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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

WILLIAM McCLUSKEY

Before Kerr LCJ, Campbell LJ and Sheil LJ

KERR LCJ

Introduction

[1] On 21 February 2003, after a trial before Nicholson LJ and a jury at Belfast Crown Court, the applicant, William McCluskey, was convicted on charges of possession of class A and class B drugs with intent to supply contrary to section 5 (3) of the Misuse of Drugs Act 1971. He was sentenced to 12 years imprisonment on each of the charges, these sentences to run concurrently. A co-accused, Simon Wood, who had pleaded guilty at the start of the trial to similar charges, was sentenced to a custody probation order, comprising six years imprisonment and two years probation. Another co-defendant, David Jackson, was charged with the same offences but because of his serious illness these charges were not proceeded with.

[2] Leave to appeal against conviction was refused by the single judge and the applicant renews that application before this court. He also applies for leave to appeal against sentence.

Background

[3] At approximately 10.30 pm on 28 February 2001 a white Mercedes van, registered number W472 UEC, was driven off a ferry in Larne. It had three occupants. These were the applicant McCluskey, Simon Wood and David Jackson. The ferry had sailed from Fleetwood to Larne. The booking for the crossing was made at 7.11 pm on 27 February for the 2.45 pm sailing the

following day. The booking form specified the Mercedes van with two adult passengers. The lead name on the booking form was D Jackson and the other passenger was named as Wood. On 28 February a third adult was added to the booking. His name was given as Johnston. It transpired that Johnston was a false name used by McCluskey. The name was added some short time before the sailing, not more than an hour before the ferry left. Evidence was given at the trial that it was not possible for a foot passenger to travel on this particular ferry. All passengers had to be associated with a vehicle.

[4] As it was driven off the ferry the van was observed by police officers from the headquarters serious crime squad of the Royal Ulster Constabulary. They followed as it travelled towards Belfast. Other police officers then took up observations of the van and it was seen to travel to the junction of Lowwood Park and Lowwood Gardens, off the Shore Road. The van stopped and McCluskey alighted and walked to a house at 35 Lowwood Park. There he had a short conversation with a female who, it later transpired, was his sister. McCluskey then returned to the van and it drove off. Observations by other police officers then began and they saw the van driven to the Lansdowne Court hotel.

[5] At the hotel the three men took rooms for the night. McCluskey was registered as Johnston, although he did not sign the registration card. One of the other two men completed all three cards. A police officer observed the men having a drink at the bar and then retiring to their rooms shortly after midnight. At 7.35 am the following morning they left the hotel and got into the van. One of them was seen to be carrying a black holdall. The van was driven once more to Lowwood Park and there the applicant was arrested in his sister's home. The van was detained and Wood and Jackson were also arrested.

[6] At the time that these events were taking place McCluskey was unlawfully at large. He had been serving a sentence of imprisonment of seven years and had been granted compassionate home leave. He had failed to return to the prison at the expiry of the period allowed. When he was confronted by a police officer at Lowwood Park and asked to identify himself, McCluskey said that his name was John Graham; he also gave a false date of birth and address. The police officer suspected that he was in fact McCluskey and at 8.15 am he arrested the applicant on the charge of being unlawfully at large.

[7] The van was searched cursorily at the scene and nothing of significance was found. At about 11 am on the same date a more thorough search was conducted. Two large cylinders that were in the rear of the vehicle were opened using equipment supplied by the firm from which the cylinders had been hired. Concealed in the cylinders were packages containing the drugs. All told, 59 kilograms of cannabis resin and 23,660 Ecstasy tablets were found. The estimated street value of the cannabis was £590,000 and of the Ecstasy £295,750.

[8] Evidence was given at the trial that the van had been hired by Jackson in Morecambe. The cylinders that were found in the van were part of abrasive cleaning equipment that had been hired from a firm specialising in the supply of that type of equipment. It had been hired in February 2000 by Wood who had failed to make monthly payments and falsely represented to the hirers that the equipment had been stolen.

