

Judicial Communications Office

14 January 2022

COURT DISMISSES APPEAL AGAINST CONVICTION

Summary of Judgment

The Court of Appeal¹ today dismissed an appeal against conviction in a case where the trial judge admitted evidence of a conviction dating from 2004 as bad character evidence against the appellant.

Paul Patterson (“the appellant”) was convicted on 1 December 2020 on three counts (two counts of possession of a Class B drug to which he pleaded guilty and one count of possession of ammunition in suspicious circumstances contrary to Article 64(1) of the Firearms (NI) Order 2004). The court imposed a determinate custodial sentence of three years (one year and six months imprisonment and one year and six months on licence). The background to the offence was that police searched the home of the appellant’s deceased mother and discovered a small box of ammunition in a yellow “Marigold” glove, which was in a black rucksack. The appellant denied any knowledge of the ammunition but accepted he owned the rucksack and some of its contents. A forensic examination of the glove concluded that the appellant’s DNA was present on the inner and outer regions of the glove but not on the ammunition box or the cartridges. The appellant’s explanation at trial was that he would have worn gloves when cleaning for his mother, for whom he acted as carer, and the ammunition was hidden by another individual unknown to him.

The appellant appealed against his conviction for the firearms offence. The appeal centred on the decision by the trial judge to admit bad character evidence under the Criminal Justice (Evidence) (NI) Order 2004 (“the 2004 Order”). Two working days before the trial was due to commence, the prosecution served a notice to adduce evidence of the appellant’s conviction at Sheffield Crown Court (“the Sheffield conviction”) in 2004 for possession of an imitation firearm. The grounds for admission of the evidence were stated as “the defendant has a propensity to commit offences of the kind charged” and “the previous convictions ... are relevant to the issue of rebutting any defence of innocent association”. The defence served a notice in response to the prosecution application on the grounds that it was out of time, the conviction was 16 years previously and it was not accepted that the circumstances of the previous conviction was capable of rebutting the defence of innocent application. In the course of submissions, the trial judge asked about the background to the Sheffield conviction and was told the only information the prosecution had been able to obtain was a BBC news report which said the appellant plus three others attempted to hold up a Post Office.

The news report was sent to the appellant’s lawyers but not shown to the trial judge and therefore the only material grounding the bad character application was the appellant’s criminal record (which contained 102 previous convictions). The trial judge extended the time for the application on the basis that the prosecution had assured the court that the application had been drafted in good time but “there [were] a number of intervening factors” which meant it had not been submitted. The trial judge allowed the prosecution to introduce the conviction for possession of an imitation firearm under the propensity element and to rebut innocent explanation.

Grounds of Appeal

¹ The panel was Lord Justice McCloskey, Mr Justice Colton and Madam Justice McBride. Mr Justice Colton delivered the judgment of the court.

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Leave was granted to appeal on the grounds that it was arguable the admission of the conviction was wrong because of a combination of the following factors:

- Article 6(4) of the 2004 Order compels the court to have regard in particular to the length of time between the commission of the offence which led to the conviction in 2004 and the circumstances giving rise to the proceedings;
- The prosecution adduced no evidence as to the circumstances of the Sheffield conviction other than what was in a BBC news report found by carrying out a Google search. As a result the court could not consider the extent of similarities or differences between the two events;
- The Sheffield conviction was insufficient to establish “propensity”.

The Court’s analysis

The test to be applied by the Court of Appeal on an appeal against conviction is whether, having considered the evidence, the court has a “significant sense of unease about the correctness of the verdict based on a reasoned analysis of the evidence” and if it has then it should allow the appeal². In applying the test, the court said it must bear in mind that the trial judge is in a better position, having heard the evidence and submissions in the trial, than an appellate court to make a judgement on the admissibility of bad character evidence. The court also recognised that judges dealing with such applications have to make decisions under pressure of time and in circumstances where such applications have to be determined in such a way as to minimise inconvenience to juries. An appellate court should be slow to interfere in the exercise of this judgement provided the trial judge has directed himself or herself correctly.

The court, however, said it had some concerns about the manner in which the application in this case was considered. Of particular concern was the lateness of the application. The court said there was no real inquiry by the trial judge as to the basis for the delay other than reference to “an oversight” and an assumption that the Covid pandemic had something to do with it. One of the consequences of the delay was that the court had very limited information about the Sheffield conviction and, as a result, the trial judge could not consider the extent of similarities or differences between the Sheffield conviction and the current offence.

The starting point when considering an application to introduce bad character evidence should be to analyse the relevance of the evidence to an important issue between the prosecution and defence in the context of the evidence in a particular case. Having done so, in determining admissibility the court should ensure it has regard to the statutory provisions of Article 6(3) (*fairness of the proceedings*) and 6(4) (*the length of time between the bad character evidence and the offence charged*) of the 2004 Order. The court said the issue of propensity, coincidence and innocent association can sometimes be closely inter-related so there may not be a material difference in any direction to a jury. However, clear identification of the grounds of relevance under 6(1)(a) of the 2004 Order will ensure the proper consideration of admissibility and an appropriate direction to a jury.

In this case the prosecution primarily sought to introduce the evidence of the Sheffield conviction as tending to rebut the appellant’s defence of innocent association, submitting that this was the basis upon which it was alleged the conviction was relevant under Article 6(1)(d) of the 2004 Order. Whilst counsel for the prosecution did refer to Article 8(1)(a) (propensity to commit offences) he

² *R v Pollock* [2004] NICA 34 at paragraph [32].

