England and Wales Court of Appeal (Criminal Division) Decisions

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Case No: 2011/04453/B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT READING
HIS HONOUR JUDGE ROSS

Royal Courts of Justice
Strand, London, WC2A 2LL
30/03/2012

B e f o r e :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
MRS JUSTICE DOBBS
and
MR JUSTICE UNDERHILL

Between:

Regina	**Respondent**
- and -	
Alan Newell	**Appellant**

Mr P Jackson for the Appellant
Mr R Spencer-Bernard for the Respondent
Hearing date: 24 January 2012

HTML VERSION OF JUDGMENT

President of the Queen's Bench Division:

1. The issue in this appeal against the conviction of the appellant on 11 July 2011 for possession of

cocaine with intent to supply is whether the judge was right to admit as evidence a previous inconsistent statement that the appellant's previous counsel wrote on a Plea and Case Management Form (PCMH Form) at the Plea and Case Management Hearing (PCMH).

2. At the conclusion of the hearing we stated that we would allow the appeal and quash the conviction for reasons we would give later. These are our reasons.

The evidence

3. The evidence in the case can be briefly stated.

4. A cousin of the appellant who was the tenant of a flat in Bracknell, Berkshire allowed the appellant to stay in 2009. Later in the year the cousin effectively moved out and the appellant had almost sole use of the flat. On 8 February 2010 officers of the landlords of the flat gained entry to enforce an eviction order against the appellant's cousin for non-payment of rent. The officers found a large square bag with a "Yankees" logo on the front. Inside the bag was a quantity of white powder. This was later examined and found to contain 383 grams of lignocaine, a cutting agent commonly used with cocaine. They also found a quantity of white power which on analysis was found to contain 26.6 grams of 66% cocaine. Next to the cocaine £400 in cash was found and on the dining table an empty box for digital mini scales. Pieces of paper showing names and amounts were also found.

5. The appellant was arrested and interviewed on 23 February 2010 and 9 April 2010 in the presence of a solicitor. To each question, including questions such as his address and questions about what had been found in the flat, he answered, "No comment".

6. He was committed for trial. A PCMH was heard on 24 November 2010 before HH Judge Wood. Neither the Crown nor the advocate for the appellant who were present at that hearing were the advocates at the trial. No defence case statement had been served. In answer to question 10.4 on the PCMH Form, "If not clear from the defence statement, what are the real issues?" the advocate wrote, "No possession".

7. The case was put into the warned list for the two weeks commencing 31 January 2011 with an estimated trial length of 1-2 days. In April 2011, the appellant changed solicitors and new counsel was instructed.

8. The trial came on for hearing at the Crown Court at Reading before HH Judge Ross on 7 July 2011. On that occasion Mr Jackson, who appeared before us on this appeal, appeared for the appellant. The appellant had provided a proof of evidence from which a defence statement had been drafted; he had not signed it. Mr Jackson prepared a new defence statement and that was served on 7 July 2011, the first day of the trial. Paragraph 1 of the statement said, "I accept possession of exhibit MLR/07 [the cocaine]. However I deny that I was in possession of the cocaine with intent to supply". The statement then added an explanation of other parts of his defence including saying that the cash was money he had earned and had nothing to do with drug dealing.

9. Following service of the defence statement, counsel for the Crown added a second count of simple possession to the indictment to which the appellant then pleaded guilty.

10. In his evidence-in-chief the appellant gave evidence in accordance with his defence statement. He explained that he had answered, "No comment" to the questions in both interviews because that was the advice he had received from his original solicitors; he explained he had not been involved in anything like this case before; he had thought it best to follow the advice given to him.

11. At the beginning of his cross-examination by the Crown, counsel for the Crown handed the PCMH Form to the appellant and the judge. Mr Jackson (who had been given no notice of the intention to use the PCMH Form) objected. Counsel for the Crown explained that he sought to adduce what was stated on the PCMH Form as it was inconsistent with the appellant's defence and his plea as to possession. The judge ruled that what was on the PCMH Form was no different to a defence statement signed on the appellant's behalf by his solicitors in accordance with his instructions; the PCMH had been the first occasion on which the appellant advanced his case and that the defence could call the advocate who had originally represented him if they so wished. It was therefore perfectly proper to cross-examine the appellant on the statement.