[9] After his arrest, McCluskey was interviewed by police officers on six occasions. At the first of these he said that he knew nothing about the drugs and that if he had known that there was anything illegal in the van, he would not have been in it. During this and subsequent interviews, apart from saying that he knew nothing about the drugs, he refused to answer any questions. In particular he refused to offer any explanation as to why he had used false names. This is significant because his sister gave evidence that he had visited her on a number of times before his arrest and it was not suggested that on those occasions he had used false names. The applicant did not give evidence on trial.

The application for leave to appeal

[10] For the applicant Mr Donaldson QC advanced a number of grounds as to the safety of the conviction and the fairness of the trial. These can be summarised under four main headings as follows:-

1. The verdict of the jury was against the weight of the evidence;

2. The learned trial judge wrongly admitted evidence that the applicant had given a false name, and having done so, misdirected the jury as to the inferences they might draw from his failure to give evidence on that issue;

3. The judge ought to have acceded to the application made on behalf of the applicant that the case be withdrawn from the jury at the close of the prosecution case;

4. The judge failed to put the defence case sufficiently fully or fairly to the jury and misdirected the jury on the proper approach to be followed in a case involving circumstantial evidence.

Against the weight of the evidence

[11] It was submitted that several aspects of the evidence strongly supported the applicant's claims of innocence and his assertion that he knew nothing of the drugs. We do not intend to rehearse each of these items of evidence but we have considered all those canvassed on behalf of the applicant in the course of the hearing of the application. What follows in the next paragraph is a broad summary of the principal points made on the applicant's behalf on this aspect of the case.

[12] McCluskey had joined the van only a short time before the ferry sailed; there was therefore no reason to suppose that he knew anything about its contents. By contrast, Wood had hired the equipment in which the drugs were concealed and Jackson had hired the van. McCluskey was at all times a passenger in the van and never had control of it nor of the equipment in which the drugs were discovered. No fingerprint or forensic evidence of contact with the drugs was produced. McCluskey's decision to stay the night at Lansdowne Court hotel was explicable on the basis that his sister had not expected him that evening. The applicant's visit to his sister's house the following morning was entirely innocuous and the holdall that he was carrying did not contain anything of sinister significance. The van was moving off at the time that the arrests were made suggesting that McCluskey was not part of any delivery plans for the drugs.

[13] We find nothing in any of these or the other points made by the applicant that suggests that the verdict of the jury was against the weight of the evidence. On the contrary, McCluskey's presence in a van where drugs were found and his association with the other two passengers of that van created a strong *prima facie* case against him which, if unanswered, provided a strong foundation for a finding of guilt. None of the matters adumbrated above, either singly or in combination pointed ineluctably to his innocence. They were, in our judgment, either as consistent with guilt as with innocence or entirely neutral. We do not consider that the jury's verdict was against the weight of the evidence.

The admission of evidence of the false name

[14] Mr Donaldson identified this issue as the centrepiece of the application for leave to appeal. He suggested that the applicant's case was irretrievably prejudiced as a result of the admission of this evidence. The applicant, he said, was thereby placed in an impossible dilemma. If he failed to explain why he had given a false name the jury would assume that this was because he was involved in the drugs offences. If he provided the explanation (that he wanted to avoid detection because he was unlawfully at large) the jury would discover that he was a sentenced prisoner.

[15] The applicant had every incentive to give a false name, Mr Donaldson claimed. He still had twenty months of a seven year sentence of imprisonment to serve. He had been unlawfully at large since 29 April 1999, having served twenty two months in prison by that time. The Crown had made it quite clear, Mr Donaldson said, that they regarded this as a very important part of the case against the applicant. He suggested that the prosecution had in effect misled the jury since they were aware that there was a perfectly obvious reason for giving a false name that had nothing whatever to do with the drugs find but had repeatedly emphasised to the jury that the giving of a false name was relevant to the offences with which the applicant was charged. The learned trial judge also emphasised the significance of the

giving of a false name "constantly" to the jury. The introduction of the evidence brought about a fundamental unfairness in the trial. It was "far-fetched and speculative" to suggest that the use of the false name had anything to do with the drugs.