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indicated that the primary ground for admission of the Sheffield conviction was a question of relevance. The court was concerned that the trial judge's decision to admit the Sheffield conviction on the basis of propensity went beyond what the PPS was seeking. It noted, however, that the trial judge was clearly alive to the two major issues raised by the appellant: the lack of any detail as to the circumstances of the commission of the offence, and the length of time between the commission of the offence and the current offence.

In relation to the argument about the lack of detail as to the circumstances of the Sheffield conviction, the court said this had to be seen in the context that the matter was admitted on the basis of the fact of the conviction alone. The fact that the appellant had been convicted of the offence of possession of an imitation firearm was relevant to an important matter in issue between the defendant and the prosecution, namely the appellant's defence of innocent association. In this case, the prosecution had to establish knowledge on behalf of the appellant and consequently possession of the ammunition and to rebut a potential defence that someone else had placed the ammunition in the rucksack and that therefore there was an innocent explanation. The court concluded that the previous conviction was relevant to the credibility of the appellant's explanation that it was sheer coincidence that ammunition was found in a rucksack belonging to him: "Because it was relevant to rebutting the defence of innocent association it could lawfully be admitted under section 6(1)(d) without reference to the issue of propensity under Article 8. The conviction itself was sufficient to demonstrate the appellant's connection to firearms."

In relation to the gap in time between the conviction and the offence being tried, the court commented that this was a factor that the trial judge had to take into account. It said there is no rule of law which requires a judge to exclude a conviction having regard to the length of time between the date of the conviction and the offence being tried. The judge is obliged to take this matter into account under Article 6(4) of the 2004 Order and the court said this is what the trial judge did.

In relation to the argument that no proper consideration was given to the strength of the prosecution case, the court noted that the trial judge properly deferred making a ruling on the bad character application until the end of the prosecution case when she was in a strong position to assess the strength or otherwise of the prosecution case. The court considered there was a strong circumstantial case against the appellant based on the following evidence: the fact that the appellant owned the rucksack in which the items were found; the fact that items within the rucksack belonged to him; the fact that he was present in the house extensively and that no other items belonging to any other person (other than his wife or mother) were found in the property; the strong forensic link between the appellant and the glove in which the ammunition was concealed and the rebuttal evidence to the effect that there were no other gloves found in the property notwithstanding the appellant's evidence that such gloves were used regularly by occupants in the premises.

The trial judge was addressed on her discretion not to admit bad character evidence on the basis that the admission of the evidence would have such an adverse effect on the fairness of proceedings that she ought not to admit it (Article 6(3)). The court said it was clear from the arguments put to the trial judge and her consideration of the matter that she did have regard to all relevant considerations. It said that the way she dealt with this matter in her closing address to the jury was important and that it was clear she explained the basis upon which the evidence was admitted in the context of rebutting an innocent explanation. She referred to the length of time between the conviction and the matters the jury were considering and in that context she said that the jury might think that the conviction was of "*lesser significance*." The court said the trial judge was careful to point out that it was a matter for the jury alone to decide the extent to which, if at all, the conviction assisted in its

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determination of whether or not the appellant committed the offence. She stressed that it was only part of the evidence, and that he should not be convicted solely or mainly because of it and by way of emphasis she told the jury: *"It's only a tiny, tiny part of the evidence."* The court added that the jury had the benefit of hearing the appellant give evidence and was in the best position to assess whether or not it accepted his defence of "innocent association."

The court did have a concern that in the course of her closing the trial judge said the fact that the appellant had a conviction for possession of an imitation firearm was relevant to his tendency to commit this type of offence, in other words, the type of offence which would arise under the firearms legislation. This was the focus of the appellant's submissions to the Court of Appeal. The court considered this was an error and the trial judge should have confined herself to the issue of relevance in terms of rebutting a defence of innocent association. Furthermore, it was not appropriate for the trial judge to admit the Sheffield conviction as a further ground, namely propensity, which had not been pursued by the prosecution. The court, however, said it could not overlook that the prosecution case was a strong one and the admission of the conviction did not serve to bolster a weak case. Overall, it considered that the issue of the appellant's previous conviction was left to the jury in a fair way by the judge and it did not play an inappropriate or disproportionate role in the proceedings.

In the course of the hearing counsel referred the court to many authorities dealing with the admission of bad character evidence. The court commented that, in truth there is limited benefit to be gained from comparing cases which are very much fact specific, noting that the general principles to be applied in relation to the bad character provisions in 2004 Order are now well-established.

Conclusion

The court concluded that the trial judge was entitled to admit the evidence on the ground that it was relevant to an important matter in issue between the defendant and the prosecution. The basis for the admission of the conviction was that the conviction in respect of a firearms offence, even an imitation firearm, was a relatively unusual type of offence by its nature. The fact of the conviction itself was sufficient for it be admitted as relevant in relation to the defence of innocent association. The bare nature of the detail probably operated to advantage, rather than prejudice, the appellant and does not invalidate the foregoing assessment.

The court did not consider that the errors it identified caused any sense of unease about the correctness of the verdict. It dismissed the appeal.

NOTES TO EDITORS

1. 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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