12. When cross-examined on the PCMH Form, the appellant accepted that the form had been completed by his counsel. He said that the words, "No possession" was the result of a misunderstanding by his counsel. He said he was a bit confused and his position had been that he was denying the whole thing, possession with intent to supply.

13. Before the summing-up the judge made clear that he would give a s.34 direction in relation to both interviews, an adverse inference direction in relation to the failure to deliver the defence statement until the morning of the trial and that he would give a *Lucas* direction in relation to the entry on the PCMH Form. Mr Jackson made clear that he could say nothing in view of the fact that the judge had ruled against him in relation to the PCMH Form.

14. In the course of his summing-up, after giving the two adverse inference directions, the judge then continued:

> "The final aspect of areas of the case where you may hold his act or omission against him is in relation to what is said to be a lie. Now it is said that in the plea and case management hearing some months ago, because there was no defence statement available setting out what the issues were, the documentation that is produced for that hearing and is considered by the judge conducting the hearing, contains a box which is designed to identify for the judge what the issues in the case are, if there is no defence statement, and that box, as you know, has been completed by his counsel (his then counsel, not Mr. Jackson) and it contains two words "possession denied". In other words, put in layman's terms: "It's not my cocaine". That is what he was saying, it is said by the Crown, to the court and to the prosecution at the time of the plea and case management hearing.
>
> You have to consider, first of all, therefore, what caused those words to be written on the form. Were they written on the form and communicated to the court by his counsel upon his instructions? In other words, do those two words sum up what his case was at the plea and case management hearing? "It's not my cocaine." "Possession denied." If you are satisfied so that you are sure that those words in that document, communicated to the court and to the prosecution, were inserted into that document as a result of his instigation, him saying: "Not my cocaine", then that is a lie which you are entitled to lay at his door.
>
> If you are not sure that the entry of the form was as a result of his clear instructions to his barrister, then you don't take any consideration of this any further because, in other words, if they are not his words it can't be his lie.
>
> But if you are satisfied that this was a lie which was told through his counsel, at his instigation, then you are entitled to consider whether or not this supports the case against him. First of all, did he deliberately lie? Well, was it something that happened as a result of the confusion of the court morning, an unfamiliarity with the process of court proceedings? If you are not satisfied it was a deliberate lie, as I say, ignore it."

The judge then gave the rest of the *Lucas* direction. We should observe that when the judge referred to the form he said it contained the words, "possession denied". That was an error; it said, as we have set out, "no possession".

15. The appellant was convicted and on 8 August 2011 was sentenced to two years imprisonment on both counts. He appeals to this court by leave of the single judge.

16. The issue which we stated at paragraph 1 has two sub-issues. First, was the statement admissible evidence? Second, if it was, should the judge have exercised his discretion under s.78 of the Police and Criminal Evidence Act 1984 (PACE) to refuse to admit it?

Was the statement admissible?

(a) The submissions

17. It is contended by Mr Jackson on behalf of the appellant that the words, "No possession" recorded on the PCMH Form were not what the appellant told his then counsel. His evidence at the trial was that he

had been trying to communicate to his counsel that he had not been guilty of supplying cocaine. He had therefore not made a statement denying possession and therefore said nothing inconsistent with the statement he had made at trial admitting possession.

18. In response it was submitted on behalf of the Crown that the form should be deemed to be a court document submitted on behalf of the appellant and that the appellant should be responsible for its content, save arguably on a point of law of which this was not one. In the absence of any evidence to the contrary it was a fair inference to draw that the appellant knew the issue of possession was a live one.

(b) Statements by counsel as the defendant's agent

19. The admissibility of hearsay evidence in criminal proceedings is governed by Chapter 2 of Part 11 of the Criminal Justice Act 2003. Under s.118(2) the common law rules were abolished save for the rules preserved by s.118(1). The sixth rule preserved by s.118(1) is:

> "Admissions by agents etc.
>
> Any rule of law under which in criminal proceedings –
>
> (a) an admission made by an agent of a defendant is admissible against the defendant as evidence of any matter stated, or
>
> (b) a statement made by a person to whom a defendant refers a person for information is admissible against the defendant as evidence of any matter stated."

