Clerk and the Jury Manual Committee of the Judicial Institute, it was agreed that from July 2020 jurors should be provided with certain materials in writing at the start of the trial. These are, a note setting out the duties and responsibilities of a juror and a document setting out the general directions which apply in every case, as well as, if appropriate, setting out specific further directions which the judge considers are appropriate in the circumstances of the particular case.
>
> 50. Accordingly, at the commencement of trials jurors are now given general oral guidance on the functions of the personnel and information about the timetabling of the case, all of which is intended to reinforce the written note setting out juror responsibilities which is issued to each juror on their arrival at the jury centre or court. This is then followed by the issuing of written instructions, <u>which the trial judge will read to the jury,</u> concerning the separate functions of judge and jury, the nature of evidence, how to assess witnesses, what is meant by an inference, the duty to decide the case only on the evidence, the presumption of innocence, the burden of proof, the standard of proof, corroboration, and how these issues impact upon the defence. Other written directions may be given as necessary concerning issues such as the purpose of a docket, a notice of special defence, the law as to concert and the concept of mutual corroboration."

[17] It is well recognised that whilst slavish and, in particular, unthinking, adherence to the words in the Jury Manual is not to be desired, a judge should not depart from the Manual, in respect of the general pre-trial directions in particular, unless satisfied that it is

necessary so to do for the purposes of achieving a fair and proper trial. The issue was addressed in *White* v *HMA* 2012 SCCR 807 (Sy), para 13:

> "… it should, on the other hand, be appreciated that the contents of the Jury Manual, which have been devised by the judiciary for the judiciary, are intended to be an encapsulation of sound law and good practice over the years. If a sheriff or judge wishes to depart from these contents, he is of course free to do so in a given case, but he requires to take care, in an ordinary case, before omitting a normal direction as described in the Jury Manual, or including an unusual direction or observation. This is particularly important when giving the jury the general directions applicable in almost every criminal case."

As the point is expressed in Renton & Brown, Criminal Procedure, 6th edition, para 18.79.1

> "while judges are not obliged to use the *ipsissima verba* of these directions, they would be well advised to do so."

These observations apply equally directly to the specimen written directions, which are designed to address only the most commonly encountered issues.

[18] It is imperative that the written directions are read to the jury by the judge at the outset of the case. It is not enough to give the directions to the jury and tell them to refer to them if they wish, as the trial judge did in this case, saying "you may care to acquaint yourself with that in due course". The judge must go through the directions with the jury as part of the introduction to the case.

[19] The written pre-instruction directions should be exactly the same as those spoken by the judge. If, as should very rarely happen, the judge chooses not to use the specimen directions, as the trial judge here chose, the directions should cover the same subjects as the specimen directions. Critically, they should be expressed in a similarly clear and concise way. It is to be borne in mind that the purpose is to assist the jury in the task ahead of them, to understand how to assess the evidence they are about to hear, and to recognise its significance in the context of the case. Clarity and concision are required to assist this process. It is not helpful, as happened in this case, for the trial judge to deliver the pre-

instructions in a lengthy, verbose, discursive fashion. It is even less helpful to deliver those directions orally and yet issue the jury with the specimen written directions which have not been read to them and to which only fleeting allusion is made. The jury here were in fact given two different sets of directions at the start of the case: the specimen written directions, which were not read to them; and the more convoluted ones prepared by the judge, which were read to them but not furnished in writing. In this case, given that there had been a clear and serious misdirection on the police interview, the issue of whether a material misdirection resulted from the provision of different written and oral directions at the same time, and the reference to concert, did not arise, but it is difficult to see that the effect of these would have been other than highly confusing for the jury.

[20] It is not anticipated that the pre-instruction directions need be re-read at the end of the trial. The judge may wish to mention them by reference whilst expanding on them in the charge. He may simply incorporate the directions wholesale by reference on a particular issue if it is straightforward. This matter was also addressed in *SB* at para 53*:*

> "In conducting a trial in accordance with the recently introduced procedures a judge will no doubt think carefully about the issues and areas of law which he or she wishes to include in the charge. The content of the charge will vary according to the length of the trial and the issues raised. In many cases it may be sufficient to draw the attention of the jury to their copies of what was delivered earlier and to remind them that they must follow both those directions and what is said in the charge itself. In other cases the judge may feel it necessary, or appropriate, to recap some of what was said or to revisit some aspects of the earlier directions in more detail. The evidence led and the speeches of the crown and defence will doubtless inform the extent to which anything more need be said in relation to the written directions. In any charge, the directions as a whole must be tailored to the circumstances of each case."

Whatever approach is adopted, the charge must be designed for the individual trial and to help the jury address the specific issues arising in it. In this case the charge as a whole failed to do that. It does not engage with the true issues in the case. It is formulaic and lacks the

approach, which has repeatedly been emphasised, that requires a bespoke charge which engages with the specifics of the particular trial and the particular issues that arise for decision (*DM* v *HMA* [2017] SCCR 235).