[2013–14 Gib LR 137]

KOUH v. R.

COURT OF APPEAL (Kennedy, P., Aldous and Parker, JJ.A.):
March 15th, 2013

Criminal Procedure—charges—severance—sufficient nexus between supplying drugs and trying to avoid confiscation of proceeds of drug trafficking—series of offences of same or similar character properly joined in same indictment

The appellant was charged in the Supreme Court with drug dealing offences and attempting to avoid a confiscation order in respect of the proceeds of drug trafficking.

On April 4th, 2009, two police officers observed someone who was driving the appellant's car speak to a man and hand him what appeared to be a slab of cannabis resin. The car was chased, and the driver appeared to throw further slabs of cannabis out the window. The car was later found abandoned. Counts 1–6 related to the events of that evening—supplying drugs, possession of drugs with intent to supply and dangerous driving. The prosecution's case was that two other police officers were able to identify the appellant as the driver of the car; and his defence of alibi was that he had lent his car to a friend, and that he had witnesses who could confirm that on the evening of April 4th he was having supper at his mother-in-law's.

After the appellant had been charged with the drugs offences, an order was obtained to examine his finances for the previous six years. Across his three bank accounts (two of which were held jointly with his wife) there were unexplained deposits (*i.e.* not attributable to the employment of the appellant or his wife) totalling around £13,800. In June 2009, the appellant found that one account had been frozen, and withdrew £4,500 from the account in his sole name. Count 7 of the indictment charged him with attempting to avoid the making of a confiscation order over money which was, in whole or part, the proceeds of drug trafficking.

The appellant applied to the Supreme Court to have Count 7 severed from Counts 1–6, and to have separate trials ordered on the basis that there was no sufficient nexus between them. The application to sever was rejected by the trial judge, the counts were tried together, and the appellant was convicted on all seven. He was sentenced to 1 year and 10 months, 10 months of which was suspended for 2 years.

He appealed against the decision not to sever the indictment, submitting that the decision not to sever Count 7 from Counts 1–6 rendered the

conviction on Counts 1–6 unsafe or, alternatively, that it rendered the conviction on Count 7 unsafe. In relation to Counts 1–6, he relied on his alibi against the prosecution's identification evidence; he submitted that even with a proper direction, the jury in assessing his credibility would be influenced by evidence given in relation to Count 7, and that since the unexplained deposits had occurred before April 4th, 2009, the jury were not properly able to draw the inference that those deposits (and so the money withdrawn) represented the proceeds of drug trafficking.

He also appealed against the sentence imposed on Count 7, submitting that (a) the trial judge may have mistakenly thought he had the option to be dealt with in the Magistrates' Court rather than the Supreme Court, which he did not, as Count 7 was joined to the indictment by voluntary bill; and (b) the sentence was too long when compared with the sentences recently imposed for more serious levels of drugs activity; and (c) that all in all, the conviction on Count 7 should not have attracted a 12-month sentence.

The Crown submitted that the counts were properly joined as they formed part of the same series of offences, and that the trial judge did not err in the sentence he imposed.

Held, dismissing the appeals:

(1) The trial judge had been correct to dismiss the application for severance. There were two stages to the inquiry into whether an application for severance should be granted—first, whether the counts were properly joined; and, secondly, whether the counts should nevertheless be severed in justice to the appellant. As regards the first stage, the counts were properly joined, as there was a sufficient nexus between them for the seven counts to be described as part of a series of offences of the same or similar character—namely supplying drugs and trying to avoid the confiscation of the proceeds of drug trafficking. As regards the second stage, there was authority that such a discretionary decision would not generally be interfered with on appeal, but in any event, it had been open to the jury to conclude, if it so thought, that the appellant was guilty of Counts 1–6 but that Count 7 was nevertheless not made out because it had not been established that in 2009 the account from which the withdrawal was made represented the proceeds of drug trafficking (para. 10; paras. 14–16).

(2) There was no reason to criticize the sentence imposed by the trial judge, or the process by which he decided on it, either in relation to Count 7 or the whole indictment. Whilst the level of the offence was not the most serious, the highest possible sentence was very much higher, and the sentence of 1 year and 10 months (10 months of which were suspended for 2 years) was for all the counts, not for Count 7 alone (para. 17).

