

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE CROWN COURT SITTING IN NEWRY

THE QUEEN

-v-

HEATHER RAMSEY

Before: Gillen LJ, Weatherup LJ and Weir LJ

WEATHERUP LJ (delivering the judgment of the Court)

[1] The appellant appeals against conviction on 21 November 2013 at Newry Crown Court on one count of concealing criminal property contrary to section 327(1)(a) of the Proceeds of Crime Act 2002, in that the appellant on a date unknown between 1 May 2009 and 1 September 2009 concealed criminal property, namely £22,000 or thereabouts. Mr O'Rourke QC and Mr Hutton appeared for the appellant and Mr Weir QC and Ms McCullough for the prosecution. The Court acknowledges the assistance derived from the manner in which the papers were compiled, the skeleton arguments composed and the arguments presented.

[2] Originally there were four defendants on the indictment, namely the appellant, Edward Bamber the appellant's partner, George Courtney a friend of Edward Bamber and Samuel Ramsey, the father of the appellant.

[3] On 7 November 2009 Bamber and Courtney drove to Monaghan and took delivery of a consignment. They returned in separate vehicles and on being stopped by the PSNI, cannabis with a street value of £500,000 was recovered from Bamber's vehicle. In a follow up search of the house that Bamber then shared with the appellant there was found a further quantity of cannabis valued at some £20,000 and cash to the value of £8,940 and €5,445.

[4] During police interviews Bamber admitted that he operated as a drugs courier between Belfast, Newry, Derry and the continent and said that he had

received a few hundred pounds per trip, with total payments of about £4,000. As to the cash recovered he told police that it represented mixed funds containing some of the proceeds of his conduct as a drugs courier with the remainder representing legitimate earnings.

[5] On 13 November 2009, on a police search of the home of the appellant's father in Randalstown, the police recovered £22,000. Bamber stated at police interviews that the £22,000 represented his savings from extensive overtime, from £300 per month received from a tenant of premises he owned and cash received for works he carried out in power washing rooftops and assisting in the erection of fences. He stated that he had left the money with the appellant's father when he had gone on holiday for a week because he was concerned that his own home might be burgled while he was away.

[6] On 8 February 2011 Bamber pleaded guilty to seven counts. One count of importation of class B drugs on 7 November 2009, the occasion of his arrest, three counts related to possession of a class B drugs in Belfast, in Derry and in Newry, as admitted to police, one count of concealing criminal property, being the £22,000 or thereabouts (the joint charge on which the appellant was later convicted) and two counts of possession of criminal property, the £8,940 and the €5,445 recovered from the home he shared with the appellant. On the count of concealing £22,000 or thereabouts Bamber was sentenced to 9 months imprisonment to run concurrently with a total sentence of 6 years imprisonment imposed in respect of the other offences.

[7] On 8 February 2011 Courtney pleaded guilty to two counts, namely importation of the class B drugs on 7 November 2009 and possession of class B drugs with intent to supply on the same date. At a later date Samuel Ramsey was acquitted on the charge of concealing criminal property, namely the £22,000 or thereabouts, by direction of the Judge.

The prosecution case against the appellant

[8] On 11 November 2013 the trial of the appellant commenced on the one remaining count of concealment of criminal property, namely £22,000 or thereabouts, being the sum recovered from the appellant's father's house on 13 November 2009. This is the count in respect of which she had been jointly charged with Bamber and in respect of which he had pleaded guilty. The appellant's trial had previously commenced on 17 October 2011 but the jury had been discharged.

[9] On the trial of the appellant the prosecution proposed to lead evidence of Bamber's plea of guilty to the charge of concealing the £22,000 or thereabouts. At the trial the appellant's Counsel raised two particular issues that are relevant to this appeal. The first issue was raised as an application to the trial Judge that, while the evidence of the Bamber plea may be relevant to the charge against the appellant, it

should not be admissible in evidence as it was unduly prejudicial. Further, if the evidence of the Bamber plea were to be admissible in evidence, then in light of the decision of the Court of Appeal in England and Wales in R v Causey (Unreported 19 October 1999), the trial of the appellant should proceed on the basis that Bamber may have pleaded guilty on the basis that only a part of the fund represented the proceeds of criminal conduct.

