Judicial Communications Office

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COURT DISMISSES APPEAL AGAINST CONVICTION

Summary of Judgment

The Court of Appeal[1] today dismissed an appeal against conviction by Nathan Phair who was convicted of causing the death by dangerous driving of Natasha Carruthers and the serious injury of Sarah Gault following a car crash in Fermanagh in 2017.

On the night of 7 October 2017, a car driven by Nathan Phair ("the appellant") lost control and crashed into a tree near Derrylin, Co Fermanagh causing the death of Natasha Carruthers and the serious injury of Sarah Gault, both of whom were in the car. The appellant's car was being pursued at the time by Padraig Toher who had paid the appellant for drugs which he failed to supply. The prosecution case against Toher was that by deliberately nudging or bumping the appellant's car he was using his own car as a weapon. The cars had been in pursuit for over 12 miles before the collision. This was the basis of Toher's plea to the manslaughter of Natasha Carruthers and to dangerous driving causing grievous bodily injury to both the appellant and Sarah Gault. The appellant was convicted by a jury on 23 September 2019 of nine counts including causing the death of Natasha Carruthers and grievous bodily injury to Sarah Gault by dangerous driving, by driving whilst unlicenced and by uninsured driving; unlawfully supplying a Class A drug (cocaine); and offering to supply a Class A drug (cocaine). He was sentenced to a determinate custodial sentence of 11 years' imprisonment.

Ground 1: The trial judge erred in permitting evidence of the appellant's bad character to be placed before the jury

The trial judge admitted evidence of offences committed by the appellant on 23 November 2017, just over one month after the offences committed in this case. The offences were theft of a vehicle, dangerous driving, driving whilst unfit through drink or drugs, driving without a licence and insurance, and possession of a Class B drug. They related to the theft of a car which subsequently was travelling in convoy with another vehicle. The cars were witnessed swerving over the road. The appellant, when stopped, said "I'm off my head on pills".

The trial judge also acceded to a prosecution application to adduce Facebook messages to correct a false impression given by the appellant as to the effect of the incident and his regard for the deceased. This was grounded on the fact that, in his evidence, the appellant broke down and cried when asked about whether he thought about Natasha Carruthers who was his girlfriend at the time of the crash. The Facebook messages, however, which were exchanged by the appellant and a friend while he was still in hospital were to the effect that he was going to claim DLA and seek compensation and there was no reference to the deceased or that he was upset about her loss.

The appellant argued that the bad character evidence should not have been admitted. The admission of bad character evidence is a matter for the judgement of the trial judge who heard the evidence and observed the witnesses in the witness box. The trial judge was therefore best placed to determine

[1] The panel was the Lady Chief Justice, Horner LJ and McFarland J. The Lady Chief Justice delivered the judgment of the court.

what impression the appellant was portraying to the jury and whether the Facebook messages had the potential to have corrected what could have been a false impression. The court said the text message clearly fell into the reprehensible conduct category and was admitted to correct a false impression regarding the applicant's concern or lack of concern for the deceased after the events about which the jury were considering. The court concluded:

> "This evidence was introduced to put a fair balance before the jury in relation to how the appellant portrayed himself as a man devastated by grief. Whether he actually grieved for Natasha Carruthers or not had very limited relevance to the counts that he faced and, in light of the other evidence in this case, we do not have any sense of unease, never mind a significant one, arising from this omission on the part of the judge."

The court then considered the admission of evidence in relation to the appellant's subsequent convictions. It said the evidence was not to show a propensity to drive dangerously as the appellant had already conceded he had driven dangerously on 7 October 2017, but rather for the following reasons:

- The appellant had maintained that drugs had not impacted on his ability to drive on 7 October 2017 despite the presence of Xanax at 19 times the upper limit of the therapeutic range in his blood; and
- In relation to the defence of duress, it showed a propensity to put himself in a position with others engaged in criminal activity in which he foresaw, or ought reasonably to have foreseen, the risk of being subject to compulsion by threats of violence.

The court considered the evidence of the appellant's subsequent conduct which resulted in criminal convictions was highly relevant. It said the appellant's propensity to act in the manner that he did six weeks later had relevance both to whether he put himself voluntarily into the position that he did on the day of the fatal crash, and whether he knew, or ought reasonably to have known, that he would have been compelled to act as he did. It considered this fell within the discretion available to the judge to admit this as evidence.