Cases cited:

(1) *Ferrell* v. *R.*, 2010–12 Gib LR 39; [2011] 1 All E.R. 95; [2010] UKPC 20, considered.

(2) *Ludlow* v. *Metropolitan Police Commr.*, [1971] A.C. 29; [1970] 2 W.L.R. 521; [1970] 1 All E.R. 567, considered.

K Azopardi, *Q.C.* for the appellant;
R.R. Rhoda, *Q.C.*, *Attorney-General*, for the Crown.

1 **KENNEDY, P.,** delivering the judgment of the court: On October 4th, 2012 in the Supreme Court, this appellant was convicted by a jury of all seven counts in the indictment which he faced, and he was sentenced to a total of 1 year and 10 months' imprisonment, of which 1 year was ordered to be served and the remaining 10 months were suspended for 2 years. He was also disqualified from holding or obtaining a driving licence for 12 months. The first six counts in the indictment arose out of events which occurred on April 4th, 2009 and the seventh count was based on a transaction which occurred on June 10th, 2009. On October 1st, 2012, before the start of the trial, Mr. Azopardi, counsel for the appellant, submitted that the indictment should be severed, so that the appellant did not have to face trial on Count 7 at the same time as he faced trial on Counts 1–6. That submission was rejected by the trial judge, and the ground of appeal against conviction relates to that decision. Mr. Azopardi submits that the decision of the trial judge renders the convictions on Counts 1–6 unsafe. He also submits that, taken from a different standpoint, it could render the conviction on Count 7 unsafe. There is also an appeal against the sentence imposed in relation to Count 7.

Facts

2 The nature of the appeal is such that the facts can be summarized quite briefly, and we draw heavily on the summary in the skeleton argument of Mr. Azopardi, which summary has been helpfully agreed by the Attorney-General.

3 At about 8.45 p.m. on April 4th, 2009, police officers who were observing in relation to an unrelated matter saw a red Volkswagen Golf arrive in front of a block of flats in the Laguna Estate. A man named Alfred Balban spoke to the car driver, who handed Mr. Balban what appeared to be a slab of cannabis resin. The car drove off. It was chased, and was eventually found abandoned. It belonged to the appellant. During the chase, the driver was seen to throw out articles believed to be slabs of cannabis resin, and two further slabs were recovered from Governor's Street. It was the prosecution case that the appellant was the driver of the car, and two police officers other than those who had been observing in the Laguna Estate said that they had been able to identify him.

4 As we have said, the first six counts in the indictment related to the events of that evening. The appellant was charged with supplying Mr. Balban with an unknown amount of cannabis resin, with possession of

cannabis resin with intent to supply, and with dangerous driving. For present purposes the details of the evidence supporting the charges do not matter.

5 The appellant's case was that he had lent his car to a Moroccan friend who lived in La Linea, and that when the offences were committed he was having dinner with his family at the home of his mother-in-law, which is also in the Laguna Estate. He called a number of alibi witnesses to support that defence.

Count 7

6 Turning now to Count 7, after the appellant had been arrested and charged with the drugs offences, Det. Const. Wyan of the Financial Crime Unit of the Royal Gibraltar Police obtained production orders under the Drug Trafficking Offences Act in relation to the appellant's financial affairs. It emerged that the appellant had a bank account in his own name at NatWest Bank, and two joint accounts with his wife, one at NatWest Bank and the other a joint savings account at the Gibraltar Savings Bank. The officer's enquiries stretched back over six years because, under s.3 of the Drug Trafficking Offences Act, if the appellant were to be found guilty of a drug trafficking offence the court would need to consider the possibility of a confiscation order; under s.5 of the Act, all payments and rewards received by the appellant, as well as all items held by or transferred to him in that six-year period, dating back from the date of the offence, can be assumed to be proceeds of drug trafficking unless the assumptions are found to be incorrect. So the officer looked at the three bank accounts, employment records of the appellant and his wife, and income tax returns.

7 In total there were 13 unexplained cash deposits totalling some £13,800. The officer concentrated on periods when the appellant was not in employment, and was careful to exclude the earnings of his wife who worked as a nurse for the Gibraltar Health Authority. The appellant's declared gross income over the six-year period was £11,032.