[10] In R v Causey the trial proceeded on the basis that, for a defendant to be convicted of the offence of concealing criminal property, it was only necessary to establish that any part of a fund represented the proceeds of crime. The defendant was convicted of conspiracy to steal motor cars and conspiracy to handle motor cars. He transferred money from a building society account and was convicted of transferring property to retain proceeds of criminal conduct to avoid confiscation. The defence case was that the money was not directly or indirectly the profit from any criminal activity. The applicable legislation was section 93C(1) of the Criminal Justice Act 1988 which provided -

“A person is guilty of an offence if he -

- (a) conceals ... any property which ... in part ... represents his proceeds of criminal conduct ...”.

[11] Haughton LJ in R v Causey stated that the section was broad and appeared to cover property obtained partly in connection with criminal conduct -

“Thus, as counsel for the Crown points out, if one penny or penny’s worth of the property dealt with is the proceeds of criminal conduct then the section is satisfied.”

[12] The offence alleged against the present appellant was in similar terms to section 93C(1) of the Criminal Justice Act in R v Causey. The appellant was charged under section 327 of the Proceeds of Crime Act 2002 which provides -

“(1) A person commits an offence if he -

- (a) conceals criminal property”.

The definition of ‘criminal property’ appears in section 340 and provides -

“(3) Property is criminal property if -

- (a) It constitutes a person’s benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and
- (b) The alleged offender knows or suspects that it constitutes or represents such a benefit.”

[13] The second particular issue raised by the appellant at the trial concerned the manner in which the prosecution proposed to prove the offence of concealing criminal property of “£22,000 or thereabouts”. Reference was made to R v Middleton [2008] EWHC Crim. 233 where the defendant pleaded guilty to counts of possession of a class C drug with intent to supply. He then faced a charge of converting the proceeds of drug trafficking under the Drug Trafficking Act 1994 by converting property, namely money to the value of “approximately” £103,000 and a second count of converting criminal property contrary to the Proceeds of Crime Act 2002 in that he converted criminal property to the value of “approximately” £70,000. The prosecution accepted that the appellant had legitimate income but also had unexplained income. On Counsel for the appellant inviting the Judge to indicate how he intended to direct the jury on the minimum sum of which they had to be satisfied before they could convict the appellant, the Judge indicated that he would direct the jury to the effect that “approximately” meant “within 20% of the figure indicated”. Accordingly the Judge directed the jury that unless they were sure on the first count that it had been proved that there was drugs money of £80,000 or more up to a maximum of £103,000 and on the second count drugs money of £55,000 up to a maximum of £70,000 they should not convict the appellant but that within those brackets the prosecution could succeed. The appeal concerned other matters.

[14] On the issue of the admissibility of the Bamber plea the trial Judge ruled that the Bamber plea was relevant and admissible.

[15] On the issue of the approach to proving the charge relating to £22,000 or thereabouts, the prosecution agreed to undertake the burden of proving that at least 80% of the £22,000 was the benefit of criminal conduct and so it was necessary for the prosecution to establish that at least £17,500 was the benefit of criminal conduct. This Court makes no comment on the prosecution adopting that position, save to state that when the prosecution undertake to prove the offence charged on a particular basis and the trial Judge accepts that approach as being appropriate in the circumstances, the trial should proceed on the basis of the prosecution undertaking.

[16] There remained the appellant’s objection that the Bamber plea could have been based on any part of the £22,000 being criminal property and therefore could not support the burden adopted by the prosecution of proving that at least £17,500 were tainted funds.