20. In *R v Turner (Bryan)* (1975) 61 Cr App R 67, this court had to consider whether what a defendant's counsel had said in a plea in mitigation in one case could be proved and admitted as evidence in another trial. The objection was made that the evidence could not go before the jury until the prosecution proved that what counsel had said in mitigation was on the defendant's instructions. The trial judge admitted the evidence as an admission made by an agent within the apparent scope of his authority. The barrister was then called who said on oath that he had said what he had said without instructions. Lawton LJ giving the judgment of the court said that the issue ought to be decided in the light of elementary principles:

> i) "A duly authorised agent can make admissions on behalf of his principal."
>
> ii) "The party seeking to rely upon the admission must prove that the agent was duly authorised".
>
> iii) "Whenever a fact has to be proved, any evidence having probative effect and not excluded by rule is admissible to prove that fact. Whenever a barrister comes into court in robes and in the presence of his client tells the judge that he appears for that client, the court is entitled to assume and always does assume that he has his client's authority to conduct the case and to say on the client's behalf whatever in his professional discretion he thinks is in his client's interests to say. If the court could not make this assumption, the administration of justice would become very difficult indeed. The very circumstances provide evidence first that the barrister has his client's authority to speak for him and secondly that what the barrister says is what his client wants him to say."

In the circumstances, the court concluded that the contested evidence was admissible as the circumstances in which the barrister said what he said amounted to *prima facie* evidence that he was authorised by the defendant to say it.

21. A similar decision was reached by this court in *R v Hayes* [2004] EWCA Crim 2844, [2005] 1 Cr App R 33, although *Turner* was not cited. This court had to consider whether a letter written by the appellant's solicitor admitting the appellant had inflicted injury could be admitted as a previous inconsistent statement at the trial when he denied causing the injury. The court held that it could be. Its reasoning was that the appellant's solicitor was his agent and had ostensible authority to write a letter; no competent solicitor would have written such a letter without instructions to do so. The letter was therefore in principle admissible, subject to considerations under s.78. *Turner* was followed and applied by the Divisional Court in *R (Firth) v Epping Magistrates' Court* [2011 EWHC 388 (Admin); [2011] 1 Cr

App R 32 to which we shall refer in more detail at paragraph 26.

22. In our view, an advocate plainly has implied actual authority to do what is normally incidental, in the ordinary course of his profession, to the execution of the advocate's express authority: see *Bowstead on Agency (18th Edition)* paragraph 3-027. Recording a matter on a PCMH Form is incidental to that which the advocate has been authorised to do – to conduct the defence of a client. Even if the advocate had no implied authority, as the client had said something different to what he recorded, the advocate would have ostensible authority to do so as regards the court on the principles set out in *Waugh v H B Clifford & Sons* [1982] Ch 374 and in *Turner.*

23. As what the court was told at the PCMH before HH Judge Wood was said by counsel in the presence of the appellant, it was admissible on the principles we have set out for the same reasons as the statement by counsel in an earlier plea was admissible in *Turner* and the solicitor's letter was admissible in *Hayes.* As is clear from the decision of this court in *Turner*, it matters not that the defendant can call evidence to show that what was said was not said on instructions; the advocate had ostensible authority to make the statement; the evidence is admissible, though the defendant can call evidence to show that it was said without authority.

24. In this case, therefore, HH Judge Ross was entitled to conclude that the statement made on the PCMH Form was in principle as a matter of law admissible at the trial before him.

The exercise of the discretion: the status of a Plea and Case Management Form

(a) The decision in Firth v Epping Forest

25. Although the statement was admissible, the judge had a discretion under s.78 of PACE, as we have set out, to decline to admit the evidence. Before turning to the particular circumstances of this case and how the discretion should have been exercised, it is necessary to consider the wider issue that arose in *Firth*, namely the use of an assertion, remark or statement made on a Plea and Case Management Form or a similar form.