The appellant again referred to what he argued were defects in the trial judge's summing up to the jury on this issue. The court was satisfied that the trial judge's summing up identified the relevance of the evidence, directed the jury as to its use, and warned the jury as to what it should not be used for. The court said the fact that there was no requisition by the defence or the prosecution strengthened its view that the direction to the jury was adequate. In summary, the court was satisfied that, in considering the two types of bad character evidence in this case, the judge applied the legislation correctly, considered all relevant factors, and made decisions to admit the evidence which gave it no reason to consider that the judge's approach to this issue rendered the verdicts unsafe which is the ultimate appellate test. Therefore, the first ground of appeal must fail.

Ground 2: Limitation on the defence of duress by circumstance

It was contended that the judge should not have included a voluntary association limitation as part of his direction to the jury on duress. The core question was whether the jury should have been told that it was not available if the appellant had voluntarily exposed himself to the risk of compulsion to commit crimes. The guide case is the decision of the House of Lords in *R v Hasan,* also known as *R v Z* [2005] 1 AC 467 which established the principle that a defendant was not entitled to rely on the

defence of duress where as a result of his voluntary association with known criminals he had foreseen or ought to have foreseen the risk of being subjected to any compulsion by threats of violence; and that it was not necessary that he should actually have foreseen compulsion to commit crimes of the kind for which he was charged. The court noted that some confusion has arisen as the Crown Court Bench Book NI does not specifically provide for a voluntary association limitation being applied to a defence of duress by circumstance (which is in contradiction to the Crown Court Compendium England & Wales). The trial judge was made aware of this and decided that the Crown Court Bench Book NI required modification and that the limitation to duress should be part of his direction to the jury.

The court said it was clear that the appellant could have foreseen or ought reasonably to have foreseen the risk of being subjected to compulsion to act in a criminal way by threats of violence to commit criminal offences:

> "The threats in this case are clearly not explicit but the entire circumstances of the drugs transaction including the deception of Toher meant that the circumstances that arose were foreseeable namely a violent aftermath occasioned by not supplying the drugs once paid for. When viewed through that prism we think it entirely foreseeable that the offended party would seek revenge as here and that the defendant may be compelled to commit criminal offences when so confronted. That includes a circumstance of causing death or grievous injury by dangerous driving as here. In our view, it was reasonably foreseeable that Toher would have reacted to being 'ripped off' by the appellant in a number of ways both seeking revenge and by requiring the appellant to commit criminal acts by threats of violence – compelled him to supply drugs to Toher at no cost, compelled him to sell drugs/steal/rob to generate money to make good Toher's losses, or, alternatively or in addition, compelled to commit criminal acts to escape from Toher's vengeance – e.g. careless/dangerous driving, speeding, causing criminal damage, theft of a vehicle/taking and driving away to make good an escape. We think all these are potentially reasonably foreseeable, both to being subject to compulsion and the nature of the criminal acts that may need to be committed."

The court said it would be invidious if a court could not give a direction to the jury in relation to voluntary association in a case such as this. This was not the usual case of duress by threats which is 'do something or else', where a person commits a crime to comply with the threatener's demands. However, that did not mean that this type of behaviour precluded the voluntary association limitation:

> "As a matter of policy and principle we consider that the defendant who becomes indebted to a drug supplier puts himself in a position where he is likely to be subjected to threats requiring him to commit crimes at the behest of the duressor should also attract this limitation. In other words, this person cannot take advantage of his own criminal behaviour. It also matters not, it seems to us, in line with the case of *Hasan* that the offence was one that spontaneously arose, such as dangerous driving, rather than one that was chosen for him, such as robbery or violence against a third person."

The court noted the principle in *Hasan* which stated that the policy of the law must be to discourage association with known criminals, and it should be slow to excuse the criminal conduct of those who do so: "If a person voluntarily becomes or remains associated with others engaged in criminal

activity in a situation where he knows or ought reasonably to know that he may be the subject of compulsion by them or their associates, he cannot rely on the defence of duress to excuse any act which he is thereafter compelled to do by them …"

The court rejected this limb of the appeal point. The second limb of this appeal point was that there was insufficient evidence to permit the jury to consider this limitation or defence. The court said there was enough evidence in this case that the appellant had engaged with others in drug dealing activity and was not naïve in relation to drugs. It said there was sufficient evidence to found criminal association as part of the particular factual matrix of this case and that the trial judge was therefore correct to leave this matter to the jury. The court dismissed this ground of appeal.