[16] Mr Donaldson had sought to persuade the trial judge not to permit the evidence about the giving of a false name to be adduced. He submitted that the judge should exclude it on the basis that its true probative value was outweighed by its prejudicial effect. The judge rejected this application. He considered that the evidence had probative value in that the applicant had no obvious motive for travelling on the ferry and taking the risk of being detected, unless it was for a criminal purpose. If the applicant had given his true name he was liable to draw attention to the vehicle in which he had been travelling and where the drugs were concealed. Moreover, he had given a different false name to the police from that which he used at the hotel and on the ferry. The judge considered that the jury might deduce from this that he had done so in the hope that the police would not link him with Wood and Jackson.

[17] The police officer who arrested McCluskey, Sergeant McLeer, was asked by Mr Donaldson whether he was aware of any reason that the applicant gave a false name that was not connected with his being in a vehicle where drugs were found. The sergeant replied that he was aware of such a reason. Having obtained that answer, Mr Donaldson understandably did not pursue the matter.

[18] The argument presented for the applicant on this issue was predicated on the claim that the only feasible explanation for his having given a false name was that he wished to conceal the fact that he was unlawfully at large. One can readily accept that this would certainly have played a part in his thinking but is it the only possible reason that he gave not one but two false names? We do not believe so. If one assumes, for the sake of the discussion, that the applicant was involved in importing the drugs to Northern Ireland, one can readily envisage reasons associated with that enterprise that would have prompted him to use a false name. He is bound to have anticipated that the use of his own name either on the ferry or in the hotel might have alerted the police to his presence. Obviously, he would wish to avoid that because he was unlawfully at large, but he would surely also wish to avoid it if he was involved with the drugs. The attention of the police, if drawn to the applicant because he was unlawfully at large, is unlikely to have ended there. McCluskey is bound to have realised that if he was detected, the chances were that the police would be interested in those with whom he was travelling and his mode of transport. Put simply, while there was good reason to use a false name because he was unlawfully at large, there was also good reason to do so if he was involved with the drugs.

[19] The evidence of the use of the false names was therefore intensely relevant to the issue that the jury had to decide. The question that then arises

is whether the admission in evidence of the fact that he had used false names was unfair to the applicant. This question must be considered in two aspects. First should the judge have exercised his discretion to exclude the evidence on the basis that its prejudicial effect outweighed its probative value? Secondly, was this a species of evidence that ought to be excluded under article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989?

[20] A number of preliminary comments should be made. Firstly, the mere fact that an item of evidence is prejudicial to a defendant on matters extraneous to the issues that arise in the trial will not, without more, suffice to render it inadmissible. A judgment must be made not only on the potential of the evidence to damage the defendant's case but also on the effect that the exclusion of the evidence might have on the case for the prosecution. The present case exemplifies the principle. The applicant was undoubtedly placed in a quandary by the evidence in relation to the false names. Either he explained why he had been using these, in which case he had to incur the risk of antipathy from the jury, or else he declined to explain in which case he ran the risk of the jury associating the use of the false names with the importation of the drugs. But that circumstance must be set against the disadvantage to the prosecution that would arise if the evidence was excluded.

[21] The second preliminary matter relates to the role of this court in reviewing the exercise of the judge's discretion in deciding whether the prejudicial effect of the evidence outweighed its probative value or that the evidence should be excluded under article 76 of PACE. On the question of discretion in relation to the prejudicial effect of the evidence in *R v Screen* [2004] EWCA Crim 938 the Court of Appeal in England and Wales described this role in the following passage:-

> "[22] We have reflected carefully on the role of this Court in a case of this kind. The balance between probative value and prejudicial effect is quintessentially one for the trial judge to strike. If the trial judge had addressed all the relevant issues to the striking of that balance and arrived at a conclusion within the generous margin available to her, it would not be right for this Court to interfere."

