

Neutral Citation No: [2017] NICA 35

Ref: STE10317

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 09/06/2017

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

—————
THE QUEEN

Respondent

v

PAUL MICHAEL HUGH DOYLE

Appellant

—————
Before: Morgan LCJ, Weir LJ and Stephens J
—————

STEPHENS J (delivering the judgment of the court)

Introduction

[1] This matter comes before the court as an appeal from the decision of Gillen LJ refusing the application of Paul Michael Hugh Doyle (“the Appellant”) for an extension of time within which to apply for leave to appeal against his conviction on 26 January 2015 at the conclusion of a trial before His Honour Judge Lynch sitting with a jury of the offence of possession on 31 January 2014 of a Class A controlled drug with intent to supply, contrary to Section 5(3) of the Misuse of Drugs Act 1971. Notice of an application for leave to appeal against conviction is required to be given within 28 days from the date of conviction. The notice in this case was given on 28 May 2016, some 1 year and 4 months from the date of conviction. This court at paragraph [8] of the judgment of Morgan LCJ in *R v Brownlee* [2015] NICA 39 set out the principles governing the exercise of the discretion to extend time to apply for leave to appeal. In order to consider the application to extend time we have considered the grounds upon which the appellant seeks leave to appeal it being apparent at the hearing of the appeal that there were two grounds.

[2] Before considering the first ground of appeal it is necessary to state that the case against the appellant at trial was that he was knowingly involved in the enterprise of moving a large quantity of Class A drugs from one location to another in that he was driving a car allegedly acting as the “scout” for the car in which the drugs were being carried which was being driven by a Ms Bernadette Tremers. In support of this case the prosecution relied on a number of circumstances, including

evidence taken from the appellant's mobile phone and phone records together with the mobile phone and phone records of the co-accused, Ms Tremers, as to telephone calls between the appellant, Ms Tremers, an individual known as "Billy" who the appellant stated supplied him with cannabis and an individual using a Republic of Ireland telephone number ending "116" who the prosecution suggested was also involved in the events of 31 January 2014. The prosecution relied on the fact of the appellant receiving two calls from that number on the afternoon of 31 January 2014 and 3 calls made by Ms Tremers to the same number on the same day. The appellant at interview had denied any knowledge of the 116 number or of speaking to anyone from a foreign number. He asserted that he had been contacted by the individual using that number out of the blue.

[3] The first ground of appeal was that this court should receive evidence, which was not adduced at the trial, in relation to the various mobile telephone calls in order to establish that the evidence at trial concerning the mobile telephone calls was inaccurate. In relation to that ground of appeal we considered the evidence in order to determine whether it ought to be admitted, whether it afforded any ground for exercising discretion to extend time to apply for leave to appeal and if so for allowing the appeal.

[4] The second ground of appeal was that the learned trial judge in his charge to the jury ought to have, but failed to direct the jury in relation to the potential for inaccuracies in the call records provided by the network providers for the two mobile phones.

[5] On the hearing of his appeal Mr Doyle appeared on his own behalf with the assistance of a McKenzie Friend. The prosecution was represented by Ms Auret.

Background

[6] On 31 January 2014 the appellant was driving a BMW motor vehicle on the Banbridge Road towards Waringstown directly in front of a silver Hyundai vehicle being driven by Ms Tremers. The police stopped and searched both vehicles finding 5,094 ecstasy tablets known, due to their colour and shape, as "blue ghosts" in Ms Tremers' vehicle with a value in the region of approximately £35,000-£50,000. There were no drugs in the appellant's car. He denied any knowledge of the drugs in Ms Tremers' car stating that Ms Tremers had contacted him and asked him to show her the way to Waringstown and as he was intending to go to Lurgan in any event, he agreed to do so.

[7] At the time that the vehicles were stopped two mobile telephones were seized by the police. The first was the appellant's Nokia phone with a 02 sim card and a telephone number ending in the numbers "021." The second was Ms Tremers' iPhone with a 02 sim card and a telephone number ending in "282." Both of these were subsequently analysed by Detective Constable Stephen Coates.

[8] At trial the learned trial judge acceded to a prosecution application to admit in evidence the appellant's previous conviction on 4 April 2008 of the offence of possession of a Class A drug with intent to supply together with a number of the appellant's other convictions for drug offences.