[17] The appellant’s defence to the charge was that the funds recovered represented savings from legitimate income. The appellant had served a report from Brendan Dwyer, forensic accountant, to support this defence. The prosecution engaged Nicola Niblock, forensic accountant, to respond to Mr Dwyers report. The respective expert witnesses gave evidence that included analysis of the suggested income and expenditure in the Bamber household and the prospects of there being savings. Mr Dwyers opinion was that, over a period of years, some £40,000 could have represented legitimate savings. In the course of her evidence Ms Niblock

conceded the possibility that up to £18,092 of the fund could be attributed to savings from legitimate income. This concession clearly impacted on the burden adopted by the prosecution of proving that at least £17,500 of the fund represented the proceeds of drug trafficking.

[18] At the conclusion of the prosecution case the appellant applied for a direction under the Galbraith test (R v Galbraith [1981] 1 WLR 1039) that the prosecution evidence, taken at its height, was such that a jury properly directed could not properly convict the appellant. The application was rejected. At the conclusion of the defence case the defence applied for the case to be removed from the jury on the basis that the jury could not properly convict. The application was rejected. The jury convicted the appellant. The Judge issued his written reasons for refusing the appellant's application for a direction at the sentencing of the appellant. It would have been preferable if the reasons had been set out before the defence case proceeded.

The appellant's grounds of appeal

[19] The appellant's grounds of appeal were stated as follows -

- (1) The conviction of the appellant was unsafe.
- (2) The trial judge erred in incorrectly admitting before the jury evidence of a plea of guilty of the co-accused (Bamber), which plea was not probative and was unduly prejudicial to the appellant in the circumstances.
- (3) The trial judge erred in refusing to accept a submission of no case to answer at the close of the prosecution case and erred in finding a prima facie case on the count charged in the indictment when at the relevant time there was no proper evidential basis for allowing the case to go to the jury.
- (4) The trial judge erred in refusing to accept a further submission that the case should be withdrawn from the jury at the close of the defence case and erred in finding that at the relevant time there was a case fit to go to the jury when there was no proper evidential basis for allowing the case to go to the jury.
- (5) The trial judge erred in failing to direct the jury fully and adequately as to the inherent lack of weight and lack of probative value in the evidence of the plea of the co-accused (Bamber) and this constituted a material misdirection.

- (6) The state of the evidence before the jury in the context of the directions given was such that the jury was left to speculate as to the meaning of the evidence of the plea of the co-accused (Bamber) and were left to speculate as to what that plea meant evidentially insofar as it related to the constituent elements of the offence which the jury were left to determine.

[20] The Notice of Appeal was lodged immediately upon the conviction of the appellant and prior to the trial Judge's written reasons for refusing the application for a direction of no case to answer. In the Notice of Appeal the appellant reserved additional grounds of appeal pending receipt of the trial Judge's reasons for refusing a direction, which reasons were, as we have said, not provided by the trial Judge until the sentencing of the appellant.

[21] The appellant developed additional reasons for appeal in a written submission in support of the application for leave to appeal, as follows -

(7) The Bamber plea should not have been introduced as evidence unless it could be said that the plea was probative of the issue, namely whether at least £17,500 represented the proceeds of criminal conduct.

(8) The interpretation of the Bamber plea most favourable to the defence should have been assumed in the absence of other evidence on the issue, namely that the Bamber plea could have been based on proceeds of one penny being the proceeds of criminal conduct as decided in R v Causey.

(9) There was no evidence that the £17,500 mark had been passed and the prosecution had not ruled out the reasonable possibility that the figure had not been passed.

(10) The trial judge should have directed the jury that the Bamber plea may only have indicated that a minimal part of the fund represented the proceeds of criminal conduct.

Stephens J, the Single Judge, granted leave to appeal.