[22] As regards article 76 of the 1989 Order, it should be noted that the courts in England and Wales have recognised (in relation to the equivalent provision, section 78 of the Police and Criminal Evidence Act 1984) that a balance has to be struck between that which is fair to the prosecution and that which is fair to the defence - see *R v Hughes* [1988] Crim.L.R. 519. Article 76 provides:-

"**Exclusion of unfair evidence**

> **76.** —
>
> (1) In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
>
> (2) Nothing in this Article shall—
>
> (a) prejudice any rule of law requiring a court to exclude evidence; or
>
> (b) affect, in proceedings such as are mentioned in subsection (1) of section 76 of the Terrorism Act 2000, the admissibility under that section of a statement made by the accused."

[23] In *R v O'Leary* 87 Cr App R 387 at 391 May LJ said that where the Court of Appeal was invited to consider the exercise of the trial judge's discretion under section 78, the court would be "loath to interfere" with the judge's decision "subject to the question of *Wednesbury* reasonableness". As the authors of the current edition of *Archbold, Criminal Pleadings, Practice and Procedure* point out at paragraph 15-472, in *R v Dures* [1997] 2 Cr App R 247 at 261-262, the Court of Appeal quoted with approval the following passage from *R. v. Quinn* [1995] 1 Cr App R 480:-

> "Before this court could reach the conclusion that the judge was wrong in that respect, we would have to be satisfied that no reasonable judge, having heard the evidence that this learned judge did, could have reached the conclusion that he did."

Rose LJ, giving the judgment of the court in *Dures*, said that this passage represented the practice of the Court of Appeal. He referred to a judgment of Laws J in *R v Middlebrook and Caygill*, unreported, February 18, 1994, in which it was suggested that section 78 did not provide a true discretion, despite the use of that word in many cases, since a true discretion implied a power that

could lawfully be exercised in more than one way. Rose LJ in *Dures* stated that if *Middlebrook and Caygill* suggested an approach that was different from that in *Quinn*, the approach in *Quinn* was to be preferred.

[24] Mr Donaldson, fastening on the suggestion made in *Archbold* that the effect of the Human Rights Act 1998 will be to require the courts' approach to section 78 to be more "rights based", and on the query raised in paragraph 15-456 (h) whether the Court of Appeal should only interfere with the exercise of the judge's discretion on *Wednesbury* principles, submitted that this court should approach the review of the exercise of the judge's discretion in a more open-ended fashion. He relied on the decision of the House of Lords in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, claiming that the approach in that case to the review by the court of the proportionality of an interference with a Convention right could be translated to the present situation. He suggested that this court should be prepared to subject the decision of the trial judge to "strict scrutiny."

[25] We do not accept that the review of the judge's decision in this case lies in direct analogy with the decision under attack in *Daly.* There a policy of excluding a prisoner from his cell while his privileged legal correspondence was examined was held to be an interference with his rights under article 8 of the European Convention on Human Rights and Fundamental Freedoms (1953), as scheduled to the Human Rights Act 1998. The scrutiny to which the Prison Service's decision was subject was directed to their assertion that this interference was justified because of the risk of intimidation, the risk that staff may be conditioned by prisoners to relax security and the danger of disclosing searching methods. The issue therefore was whether the policy was proportionate to the aims that it purported to achieve. Here we are concerned with a decision by the trial judge that does not involve the principle of proportionality. In effect the judge decided that the admission of the evidence in relation to the giving of false names did not constitute an interference with the applicant's rights under the Convention. A review of that decision takes place in an entirely different context from that where interference is sought to be justified on the basis of a proportionate and permitted interference with a qualified right.

[26] The fact that a *Daly* type review is not appropriate does not dispose of the question whether the judge's decision may only be considered on the basis of a Wednesbury challenge, however. One might observe that section 78 (and article 76) do not involve the exercise of a discretion in the way that that expression was used by Laws J in *Middlebrook and Caygill* but that a trial judge, called on to exclude evidence under these provisions, is nevertheless engaged in the weighing of competing arguments in a setting where his judgment is likely to be better informed than that of the Court of Appeal in that he is able to observe the ebb and flow of the case and is better placed to assess the possible unfairness to the defendant of the introduction of the particular item of evidence to which objection is taken. These considerations may warrant a measure of reticence on the part of the Court of Appeal in 'second-guessing'

the judge's decision. It is doubtful, however, that the reviewing power of the Court of Appeal should be constrained by a *Wednesbury* approach. After all, this court has the advantage of being able to review the entirety of the case, including its outcome, in deciding whether unfairness in fact occurred. It appears to us, therefore, that we should approach the review of the judge's decision to admit the evidence of the applicant having used false names on the basis that if a reasonable judge ought to have concluded that admission of the evidence would produce unfairness, the conviction cannot be regarded as safe. The same approach is appropriate, in our view, to the question whether the evidence should have been excluded as having less probative value than its prejudicial effect.

