APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 4
HCA/2019/215/XC

Lord Justice Clerk
Lord Brodie
Lord Malcolm

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION

by

WILLIAM CARMICHAEL

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: A Ogg, Sol Adv; Renfrew Defence Lawyers
Respondent: S Borthwick AD; Crown Agent

16 January 2020

[1] The appellant was convicted of being concerned in the supply of a quantity of heroin recovered from a vehicle during the arrest of another individual. The heroin was inside a canvas bag. Inside the canvas bag was a knotted blue plastic bag, and inside that was a knotted clear plastic bag containing the heroin. The street value of the drug was just over £15,000, and there was evidence from a duly qualified officer that this was in excess of what might be considered for personal use.

[2] A joint minute agreed that the knot of each bag was untied and a DNA sample taken from the previously knotted area. A mixed DNA profile was identified on each sample, which could be explained by the presence of DNA from the appellant as the major contributor, to a very high degree of probability.

[3] A police officer carried out a presumptive test for drugs. Although forensically aware she could not recall whether she untied the bags, or slit them and used a spatula. The scientist who examined the bags could not remember either bag being cut or damaged. This essentially led to the primary point in this appeal, namely that it could not be said that the knots examined by the forensic scientist were those which had originally sealed the bags. It should be noticed that the line of evidence was not pursued to a significant extent and no conclusive recollection was spoken to by any witness.

[4] A section 97 submission was made, that the presence of the DNA on moveable items was not sufficient, in the absence of other evidence, to allow an inference of guilt, under reference to *Campbell* v *HMA* 2008 SCCR 847. That submission was repelled. The issue which forms the basis of the appeal did not form part of the defence submission to the jury.

Sufficiency

[5] It was accepted that the presence of DNA on the knots could lead to a reasonable inference against the accused constituting a sufficiency of evidence against him. However, the fact that the DNA was recovered from the knots was a central plank of the Crown case that the jury could infer that the appellant was involved in a supply operation, since it allowed the inference that he had placed the drugs in the bags and knotted them. Without evidence showing clearly that the DNA came from the original knotted areas the evidence simply showed the presence of DNA on a moveable item. It was also argued that it could

not be known what significance the jury put on the presence of the DNA on the knotted areas**.**

Ground 2 (b) directions

[6] It was submitted that the Sheriff erred in directing the jury that the presence of cocaine and a sword in the vehicle where the heroin was recovered added weight to the potential inference the jury could draw that the appellant was concerned in the supply chain. In the absence of evidence linking the appellant to the vehicle or the items they were not relevant in the case against the appellant.

Analysis and decision

[7] It should be noted that there was no objection taken to the line of evidence about the examination of the bags, and the crown did not place reliance on section 68(3) of the Criminal Procedure (Scotland) Act 1995. Nor was it suggested that any question of leading evidence contrary to the joint minute arose, the reference to knots simply being a reference to the knots in place when the scientists examined the bags. We are far from accepting the Crown's position that section 68(3) is of no moment in the circumstances of this case, but given the view we have reached we do not require to consider that matter any further.

[8] The concept of being concerned in the supplying of a controlled drug is a broad one covering not only actual physical supply but any link in the chain of distribution from the producer to the ultimate consumer. In the present case the heroin contained within the bags was of such a quantity as to suggest that those intromitting with it, as the crown put it, were involved in a drug supply operation (*Haq* v *HMA* 1987 SCCR 433*)*. Evidence that DNA of the appellant was found within the knotted area of each bag would of course be strong evidence that he was one of those individuals. However, even if the evidence could only

show that the appellant's DNA was on the surface of each bag this was still, in our view, sufficient. The point here is that there were two bags and the DNA was found on the outside surface of both of them. Moreover, the bags were of different kinds, one clear and one blue, meaning that it could not, for example, simply be suggested that the DNA got there by being on a roll of bags from which both were taken. There was a clear sufficiency of evidence, having regard to *MacPherson* v *HMA* 2019 JC 171, and any other matters would go simply to the weight to be attached to the evidence.

[9] In any event, the evidence did allow the Crown to submit that the DNA came from the original knotted areas of the bag, not just from the evidence noted above, assessment of which was a matter for the jury, but taking account of the inherent improbability, had the knots been re-done, of the appellant's DNA being found on both knots.

[10] As to the argument that it could not be known what significance the jury put on the presence of the DNA on the knotted areas, it was entirely open to the defence to submit to the jury that the Crown submission that the DNA was taken from the knotted area of the bags could and should not be accepted on the evidence; to submit that the most which could be said was the DNA was on the surface of the bags; and that these being moveable the jury should not draw an inference of guilt from the evidence. It would then be a matter for the jury to consider what weight was to be given to the evidence in light of these submissions. What is not legitimate is to refrain from making a submission on weight which was perfectly available on the evidence and then seek, without justification, to turn it into an argument on sufficiency which it patently is not.

[11] As to the sword and cocaine in the vehicle, the sheriff noted only that the crown relied on the finding of the cocaine as one of the circumstances of the case. He did not, as the grounds of appeal suggest, indicate to the jury that this evidence was capable of

constituting corroboration of the case against the appellant; nor did he direct them that it was a factor for them to take into account in determining whether they had a reasonable doubt in the case. What he in fact directed them was:

> "It is the presence of what the Crown say is the accused's DNA on both bags which enables the adverse inference to be drawn against the accused."

In any event, it was open to the Crown to suggest that the finding of these items along with the heroin lends some weight to the argument that the heroin was part of a drug supplying operation at the time of its discovery. It would be a matter for the jury to determine what weight, if any, they should attach to that evidence. There was otherwise clear evidence that the quantity of drugs could only be for onward supply. The critical evidence against the appellant, however, as the sheriff made very clear, at repeated stages of his charge, namely pp 22, 23, and 24 and especially p 25 lines 4-15 and p 27 lines 12-18, was the DNA on both bags and the quantity of the drug involved. The sheriff clearly directed the jury (pp 25 and 27) that it was the DNA on the bags from which the inference of guilt could be drawn. In our view there is no merit in this appeal which must be refused.