The evidence of the Bamber plea

[22] The appellant contends that the evidence of the Bamber plea should not have been admitted in evidence. Article 76(1) of the Police and Criminal Evidence (Northern Ireland) Order 1989 provides that the Court may refuse to allow evidence which in all the circumstances "would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it". There are three steps to the process. The first is to have regard to all the circumstances. The second is to determine whether the admission of the evidence would have an adverse effect on

the fairness of the proceedings. Fairness involves a balance between the interests of the prosecution and the interests of the defence. The third step is to exclude evidence where the adverse effect would be such that the Court ought not to admit the evidence. This aspect concerns the adverse effect on the defendant.

[23] The Court is satisfied that the evidence of the Bamber plea was relevant and admissible and its admission in evidence would not have had an adverse effect on the fairness of the proceedings. It was evidence related to the provenance of at least some part of the fund that was the subject matter of the charge. The issue, apart from the mens rea of the appellant, became whether the prosecution could establish that at least £17,500 represented the proceeds of criminal conduct, the prosecution having undertaken to prove the offence on that basis. The admissibility of the evidence of the Bamber plea did not of itself impact on the fairness of the proceedings against the appellant.

[24] However it was necessary during the course of the trial that there should be a clear approach to the effect of the Bamber plea and that, in the event that the case was left to the jury, the jury would have a clear understanding as to the effect of the Bamber plea. The trial Judge's charge to the jury is a matter to which we shall return.

The evidence of the possible Bamber savings.

[25] In support of the defence case that the recovered fund represented legitimate savings Mr Dwyer for the defence produced a report that set the scene for the eventual forensic accounting evidence. He took a period of 3 years and considered the household income from employment and overtime, rents and odd jobs, then applied government statistics on average household expenditure and concluded that some £40,000 could have been saved. Ms Niblock, as the expert accounting witness for the prosecution, also had regard to the stated legitimate income and to the statistics on average household expenditure and in the course of her evidence she conceded that possible savings could have amounted to £18,092. In her evidence she stated what the £18,092 represented "... a surplus is probably the best way of putting it, potential surplus of funds when you consider the known declared sources of income and the taking of the estimated expenses and also allowing for the increase over the period in the bank balances."

[26] However Ms Niblock did not include in this calculation the sum of £13,000 in a Bamber bank account because she did not know the source of those funds. Mr Dwyer had taken account of that sum in making his calculations. One effect of bringing the £13,000 into account was that, while there was a prosecution concession that £18,092 could possibly be the result of Bamber savings, which would have undermined the prosecution attempt to establish that at least £17,500 of the fund was tainted money, the unexplained £13,000 in the Bamber bank account diluted that effect as it left a significant unexplained amount.

[27] The financial evidence developed into a debate about the application of the government statistics on average household expenditure. Tables considered 'expenditure by one man one woman non retired households by gross income quintile group'. The higher the income quintile the higher the expenditure. The evidence in relation to the additional £13,000 gave rise to a dispute as to whether a higher quintile had been reached.

[28] The appellant contends that, at the conclusion of the prosecution case, the trial Judge should have given a direction that the appellant had no case to answer or, at the conclusion of the defence case, should have withdrawn the case from the jury. In the trial Judge's ruling rejecting the appellant's application for a direction there was no express reference to the prosecution concession of possible savings of £18,092. There was reference to the £13,000 in the bank account from unidentified sources. Taking that into account the trial Judge stated -

"This negated, in large part, any ability to show the potential to have accumulated the savings from expenditure, at the level of the cash found ..."

[29] Thus the trial Judge appears to have concluded that the evidence of possible savings of £18,092 was, in large part, negated by the additional £13,000 in the bank account. Setting against the total amount of £35,000, being the £13,000 and the £22,000, the possible savings of £18,000, there still remained £17,000 which in large part allowed the prosecution to meet their undertaking to prove that £17,500 represented tainted funds. However the trial Judge's approach was not clear until the issue of the written reasons for dismissing the application for a direction, which unfortunately were not provided until after the verdict.