[27] The third matter that should be taken into account is that the learned trial judge suggested to defence counsel various ways in which the prejudice accruing to the applicant from the disclosure that he had been unlawfully at large might be mitigated. Nicholson LJ, in ruling that the evidence was admissible, suggested that it would be possible to emphasise to the jury that the applicant was unlawfully at large for a wholly unconnected offence. Such a direction could only have been given, of course, if the applicant had given evidence that he had failed to return to prison after a period of home leave but, as we have said, he elected not to give evidence. But, in any examination of the propriety of the decision to allow the evidence in relation to false names to be given, it is relevant that the trial judge was considering the means by which any disadvantage that might ensue would be reduced. He also proposed that if the jury was told by the defence that the applicant had been travelling under a false name in order to avoid recapture they should be directed that, if they accepted that this was the only reason for the deception, they should ignore that evidence. Again such a direction could only be given if the applicant had given evidence and that did not happen. It is significant, however, that Mr Donaldson accepted that the trial judge did "anxiously search for a formula which might have avoided the worst effects" of the evidence being given.

[28] The proposition implicit in the applicant's argument on this issue was that the probative value of the evidence was extinguished by the consideration that he had a clear motive to conceal his identity because he was unlawfully at large. We cannot accept that this is so. The potential value of this evidence to the prosecution was considerable. Although, as Mr Donaldson pointed out, it was not in issue on the trial that the applicant was in the van with the other two accused and that he had been in the Lansdowne Court hotel with them, this does not dispose of the argument that the applicant used a false name on the ferry and in the hotel in order to avoid the attention of the authorities, not only because he was unlawfully at large but also because he was involved in the importation of the drugs. By the time of the trial it would have been pointless for the applicant to contest that he had been with Wood and Jackson when they were detained outside his sister's home, but this does not detract from the potential impact on the minds of the jury of the evidence that he gave a false name at the time of his arrest

because, as the prosecution claimed, he wished to give the appearance that he did not have any association with them.

[29] In our judgment, the trial judge was correct in his decision to admit the evidence of the applicant having given false names. The applicant's case was that he had no knowledge of the drugs in the van. The defence that was advanced on his behalf was that he had innocently become associated with the other defendants, had stayed the night in the hotel with them because it was inconvenient for his sister to have him to stay and that he knew nothing whatever about the drugs. The fact that he used false names went a long way to counteract those claims. He may well have had another reason for doing this but should the possible existence of that other reason have prevented the prosecution from making use of this valuable evidence? We think not. We recognise that the applicant was placed in an invidious position in deciding whether to explain why he had used those names but we cannot accept that this dilemma (which, after all, arose as a result of his own wrongdoing) should operate to deprive the prosecution of important material that pointed to his guilt. It is also, in our judgment, relevant that the trial judge sought to explore ways in which, if he had chosen to give evidence, the applicant's position might be protected and that the police officer had confirmed that there was a reason that the applicant had used false names other than one associated with the drugs. These mitigated significantly any disadvantage that might otherwise have accrued to him.

The judge's direction on the false names issue

[30] Mr Donaldson argued that the judge should have directed the jury that it was open to them to disregard the fact that the applicant had used names other than his own. Instead he repeatedly emphasised that the applicant had not given an explanation as to why he had used false names. This, Mr Donaldson said, was disingenuous since he knew perfectly well that there was a "good reason" for giving the false names. The judge reminded the jury that Sergeant McLeer had said that there was a reason for not giving a false name that was unconnected with the drugs but went on to say that the prosecution attached particular significance to the fact that the applicant had not given that reason in evidence and had not thereby exposed himself to cross examination about his association with Wood and Jackson. This, Mr Donaldson said, was unfair because the judge knew the constraints that inhibited McCluskey from giving evidence.