26. In *Firth* the defendant was charged with assaulting a woman on the train. Her then lawyer told the court in the defendant's presence that the issue for trial would be "Assault on defendant by complainant. Only contact made was in self defence". That was written on the Case Progression Form then in use in the Magistrates' Courts. When subsequently the defendant was charged with a more serious offence and arrangements were made for committal to the Crown Court, the defence challenged the sufficiency of the evidence that the defendant was present at the scene of the offence at all. The prosecutor sought to rely on what was set out on the Case Progression Form as evidence that the defendant had admitted being involved. The Magistrates decided the statement was admissible and the case was committed.

27. The committal was challenged by judicial review in the Divisional Court. After determining that what was stated on the form was admissible on the basis of the decision in *Turner* (to which we have referred at paragraph 20 above) it was argued on the defendant's behalf that the Case Progression Form was not admissible as the ordinary principles of admissibility recognised in *Turner* did not apply to a document completed at a Case Management Hearing. The court rejected that argument, holding that what had been said by this court in *R v Hutchinson* [1986] 82 Cr App R 51 in relation to the then system of pre-trial review and in *R v Didrich and Aldridge* [1997] 1 Cr App R 361 in respect of a PCMH that had taken place under the then provisions were no longer good law. It rejected the contention that the information given on the form should not properly be regarded as identifying the issues but merely a forecast of what the issues are likely to be.

28. This decision has been much discussed. For example, in an article entitled *Case Management Forms* at [2011] Crim LR 547, Mr Anthony Edwards pointed out that, as the Crown had to prove its case without the help of a defendant, if information given to assist in case management became admissible in evidence defence solicitors would be well advised to ensure that appropriate parts of the form were merely completed with the word "privileged".

29. The CPS has issued guidance in relation to the use of statements made on PCMH Forms following the decision in *Firth*. After referring to *Turner,* the guidance states:

> "It follows that assertions should not be relied on to bolster an inherently weak case or

where a technical deficiency can be remedied by the use of other evidence. An application to admit assertions should only be made to admit when necessary and appropriate. For example, where the defence are not acting in the spirit of the Criminal Procedure Rules, in seeking to ambush the prosecution or raising late and technical defences that were not previously raised as issues."

30. In written submissions to us it was accepted by the Crown Prosecution Service that the use by the Crown of what is recorded on the PCMH Form as either evidence to establish a *prima facie* case against a defendant or to cross-examine a defendant on the basis that it is an inconsistent statement or representation should be the exception rather than the rule. There were however cases where the court should permit what was stated on the form to be used, as it would be fair to do so.

31. It appears that since the decision in *Firth*, one of the consequences has been that defence lawyers have become much more cautious in providing information on the form (which is intended to help in the management of cases before and at trial) so as to avoid the risk that what might be said on the form would be used as evidence against their client or to cross-examine the client.

(b) The PCMH

32. It is necessary, we think, to stand back and look at the position as it currently exists under the Criminal Procedure Rules:

i) It is and remains the task of the Crown to establish a *prima facie* case and then to prove its case.

ii) The Criminal Procedure Rules require a "cards on the table" approach and give to the PCMH a central role as an integral part of the trial process. The PCMH is not a formality. A rigorous examination of each case in which there is no guilty plea is required to ensure that the trial can be fairly and expeditiously conducted in the interests of justice.

iii) The defendant is therefore required at the PCMH through his trial advocate who must be present in person (or through a nominee whose informed decisions will bind the defence at trial) to identify the issues which will arise at trial. The trial advocate will also identify which part of the Crown's case will be challenged and which witnesses are required, the detailed timetable set for speeches, examination and cross-examination of witnesses. The trial advocate must also provide all the other information required in the PCMH Form.

iv) If an issue is not identified and subsequently raised, the Court has ample powers including giving the Crown time to deal with that issue: see *R (DPP) v Chorley Justices and Forrest* [2006] EWHC 1795 (Admin) and *R v Penner* [2010] Crim LR 936.

v) In the Crown Court the defence statement provided for by s.5 of the Criminal Procedure and Investigations Act 1996 (CPIA) will set out the nature of the defendant's defence. Although it is good practice for this to be signed by the defendant, a defendant does not have to sign it but a judge can require a defendant where a statement is unsigned to satisfy him that the document really is his statement.

vi) S.11 of the CPIA sets out the nature of the breaches of requirement that can attract a sanction (such as the failure to serve a statement or serve it within time or setting out inconsistent defences). The sanctions are that the court or any other party may comment and the court or jury may draw such inferences as appear proper.