8 In June 2009, the appellant and his wife discovered that their Savings Bank account had been frozen. They consulted their lawyer, Mr. Christopher Miles, who sent a fax to the police. The appellant then withdrew £4,500 from the account which was in his sole name, leaving a fairly modest balance in that account. That withdrawal was the subject of Count 7, which alleged that by withdrawing the money he converted or transferred property which, in whole or in part, represented the proceeds of drug trafficking, for the purpose of avoiding the making in his case of a confiscation order. Count 7 was added to the indictment by means of a voluntary bill, and thus the matter came before the trial judge.

The application to sever

9 It was common ground that evidence to be adduced in relation to Count 7 was not admissible in relation to the earlier counts, and Mr. Azopardi submitted, and submits to us, that a separate trial should have been ordered because there was no sufficient nexus between Count 7 and the other offences in the indictment. The attention of the trial judge was drawn to the relevant authorities, including the relatively recent decision of the Privy Council in the case of *Ferrell* v. *R.* (1), on appeal from this court. Mr. Azopardi relied then, and relies now, on the nature of the prosecution case and the nature of the defence case in relation to Counts 1–6. The prosecution was relying on identification, and the defendant on alibi. Much depended on the view which the jury would take of the appellant's credibility, and even with proper directions, which were undoubtedly given, it is submitted that the evidence relevant to Count 7 which the jury received was evidence which would be prejudicial when the jury came to approach earlier counts.

Conclusion on severance

10 It is accepted that there are two stages to the inquiry which the judge was being invited to consider. The first was to decide whether, in this indictment, Count 7 was properly joined. That does not seem to have been developed as a separate issue before the trial judge, but as has been pointed out to us, that was something which inevitably was the first step in a consideration of this kind. In *Ludlow* v. *Metropolitan Police Commr.* (2), Lord Pearson dealt with this matter. He said this ([1971] A.C. at 38):

> "The general scheme of the provisions is plain. Section 4 contains a broad, general authorisation of the joinder of charges in indictments 'subject to the provisions of the rules under this Act.' Then rule 3 introduces the limitation: charges may be joined in one indictment if they 'are founded on the same facts, or form or are a part of a series of offences of the same or a similar character.'
>
> Section 5(3) adds a safeguard. Even if charges are properly joined according to the rule, the judge still has a discretionary power to order separate trials if a joint trial of the charges might prejudice or embarrass the accused in his defence.
>
> The first step is to ascertain whether the two charges in the present case were properly joined according to the rule. They were not founded on the same facts. Did they comply with the alternative condition that they should form or be a part of a series of offences of the same or a similar character? This question can be narrowed, because these two offences were not presented as being part of some larger series of offences and they were not of the same character."

So it is quite clear that if one is considering a submission of this kind, the starting point is likely to be "Was the count properly joined?" Lord Pearson went on to say this (*ibid*., at 39): "In my opinion, however, it is important to notice that there has to be a *series* of offences of a similar character. For this purpose there has to be some nexus between the offences." And, a little further down: "Nexus is a feature of similarity which in all the circumstances of the case enables the offences to be described as a series."

11 *Ludlow*, and the decision in that case, is a background to the decision of the Privy Council in the case of *Ferrell* (1), to which we have already referred. In that case Lord Clarke, giving the opinion of the Board, said this (2010–12 Gib LR 39, at para. 6): "There were a number of issues before the Court of Appeal, which rejected all the grounds of appeal advanced before it. In this appeal three issues are raised on behalf of the appellant." He then related them to the relevant counts in that case, and went on to deal with the question of joinder. The appellant's counsel in that case (*ibid*., at para. 7)—

> ". . . submitted on behalf of the appellant that the money laundering counts should not have been joined and thus tried together with the drugs counts. It is common ground that the principles relevant to joinder in Gibraltar are the same as in England and Wales . . ."

And then he set out what had occurred in that case (*ibid*., at para. 8):

> "At first instance, Pitto, J. held that the two sets of charges arose out of the same facts. However, it was accepted by the Attorney-General, both in the Court of Appeal and before the Board, that he was wrong so to hold. The issue, both before the Court of Appeal and before the Board, is whether the two sets of offences 'form or are part of a series of offences of . . . a similar character.' The Court of Appeal held that they are. The question is whether it was correct to do so."