[31] We do not accept these arguments. There were obvious questions about his association with Jackson and Wood that the applicant avoided by refusing to give evidence. The thrust of his case was that he knew nothing about the drugs. An inevitable line of cross examination would have dealt with how he came to travel with the other two, who plainly did know about the drugs, and why he had spent the night with them in the hotel. His sister had given evidence that she had told McCluskey that he could not stay at her house, although there had been other occasions when he had stayed without making

prior arrangements. She said that she could not think of any reason that she had said that. Then she said that he did not ask to stay. If that is so, various questions arise: why had he called at the house that night and why did he not ask to stay and why did he choose to stay in the hotel. In essence Mr Donaldson's argument resolves to the claim that the applicant should be exempt from the inferences that would normally flow from his failure to address these issues because he did not wish to reveal to the jury that he had been unlawfully at large. We cannot accept that this circumstance entitles him to that exemption.

[32] Most, if not all, of the passages from the judge's charge dealing with the inferences to be drawn against the applicant to which Mr Donaldson took exception were the judge's rehearsal of the case made by the prosecution and merely represented his synopsis of their arguments rather than any espousal of those arguments. In any event, the learned trial judge properly warned the jury of the need for care in drawing inferences against the applicant because he did not give evidence. At pages 64/65 of the transcript of his charge the following appears:-

> "… if (in regard to inferences) you are prepared to draw them against him … but you say to yourself well now if he had gone into the witness box and given an explanation I might not have drawn that inference, only take that against him if you say, 'well really, that cries out for an explanation and he didn't give it to us. If you draw this inference against him look at that very carefully indeed in drawing such inferences against him because the man has no obligation to go into the witness box to give evidence in the case against him. He is entitled to say, 'You prove the case against me, if you can't prove the case against me I'm entitled to be acquitted. So use particular caution before holding the accused's silence against him."

[33] We are satisfied that the judge was not required to direct the jury that they could ignore the fact that the applicant had used false names. This was a relevant and potentially pivotal piece of evidence. The judge correctly reminded the jury of what Sergeant McLeer had said and properly left it to them to assess that evidence. We consider that he was right to point out to the jury that the applicant's failure to give evidence on a number of obvious matters provided the occasion for the drawing of inferences against him and we have concluded that he gave the jury appropriate warnings as to the conditions that required to be satisfied before drawing those inferences.

Submission of no case to answer

[34] It was argued that the trial judge should have acceded to the submission of no case to answer. It was submitted that the evidence amounted to no more than that he had travelled in a van with two other men. This was not sufficient to ground the charge of possession of the drugs. He did not drive the van. He had not hired it nor had he hired the equipment. There was no evidence that he had had any contact with the van until he travelled in it from Larne to Belfast. There was no evidence that the decision to stay in the hotel was anything other than innocent. The others drove off in the van after dropping the applicant off at his sister's house. All of what had been observed of the applicant's contact with the van and the other men was equally consistent with his innocence as with any criminal activity.

[35] We consider that the judge was correct to refuse the application of no case to answer. There was clear evidence that the applicant was associated with a van in which a substantial quantity of drugs was found. He joined the complement of the van's passengers shortly before the ship sailed. The others (who unquestionably knew about the drugs) were willing to allow him to join them. They remained together on the trip to Belfast and waited while he spoke to his sister on the evening of his arrival in Northern Ireland. They went together to the hotel, checked in together and had drinks together. They left the hotel together the following morning. All of this spoke strongly of a close association between the three men. Such an association provided clear *prima facie* evidence of the applicant's participation in the criminal enterprise. Taken with the applicant's having used two false names there was ample material on which the jury could infer that he was aware of the presence of the drugs in the van and was complicit in their importation to Northern Ireland.