[9] The case on behalf of the appellant at trial was that in 2014 he was using cannabis and that his supplier was Billy. That on 30 January 2014 the appellant's house had been searched by the police and damage had been occasioned to the front door. That as a result he needed money to buy a new front door so on 31 January 2014 he borrowed money from Billy informing him that he was going to Lurgan to sell alloy wheels from his BMW car and that he would pay him back later after having done so. The applicant stated that as he was driving to Lurgan he received a call from Ms Tremers who he knew to see. She wanted to know the way to Waringstown. He said that he would wait for her on the hard shoulder and she could follow him. When she arrived he did not get out of his car to have a conversation with her but rather she flashed her lights at him and they moved off together. He denied any knowledge of the drugs that she was transporting or that he was driving in front of her to keep an eye out for the police.

[10] Prior to trial the prosecution evidence in relation to the mobile telephone calls was initially more extensive and in the event partially inaccurate. In October 2014 a "no bill" application was brought by the appellant and a written response was submitted on behalf of the prosecution dated 7 October 2014. That response referred to a number of phone record entries showing contact between the appellant and Ms Tremers not only on 31 January 2014 *but also over a week before that date*. The significance of that evidence included establishing that the appellant's replies at interview were false. The appellant had said that he knew Ms Tremers to say hello to but would not be in contact with her. He was asked the last time he spoke to her or was in her company and he said never really. He said that on 31 January 2014 she rang him out of the blue and he did not know how she got his telephone number. The prosecution case was that the mobile telephone contact established not only that this account of the appellant's knowledge of Ms Tremers was false but also that it was inconceivable that these contacts between the appellant and Ms Tremers and between both of them and the individual using the Republic of Ireland number ending 116 were some remarkable coincidence. The prosecution contended that the mobile telephone calls were evidence of the appellant, Ms Tremers and the individual using the Republic of Ireland number being in contact with each other in order to arrange the transport of these drugs. The prosecution also contended that it was entirely implausible that the appellant just happened to be on his way to Lurgan when contacted by a woman he barely knew and yet waited for her for 20 minutes. The "no bill" application was rejected by His Honour Judge Lynch.

[11] Subsequent to the "no bill" application the appellant's then solicitors obtained a report dated 25 November 2014 from Mark Henderson, a forensic scientist and a member of the Digital Forensic Team at Keith Borer Consultants, specialising in the

extraction and examination of detail from mobile telephones. That report established that there were errors in the prosecution evidence relating to some of the handset material extracted from the mobile telephones. The appellant agreed that the report should be shared with the prosecution and subsequently the prosecution accepted that various entries in the prosecution reports were incorrect. It was also accepted by the prosecution that Mr Henderson's report was correct. The position was that the prosecution proceeded at trial on the basis of the evidence in relation to the telephone calls as corrected by Mr Henderson's report. The erroneous material which had been introduced at the "no bill" stage and which was contained in the depositions was not before the jury. This meant that at trial there was no evidence as to any calls between the appellant and Ms Tremers prior to 31 January 2014 and the evidence at the stage of the "no bill" application of calls earlier than 31 January 2014 was not introduced at the trial. In short there was no issue at trial between the prosecution and the defence as to the calls made on 31 January 2014.

[12] Detective Constable Stephen Coates gave evidence at the trial. In relation to the appellant's Nokia phone with a telephone number ending "021" and in summary he stated that:

- (a) There was a number stored on that phone under the name "Bill P" with a telephone number ending in "183." (Bill P was the individual whom the appellant stated supplied him with cannabis).
- (b) There were 2 calls to Ms Tremers telephone number ending in "282" on 31 January 2014 just before 7pm.
- (c) There were 2 calls from the Republic of Ireland number ending in "116" one just before 3pm and one just after 3pm on 31 January 2014.
- (d) There was a call from Ms Tremers' telephone number ending "282" on 31 January 2014 at 6:50pm.
- (e) There were various text messages sent from the appellant to Bill P including one which stated "Can you get me Bud, f***** choking for a joint."
- (f) There were deleted text messages the substance of which were restored but it could no longer be stated whether they were incoming or outgoing texts including one which stated "That dickhead is f***** about with that Polly. I told him to go f*** himself. I need two five packs of them ghosts." (The appellant in his evidence accepted that he

sent this text message explaining that he was looking for ecstasy tablets for personal use.)