12 It is important to have regard to the stage of the proceedings at which this submission was made, because we were invited to look, with some care, at the evidence given by Det. Const. Wyan during the trial. In some ways that evidence is irrelevant, because it was simply not available at the time when the judge was considering the issue of whether there had been proper joinder and if so whether it was appropriate in the particular circumstances of this case to order that there be separate trials. In fact the evidence showed, and this much was clear, that the bank account upon which Count 7 was founded related to one of the three accounts of the defendant and his wife. He and his wife were joint holders in respect of two accounts but this was the account with the NatWest Bank which was in his sole name.

13 Mr. Azopardi submits that, in relation to that account, the deposits—which the officer accepted were, as he put it, "deposits which could not be explained"—took place some time before the officer began his investigation. Indeed they took place as long ago as 2004 and 2006, and they related in broad terms to payments of £5,000 and some £1,500. He submits that in those circumstances, to say that by 2009 this account represented the proceeds of drug trafficking was an inference which the jury would not properly be able to draw.

14 Now, that is the substance of the case being put forward on behalf of the defence, and that was, in part at least, why the submission was being made. But it seems to us the proper approach here was to have regard to what had undoubtedly been the subject-matter of the first six counts in the indictment. That is to say, the offences of April 4th, 2009. The jury were going to hear about those. They were also going to hear about what happened in June when the appellant and his wife sought to draw money from the savings account into which there had also been a number of unexplained deposits.

15 In our judgment, there was nothing whatsoever that could really be said about these series of accounts to undermine the submission of the prosecution that Count 7 and the preceding counts were part of a series of offences of the same or a similar character, namely supplying drugs and dealing with the proceeds of drug trafficking in such a way as to try to avoid the impact of a confiscation order.

16 So it seems to us that the judge was entirely right to conclude that the counts were properly joined. As to the question of whether or not they should nevertheless be severed in justice to this defendant, that was a question for the discretion of the judge, and there is authority to support the proposition that such a discretionary decision is not one with which any appellate court is likely to interfere. In fact, on the facts of this case, there would seem to be very little ground for interference. The jury would be perfectly able to conclude for themselves, if so minded, that although the defendant was guilty of the offences charged in Counts 1–6, that Count 7 nevertheless was not established because they could not be satisfied that the account to which it referred, or at any rate the balance to which it referred, by the time that the inquiries came to be made, represented in whole or in part the proceeds of drug trafficking. Accordingly, we are driven to the conclusion that no valid criticism can be made on the ruling of the learned judge at the time when that ruling was made. In our judgment he was right to come to the conclusion that the application made to him was one which had to be dismissed, and accordingly, this appeal against conviction is dismissed, because there is no criticism, nor really could there be, of the way in which the trial went thereafter. It was, for instance, never submitted to the trial judge that at the end of the prosecution case some unfairness had arisen as a result of the evidence

from the Detective Constable which would render the trial going to its conclusion in the normal way unfair. We therefore accept the submissions made by the Attorney-General and dismiss this appeal. We will, however, of course, hear submissions in relation to sentencing.

Sentence

17 We now turn to the question of sentence. On behalf of the appellant, Mr. Azopardi makes a number of submissions. First, he points out that this appellant had no option but to be dealt with in the Supreme Court because, as far as Count 7 was concerned, that count came into the indictment by means of a voluntary bill, and insofar as the sentencing judge may have thought that he had an option for it to be dealt with in the Magistrates' Court, that was not the case. He then invited our attention to the decision to which we have already referred, the case of *Ferrell* (1), where undoubtedly the activity of the defendant was greater in the drugs field than the activity of the appellant in the present case, and he submits that all in all, this appellant should not have attracted, so far as Count 7 was concerned, a sentence of 12 months' imprisonment. It is worth noting that the possible sentence in relation to this type of offence is very much higher, but of course it has to cover cases where the offending is very much more serious than the present case. We, having looked at the matter, can see no reason to criticize the sentence imposed by the learned judge in relation to that count in the indictment, and it is worth remembering that although properly there was a separate sentence for each count, what the learned judge did was to impose an overall sentence, part of which was suspended. So, whether looking at Count 7 on its own, or looking at the sentence overall, we can see no reason to criticize in any way the decision at which the judge arrived.

18 Accordingly, the appeal against sentence, like the appeal against conviction, is dismissed.

Appeal dismissed.