[36] Mr Donaldson made passing reference to a number of cases on the question of joint possession. He relied particularly on the decision of the Court of Appeal in England in *R v Strong* (1989) Times, 26 January. That case involved appeals against conviction for possession of cannabis resin found hidden in a car driven by one appellant with a second appellant and another man as passengers. The cannabis was found in a plastic bag wrapped in a jumper, which was under a child's seat in the rear, under a mat by the driver's feet and between the back rest and seat in the rear. The appellant Strong, who was in the rear seat beside the child's seat, said that he was going to an auction in London and denied knowledge of the drugs. It was held that unless he was proved to have known about the cannabis he could not be in joint control of it. Even if he did know about its presence, that was not enough. The mere fact that someone, for instance, had told him that there was cannabis in the car would not be enough to saddle him with possession. It was held that the submission of no case to answer should have been acceded to; the appeal was therefore allowed. Delivering the judgment of the court Lord Lane CJ said:-

> "In short, mere presence in the same vehicle as the drug and in particular where there was no evidence of knowledge could not amount in the circumstances of the present case to evidence from which the jury could properly infer possession, whether individual or joint."

[37] Drawing on this passage Mr Donaldson submitted that, as with Strong, there was no particular nexus between McCluskey and the drugs and no direct evidence that he knew of their presence. In effect allowing the case to go to the jury meant that the jury was being invited to assume that he was aware of the drugs solely on the basis of his association with the two other men and his having given false names.

[38] We do not accept these submissions. As we have already indicated, we consider that there was clear *prima facie* evidence against the applicant. The contrast with the circumstances in the *Strong* case is obvious. Here McCluskey had associated with the two other men not for a short car journey (as in Strong's case) but overnight. He had gone with them first to his sister's house and then to a hotel. He had given not one but two false names. He had failed to give any explanation during interview of his presence in the van or his having used false names. Apart from an unvarnished assertion that he knew nothing about the drugs he refused to answer police questions. These circumstances raised a significant case against him which called for an answer.

Misdirection on the issue of possession

[39] Although the skeleton argument filed on behalf of the applicant foreshadowed a claim that the trial judge had misdirected the jury on the law relating to possession, this was not pursued on the hearing of the appeal. Mr Donaldson did suggest that the judge had misdirected on the facts relating to the applicant's knowledge and the evidence imputing possession to him. We do not consider it necessary to set out each of the passages from the judge's charge that Mr Donaldson read to us. We have considered each of them. The main thrust of Mr Donaldson's complaint was that the trial judge equated association with the men as establishing guilt. We do not accept that this was the effect of the judge's charge. Clearly, the association between the applicant and Wood and Jackson was critical to the prosecution case. The judge directed the jury's attention to various aspects of that association, as he was entitled, indeed was required, to do. He did not suggest that the mere fact of association was sufficient to establish guilt. We are satisfied that there was no misdirection by the judge on this issue.

Failure to put the defence case sufficiently fully

[40] Mr Donaldson made a number of discrete references to the transcript of the charge in support of this general submission. In particular he referred to the learned trial judge having suggested to the jury that they should not be influenced by what counsel or the judge had to say to them. Mr Donaldson suggested that this was plainly wrong since it was part of counsel's function to influence the jury and the judge's charge on this point would have left them with the impression that they should ignore what counsel had said. There is nothing in this point, in our view. Taken in context the judge's adjuration was directed to reminding the jury of the need to form their own independent judgment on the disputed issues that they had to resolve. Viewed as a whole, the charge clearly conveyed to the jury the need to consider carefully the points that had been made both by prosecution and defence.

[41] The judge was criticised by counsel for having failed to put what Mr Donaldson described as the "counterpoints" to the prosecution case. But the case for the defence resolved to a simple proposition *viz* that he knew nothing about the drugs and we are entirely satisfied that the jury was appropriately reminded of this by the trial judge. Mr Donaldson suggested that the judge should have told the jury that they should hesitate to convict solely on the basis of the evidence of association between McCluskey and the other two men, particularly because that association was "unexplained". We do not accept that submission. The applicant himself was responsible for the lack of an explanation of the association and we are quite unable to accept that the circumstances of the discovery of the drugs, together with McCluskey's failure to give any such explanation, should have prompted a direction that the jury should be slow to convict.