The court did not accept that the directions of the trial judge as to the burden and standard of proof on the issue of duress were insufficient. It said that every charge to the jury must be regarded in the light of the facts of a trial and the conduct of a trial:

> "A charge should also reflect the questions which have been raised by counsel for the prosecution and the defence. The trial judge is uniquely placed to frame his charge accordingly. This Court of Appeal will consider whether or not any misdirection or non-direction has been made but also, crucially, what effect that has on the safety of the conviction in any case which is the ultimate test. As we have said, charges and directions are often open to improvement, but they should not be subject to scrutiny which extends beyond the ultimate test for this appellate court which is safety of the conviction. "

Grounds 3 and 4: Hearsay Evidence/Submission of no case to answer

These grounds of appeal related to the evidence of a prosecution witness, Andrew Waters. He made a statement to police dated 21 December 2017 and he then gave evidence at the trial. The nub of this point on appeal was that Waters' evidence at trial differed from his statement and contained hearsay evidence. There was no objection at the time to this evidence, however, there was an application at the end of the prosecution case for the jury to be discharged and no case to answer on the drugs offences.

The defence said that Waters' statement contained a completely different version of events, namely that he, Waters, and not Toher, made the phone calls with the appellant to arrange to purchase the drugs on behalf of Toher. The defence maintained that they were not put on notice that this witness was likely to change his evidence from that contained in the witness statement and therefore, were taken by surprise. In reply the prosecution said it did not have notice of what this witness would actually say and, in some respects, his evidence in the witness box was more favourable to the appellant than his statement. The point at issue was whether there had been firstly, non-compliance with the rules and, secondly, whether or not that should have led to a discharge of the jury on the basis of the evidence that was filed.

The court said there was significant evidence which supported Waters' core evidence that the drugs offences had occurred and upon which a case to answer could properly be founded. Not least was the fact that on 1 March 2019 Andrew Waters pleaded guilty to being concerned in the supply of cocaine between 15 August and 5 October 2017 and being concerned in an offer to supply cocaine on 6 October 2017. On 7 March 2019 Padraig Toher pleaded guilty to conspiracy to possess a controlled drug, namely cocaine, a Class A drug, between 15 August and 6 October 2017. The court said the

convictions of Waters and Toher were evidence not only of their involvement in the drug deals but also the fact of those deals. Further, confirmatory evidence was found in text messages from the time. The court said that that even in the absence of the hearsay evidence which was admitted fairly there was sufficient evidence upon which a reasonable jury properly directed could convict of the three drugs offences. It concluded that whilst the strictures of the legislation had not been followed the oversight was predictable due to the way the case was presented by the defence and led to no unfairness in this case. It said it was left with no sense that this issue made the convictions on the drugs convictions unsafe in any way.

New ground of appeal: Self-Defence

This new ground of appeal, which was not initially pursued, was that the judge erred in declining to leave self-defence as a defence to the jury. The court said that two legal questions had to be asked in a case where the issue of self-defence arises:

- Were the facts (as the appellant believed them to be) such that the use of force was necessary? This is the subjective question; and
- Was the degree of force reasonable for that purpose in the light of the perceived facts? This is the objective question.

The court said there was no evidence available which could raise a prima facie case of self-defence on the facts. Rather, it agreed with the assessment of the trial judge who decided that the evidence fell far short of self-defence. This was a view which the trial judge was entitled to take on the basis of his knowledge and understanding of the case. The court said there could be no doubt that the more apposite defence in this case was that of duress by circumstances and not self-defence:

> "We are therefore satisfied that the trial judge did not err in leaving only the defence of duress by circumstances to the jury. Rather, he considered whether self-defence was available on the facts and found that it was not. We can see no reason to interfere with that assessment. Secondly, in any event, only one defence should be left, and in this case, we consider that the defence of duress by circumstances was clearly the defence at the forefront of this case and was the one that should rightly have been left to the jury. Therefore, in all of the circumstances this court will refuse leave to the appellant to amend the grounds of appeal for the reasons given which are in symmetry with those provided by the trial judge. We do not consider that he committed any error in law by failing to put the defence of self-defence before the jury in this case. This court is entirely satisfied that the trial judge was correct not to allow the defence of self-defence to be put before the jury and does not consider that that decision in any way, undermines the safety of the convictions of the appellant."

Overall Conclusion

The court dismissed each ground of appeal.

NOTES TO EDITORS

This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

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