[30] The prosecution defended the rejection of the appellant's application for a direction on the basis that the concession of possible savings of £18,092 did not preclude the jury from finding that a sum in excess of £17,500 was tainted money. The appellant contended that the £13,000 could not be relied on by the prosecution as Ms Niblock had not taken that sum into account in making her calculation of possible savings. If the £13,000 is not to be relied on then the savings defence could be made out and the jury, properly directed, could not properly have convicted. However we are satisfied that the existence of the £13,000 was in evidence as unexplained funds and the members of the jury were entitled to take that sum into account. The evidence that the jury accepted or rejected on the make up of the Bamber income and expenditure was a matter for the jury to decide. There was evidence on which the jury properly directed could have properly convicted the appellant. Accordingly we are satisfied that the trial Judge was correct to refuse the appellant's application for a direction.

The trial Judge's charge to the jury on the Bamber plea

[31] The appellant contends that the trial Judge's charge to the jury failed to address the limited probative value of the Bamber plea and that the jury were left to speculate as to the effect of the Bamber plea. The burden was on the prosecution to establish that at least £17,500 of the fund was tainted money. As R v Causey establishes, liability for concealing criminal property can arise when any part of a fund represents the proceeds of criminal conduct and the appellant contends that, as the Bamber plea may have been entered on that basis, the jury should have been so directed.

[32] The trial judge's charge to the jury on the Bamber plea was as follows:

"The prosecution rely on the conviction of Edward Bamber for concealing criminal property in relation to the same money. They have put before you evidence of Edward Balmer's conviction to prove they say that the £22,000 is the benefit of criminal conduct and that evidence is a matter for you to weigh. The conviction does not necessarily mean that all of the £22,000 must be the benefit of criminal conduct. Edward Bamber pleaded guilty to concealing criminal property in the sum of £22,000 or thereabouts. In this case the term 'or thereabouts' has been defined as being a figure of at least £17,500. Unless, therefore, you are satisfied beyond reasonable doubt that when Edward Bamber pleaded guilty, he did so to a figure of no less than £17,500 of benefit to criminal conduct, you must acquit the defendant.

Edward Bamber pleaded guilty to the same charge, on the same particulars, relating to the same cash. We do not know the circumstances of that plea, or what was in Edward Bamber's mind when he pleaded guilty and it would be wrong to speculate on the thoughts and decisions made by Edward Bamber in deciding to plead guilty to the offence of concealing criminal property. We cannot know what was in his mind. There is no evidence of what he thought. The simple fact you have is that he pleaded guilty to the same charge as that facing the defendant, based on the same particulars that he concealed criminal property namely £22,000 or thereabouts."

[33] As we have pointed out above, section 327(1)(a) of the Proceeds of Crime Act 2002 is in similar terms to the legislation in R v Causey to the effect that the offence may be established if any part of the fund in question represents the proceeds of criminal conduct. In relation to the Bamber plea, any part of the £22,000 fund that was the produce of drug trafficking tainted the whole fund. In Bamber there was no written basis of plea. Bamber had admitted that £4,000 of the fund may have been the product of drug trafficking. However, by his plea, Bamber may have intended to accept no greater part of the fund as being the proceeds of drug trafficking. There was no undertaking by the prosecution in the Bamber trial that it would be

established that £17,500 of the fund represented the proceeds of criminal conduct. The Bamber plea did not mean that Bamber had accepted that at least £17,500 of the fund represented the proceeds of criminal conduct. That was a relevant issue for the appellant but was not a relevant issue for Bamber.