[42] Mr Donaldson also criticised the learned trial judge for in effect inviting the jury to speculate as to the part that the applicant might have played in the criminal enterprise. This was not an easy argument to make since the passages of the transcript to which Mr Donaldson referred us in fact contained express directions to the jury that they should not engage in speculation. We are satisfied that the matters raised by the judge in those passages were merely illustrations of the type of speculation that he warned the jury to avoid and that there is no merit in this point. Finally, on this issue, Mr Donaldson was critical of the manner in which the judge dealt with the matters raised in requisition of his charge. We have considered these carefully. We do not accept that there was anything untoward in the judge telling the jury that he had been asked by counsel to deal with those matters or that he failed to deal with each of the requisitions fully.

Circumstantial evidence

[43] It was submitted that the learned trial judge failed to give a correct direction to the jury on the proper approach to the assessment of circumstantial evidence. At pages 9/10 of the transcript of his charge the judge is recorded as saying:-

> "The case for the prosecution is based on circumstantial evidence. That evidence must be examined and treated with great care by you and it is my duty to point out any circumstances which tend to establish innocence and which are inconsistent with guilt. Insofar as there are such circumstances I will attempt to do so.
>
> Your task, as I say, involved the drawing of a conclusion from the proved facts. To bring in a verdict of guilty it is necessary that they should be rational inferences that the circumstances would enable you to draw. That is to say that there is no other explanation than guilt which is reasonably compatible with the circumstances and there is no other reasonable explanation than guilt … Circumstantial evidence must lead to one conclusion only – namely, the guilt of the accused."

[44] At page 11 the judge said:-

> "Therefore circumstantial evidence must be examined with great care for a number of reasons but to see whether there exists more than one circumstance which is not merely neutral in character but is inconsistent with any other conclusion than that the defendant is guilty. This is particularly important because of the tendency of the human mind to look for and often to slightly distort facts in order to establish a proposition, whereas a single circumstance which is inconsistent with the defendant's guilt is more important than all the others, because it destroys the conclusion of guilt on the part of the defendant."

[45] Finally, at page 61 the judge said:-

> "I have to help you as to whether there is anything inconsistent with guilt. There is nothing that I can suggest to you that points the opposite way, but there are three points that I should mention. Wood hired the equipment in which the drugs were found. It was Jackson who hired the van. And that Wood and Jackson dropped the accused off at 35 Lowwood Park and were going to drive on leaving the accused behind."

[46] Mr Donaldson focused on the last of these passages which, he said, did not correspond with the requirements for a proper direction to the jury on circumstantial evidence. He relied particularly on the decision of this court in *R v Anderson* [1995] unreported. In that case Hutton LCJ reviewed a number of authorities where the general principle had been recognised that "a judge ought to point out circumstances which tend to establish innocence, and more especially circumstances which are inconsistent with guilt." Mr Donaldson suggested that the trial judge's charge had failed to fulfil this requirement.

[47] We do not accept this argument. The trial judge's charge must be taken as a whole. In the earlier passages set out above he scrupulously advised the jury of the correct approach to be taken to the issue of circumstantial evidence. It is true that in the last section that we have quoted the judge said that he was not able to identify any aspects of the evidence that pointed "the opposite way", but we are satisfied that this was meant to convey (and would be understood by the jury to mean) that there was no item of evidence that was clearly inconsistent with the applicant's guilt. In our view, the judge was entitled to form this view on the evidence. In any event, he did refer the jury to three matters canvassed by the defence on the trial. Mr Donaldson was unable to point to any other aspect of the evidence which, in the opinion of this court, required to be drawn to the jury's attention.

Conclusions

[48] None of the grounds advanced for the applicant has succeeded. We are satisfied that the judge was correct to admit the evidence in relation to the giving of false names and to refuse the application for a direction of no case to answer. We consider that his charge to the jury cannot be faulted. We do not accept that the verdict of the jury was against the weight of the evidence. On the contrary, we are satisfied of the safety of that verdict. The application for leave to appeal against conviction is dismissed.

[49] The application for leave to appeal against sentence shall be listed for hearing on a day suitable to the parties.