33. Given that statutory regime in the Crown Court embedded primarily in the CPIA and the Criminal Procedure Rules, and the obligation to put "cards on the table" through the attendance of the trial advocate at the PCMH, the requirements of a PCMH Form in the Crown Court should be seen primarily as a means for the provision of information to enable a judge actively to manage the case up to and throughout the trial and the parties to know the issues that have to be addressed and the witnesses who are to come. The nature of the defence should appear from the defence statement with the statutory consequences provided for in the result of a breach of requirements. The Crown is also generally protected by the principles in *Chorley Justices* and *Penar*, if in breach of the obligation to identify the issues an ambush is attempted by the defence.

34. A typed defence statement must be provided before the PCMH. If there is no defence statement by the time of the PCMH, then a judge will usually require the trial advocate to see that such a statement is provided and not proceed with the PCMH until that is done. In the ordinary case the trial advocate will be required to do that at the court and the PCMH resumed later in the day to avoid delay and further cost to be borne by the public purse. Given that position, the trial advocate at the PCMH should see it as part of the trial advocate's duty to help the court with the management of the case by setting out information on the PCMH Form without the risk of the information being provided being used as a statement admissible in evidence against the defendant, provided the advocate complies with the letter and the spirit of the Criminal Procedure Rules.

35. In the Magistrates' Court where there is no PCMH and no provisions equivalent to s.11 of the CPIA unless a defence statement is given voluntarily, the position is a little different. The Trial Preparation Form (which has replaced the Case Progression Form) should be completed at the first hearing. It provides for the making of admissions or the acknowledgement that matters are not in issue. Where admissions are made in that way they will be admissible at the trial. Where statements are made on the form which are not made under the section relating to admissions, such statements should be made without the risk that they would be used at trial as statements of the defendant admissible in evidence against the defendant, provided the advocate follows the letter and the spirit of the Criminal Procedure Rules.

36. Applying what we have set out, therefore, the position should be, provided the case is conducted in accordance with the letter and spirit of the Criminal Procedure Rules, that information or a statement written on a PCMH Form should in the exercise of the court's discretion under s.78 not be admitted in evidence as a statement that can be used against the defendant. The information is provided to assist the court. Experience has shown that, unless the position is clear, the proper administration of justice is hampered. There may of course be cases where it would be right not to exercise the discretion but to admit such statements. Those circumstances are fact-specific, but an example is a case where there was no defence statement, despite the judge asking for one to be provided, and an ambush attempted inconsistent with what was stated on the PCMH Form. In such a case it would not be appropriate to exercise the discretion to refuse to admit what was stated on the form, if an adjournment to enable the Crown to deal with the issue could be avoided. However, we think, provided the parties adhere to the letter and the spirit of the Criminal Procedure Rules and follow the practices we have outlined, such cases should be very, very rare.

The application of the principles to the facts in this case

37. In our view, applying the principles we have set out, the judge should not have admitted the statement on the PCMH Form as evidence against the appellant. We have reached that decision partly for the reasons connected with the good administration of justice which we have set out in the preceding paragraphs, but primarily because of what happened at the trial. The appellant's counsel had by the time of the trial produced a defence statement which made the case clear and admitted possession. The sanction provided for in the CPIA was sufficient. The statement on the PCMH Form was put to the appellant in the witness box without any warning to the appellant's counsel. The Crown were then seeking to say that his previous position as recorded on the form was a lie and to rely on that lie as evidence of his guilt. This was therefore a case where there was no disadvantage to the Crown; on the contrary, the Crown was seeking to use the statement to the detriment of the appellant. The way in which it was done was unfair to the defence. The direction under s.78 should have been exercised so as to refuse the admission of the statement.

38. The conviction in such circumstances was not safe and had to be quashed.