[34] The Bamber plea was an important ingredient of the prosecution case. The trial Judge referred to the Bamber plea as being one piece of evidence that the jury must weigh with all the other evidence. He referred to evidence of Bamber having pleaded guilty to other serious drug offences involving high value quantities of drugs. It was necessary to convey to the jury that the evidence of the Bamber plea was not in itself sufficient to establish that an offence had been committed in the terms of the undertaking in the present prosecution, namely that at least £17,500 of the fund represented the proceeds of criminal conduct. The trial Judge, in the first paragraph set out above, did direct the jury that if Bamber pleaded to a figure of less than £17,500 they must acquit the appellant. However, in the second paragraph set out above, the trial Judge stated that there was no evidence of the basis of the Bamber plea and that it was wrong to speculate about the basis of the Bamber plea. He concluded that the simple fact was that Bamber pleaded guilty to the same charge as that facing the appellant, based on the same particulars that he concealed criminal property, namely £22,000 or thereabouts. We are satisfied that overall the terms of the Judge's charge to the jury were not consistent and not adequate to convey the question mark over the probative value of the Bamber plea. The trial Judge's direction in effect invited the jury to disregard the possibility of the limited effect of the Bamber plea on the prosecution undertaking in the appellant's case.

The trial Judge's charge to the jury on possible savings

[35] The further aspect of the trial Judge's charge that requires consideration is the treatment of the prosecution evidence of possible savings of £18,095. The trial Judge's charge on the possible savings was as follows –

“The experts (Mr Dwyer and Miss Niblock) gave evidence of what money could have been generated by the defendant (and her partner, Edward Bamber) as a surplus of income over expenditure. They arrived at different figures. Mr Dwyer arrived at a figure of around £40,000 (£40,672) and Miss Niblock the figure of £18,092 and these differing estimates were arrived at using the same information and data. And you may consider this accountancy evidence is of assistance in determining whether the defendant and Edward Bamber could potentially have saved money and whether the defendant could reasonably have believed that that money was savings. You must remember that these figures were calculated on the basis of a series of assumptions made by the accountants.... Income was assessed by reference to the bank accounts, and not all of the money in the bank accounts had an identifiable source.

Expenditure was calculated using some notional figures, as well as actual expenses. And the experts did not agree in this case on whether, if the additional income of approximately £13,000 was added to the income from known sources, the effect would be to move the defendant and Edward Bamber to a higher level and thus increase the level of average expenditure. We do not know the actual out-goings of Edward Bamber and the defendant. In other words, we do not have a complete picture of the actual expenditure of this couple. You should remember that this evidence - the accountancy evidence – relates only to a part of the case, and whilst it may be of assistance to you in reaching a verdict, you must reach your verdict having considered all of the evidence.

Now whether or not the defendant and Edward Bamber could have saved between £18,000 and £40,000 does not give a complete answer to the source of the £22,000. Whether all or any of that £22,000 constitutes the benefit from criminal conduct is for you to decide.”

[36] It is clear from the verdict that the jury decided that the appellant had the necessary knowledge or suspicion of the tainted nature of the fund. The other issue for the jury was whether it was proved beyond reasonable doubt that the amount recovered by police included £17,500 of tainted funds. The issue for this Court is the safety of the appellant’s conviction. The evidence of the Bamber plea could not satisfy the burden on the prosecution although, as we have found above, the jury were left with the impression that the Bamber plea was capable of doing so. Had there been clear evidence that at least £17,500 of the fund represented the proceeds of criminal conduct the verdict may have remained safe. However there is a distinct lack of clarity about the state of the evidence that £17,500 of the funds represented the proceeds of criminal conduct. There was the concession by Ms Niblock of possible Bamber savings of £18,092. There was vagueness about the unattributed funds in the Bamber bank account which, while they had a direct bearing on the capacity to explain the available funds, became the focus of a debate about the application of the government statistics. There was unsupportable weight placed on the evidence of the Bamber plea. The defence case on legitimate savings was not articulated to the jury. In this combination of circumstances we are left with distinct unease about the conviction of the appellant. We conclude that the verdict is unsafe. In the circumstances the conviction is quashed. We shall hear Counsel on whether a retrial should be ordered.