[13] In relation to Ms Tremers' iPhone with a number ending in "282" and in summary Detective Constable Stephen Coates stated that:

- (a) There were numbers stored under the name "Billy" and under the name "Doyler." The number under Doyler ended in "021" which was the appellant's telephone number.
- (b) There were a number of calls to the appellant's telephone number ending in "021" on 31 January 2014 which had a zero duration which meant that the call had not connected with the appellant's phone.
- (c) There were a number of calls to the Republic of Ireland number ending in 116 which did not connect followed by a call to that number at 4:11pm on 31 January 2014 which lasted for 1 minute and 12 seconds.
- (d) There was a call to Billy with a number ending "183" on 31 January 2014 at 6:45pm.
- (e) There were 2 calls to the appellant's number ending in "021." The first with no duration so that it did not connect and the second at 6:50pm on 31 January 2014 with a call duration of 38 seconds.
- (f) There were received calls from Billy with a number ending in "183" at 3:49pm, 5:37pm, 5:56pm and 6:46pm on 31 January 2014.
- (g) There was a call from the appellant's phone at 6:55pm on 31 January 2014.

[14] At trial there was no cross-examination of Detective Constable Stephen Coates. There was no challenge to the accuracy of any of his evidence and there was no issue as to any part of his evidence. There was no requisition to the trial judge in relation to any aspect of his charge to the jury including any aspect of the charge which related to the calls to and from the various mobile telephones.

Discussion

[15] As we have indicated the appellant wishes to establish that the evidence at trial as to the telephone calls was inaccurate. In that respect the appellant made a number of submissions.

[16] The appellant suggested that the original report of Detective Constable Coates which the prosecution accepted contained inaccuracies had been placed before the jury. However, the appellant subsequently correctly identified the relevant document which was before the jury which did not contain the inaccurate data.

[17] The appellant also referred the court to the Pre-Sentence Report prepared by Fianait Mageean dated 18 February 2015 at page 4 of which reference is made to phone activity between the appellant's phone and the Republic of Ireland number not only on 31 January 2014 but also on 20, 22 and 24 January 2014. This was based on the case depositions but it is clear that the evidence at trial as to the phone activity with the Republic of Ireland number was confined to 31 January 2014 and that it is common case that such a call took place with one of the issues for the jury in relation to that call being the appellant's explanation that he answered the call but there was nobody on the line. That issue was before the jury.

[18] The appellant also relied on that part of the judge's charge which referred to two failed calls from Ms Tremers to the appellant at 14:29 and 18:49 on 31 January 2014. The appellant asserted that the phone records established that these calls did not take place there being no entry in the network provider's record in relation to them. However, the explanation is straightforward in that the evidence as to the failed calls comes from Ms Tremers' handset. The call durations were zero in relation to both calls so that her phone did not connect with the appellant's phone. That being so there would be no record on the appellant's own handset or own phone records of those two telephone calls. The learned trial judge informed the jury accurately that these were failed calls. The fact that no record of the calls exists on the appellant's own handset or on the telephone records confirms exactly what had taken place. The calls had failed. The evidence was not inaccurate. The charge was accurate.

[19] As we have indicated none of the inaccurate material in relation to the mobile telephone calls was before the jury. We do not consider that there is any substance in any of the appellant's submissions and we do not consider that there is any evidence which if admitted would afford any ground for allowing the appeal. The applicable provisions in relation to the admission on appeal of evidence not adduced at the trial are contained in Section 25 (1) and (2) of the Criminal Appeal (Northern Ireland) Act 1980. Those provisions have been considered by this court in *R v Rafferty* [1999] 8 BNIL 8 and in *R v Walsh* [2007] NICA 4. The application for reception of evidence is refused.

[20] The second ground of appeal was that the learned trial judge in his charge to the jury ought to have, but failed to direct the jury in relation to the potential for inaccuracies in the call records provided by the network providers for the two mobile phones. However, there was no issue at trial in relation to the accuracy of those records. In such circumstances we do not consider it was necessary for the learned trial judge to give any direction to the jury.

Conclusion

[21] Applying the principles set out by Kerr LCJ in *R v Pollock* [2004] NICA 34 we consider that none of the matters raised on behalf of the appellant, either separately or in combination give rise to any concern about the safety of the conviction and accordingly we decline to extend time in which to lodge an application for leave to appeal against conviction.