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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

THE QUEEN

v

PATRICK CORRIGAN

_____

Before: HIGGINS LJ, GIRVAN LJ and STEPHENS J

_____

STEPHENS J (delivering the judgment of the Court)

Introduction

[1] This is an appeal by Patrick Corrigan ("the appellant") from his conviction on 7 November 2013, at the conclusion of a trial with a jury at Craigavon Crown Court and by a unanimous jury verdict, of the offence on count 1 on the indictment of being knowingly concerned on 2 July 2012 in carrying 1.1 million cigarettes with intent to defraud Her Majesty of any duty payable contrary to Section 170(1)(b) of the Customs and Excise Management Act 1979 (the "1979 Act"). On 9 September 2013, at his arraignment, the appellant had pleaded guilty to the offence on count 3 on the indictment of being knowingly concerned on 9 November 2012 in carrying 100,000 cigarettes with intent to defraud Her Majesty of any duty payable contrary to Section 170(1)(b) of the 1979 Act. On 6 January 2014 as a consequence of his conviction on count 1 and his guilty plea on count 3 the appellant was sentenced by the Learned Trial Judge to a determinate sentence of 11 months on count 1 and to a consecutive sentence of 1 month on count 3, a total of 12 months imprisonment. The Learned Trial Judge also ordered the destruction of the cigarettes. The appellant appeals from the conviction on count 1 with leave of the single judge. Following the hearing we allowed the appeal and stated that we would give our reasons later which we now do. The appellant was represented by Mr Greene while Mr Maguire appeared on behalf of the prosecution.

Factual background

[2] The appellant, 62, lives with his wife and son outside Dundalk. He commenced employment in 1967 at the age of 16 with the Irish Transport Authority, CIE. He remained in that employment for 24 years and the work that he undertook mainly consisted of maintaining buses. He took early retirement in 1992 and then acquired an HGV licence. He was subsequently employed for approximately 6 years as a lorry driver by Salmon Transport, a company based in Moira, Northern Ireland. His job involved driving lorries between Ireland and the United Kingdom. This employment came to an end when illness caused him to lose his HGV licence and he has since been in receipt of disability benefit.

[3] There were two occasions when the appellant was found driving a van containing cigarettes upon which duty had not been paid. The first was on 2 July 2012 and the second was on 9 November 2012.

[4] On 2 July 2012 police stopped a white Mercedes Sprinter van near the Hillsborough roundabout on the A1. The driver was the appellant who was very nervous and shaking when spoken to by the police. When asked what was in the back of the van he replied "shoes" and that he was taking the consignment to York Gate shopping centre in Belfast. As was normal with vans of this type the cab was separated from the rear by a metal bulkhead. This meant that from the cab an occupant could not see into the rear. It also meant that any odour emitted from objects in the rear could not be smelt in the cab. In order to see what was being carried in the rear of the van or to smell any odour, one of the doors to the rear of the van would have to be opened. The police upon opening an unlocked door into the side of the van noted a strong smell of tobacco. They also saw a number of cardboard boxes which did not have any external labels or markings on them. The police opened one of the boxes and found that it contained Kingsize Palace cigarettes. It subsequently transpired that there were 10,000 such cigarettes in that box and a total of 1.1 million cigarettes in the rear of the van. The vast bulk of these were Palace cigarettes. There was a smaller number of Bond International branded cigarettes which are not marketed in the United Kingdom. All of the cigarettes were counterfeit. Upon seeing the cigarettes the appellant went to the side of the road and was sick.

[5] At the scene the appellant informed the police that he had been paid £100 to take the van to York Gate shopping centre car park and to leave it there for 30 minutes and that he had been approached by a Mr McNulty to do this job. He was arrested and taken to Lisburn Police Station where he was interviewed on two occasions by officers of HMRC on 2 July 2012. At his first interview and without being invited to do so by the appellant, but in his presence, his solicitor, Naomi Devlin of McKenna Sweeney McKeown, read what she described as "the prepared statement of Patrick Corrigan." Ms Devlin declined to make a copy of that statement available to the interviewers on the basis that it had been read out for the purposes

of the tape and had therefore been recorded. She asserted that it had been signed by the appellant though there is no record of her showing the statement let alone the signature to the interviewers. The appellant did not identify his signature on the document during the course of the interviews. There is no record of the appellant expressly adopting or approving the statement during the rest of that interview or in the subsequent interview. After the statement was read the appellant was asked a number of detailed questions but replied to all of them with the response "no comment." The transcript of the interview contains what Ms Devlin read out as "the prepared statement of Patrick Corrigan" as follows:-

> "I am fully aware of the offence on which I am to be interviewed about. I was approached by a man called John McNulty some weeks ago about doing a van run to Belfast. I knew this gentleman from my time as a lorry driver years ago. I have not driven lorries in a number of years due to medical reasons. He told me I could earn one hundred pounds. This appealed to me as I am going on holiday in September. I was told to collect the van up in Jonesborough and drive it to York Gate Shopping Centre in Belfast. I was told that I was insured to drive the van and that it was a simple delivery of running shoes. I collected the van and was on my way to Belfast when I was stopped. I had been instructed to leave the van at York Gate at three pm, put the key in the window visor and return to it in half an hour. I deny all involvement in the commission of this offence and deny any knowledge of same."

[6] At the conclusion of the interviews the appellant was released on report rather than on bail.

[7] On 9 November 2012 the police stopped a VW van in the slip road of the M1 at Sprucefield. The appellant was the driver of the van. In the rear there were a number of boxes containing 100,000 Jin Lin cigarettes. The defendant admitted that he believed that he was carrying cigarettes. At interview he stated that shortly after his release from police custody in July 2012 he was visited by two men who informed him that he was responsible for the loss of 1 million cigarettes and that he would have to work off that debt by doing more driving for them. He said that he was really frightened from the tone of voice used, though they did not physically threaten him. He got the impression that they might harm him or his family. He did not report the matter to An Garda Síochána. One of the men came back on the evening of 8 November 2012, and told him that the next day a van was going to be in the pub car park in Jonesborough and the key was going to be on the top of the driver's right hand wheel. The man directed the appellant to drive the van to York Gate where he was to leave it for a period of 30 minutes and then drive it back to the

pub car park in Jonesborough. He was not to receive any payment but rather this was to pay off the debt. He stated he succumbed to this pressure and did as he was told.

[8] The various cigarettes found on the two occasions in question contained tobacco on which duty is chargeable and which had not been paid.

The indictment, the arraignment and the trial

[9] Section 170(1)(b) makes it an offence if any person is in any way knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with such goods as are identified in section 170(1)(a) and does so with intent to defraud Her Majesty of any duty payable on the goods or to evade any such prohibition or restriction with respect to the goods. The goods which are identified in section 170(1)(a) are:

(i) goods which have been unlawfully removed from a warehouse or Queen's warehouse;

(ii) goods which are chargeable with a duty which has not been paid;

(iii) goods with respect to the importation or exportation of which any prohibition or restriction is for the time being in force under or by virtue of any enactment;

It can be seen that an offence under section 170(1)(b) can be committed in a number of different ways. For instance, a person might be concerned in carrying or removing or depositing or harbouring or keeping or concealing or in any manner dealing with goods. Also there can be variations in relation to the nature of the goods. They may be goods which have been unlawfully removed from a warehouse or Queen's warehouse or goods which are chargeable with a duty which has not been paid or goods with respect to the importation or exportation of which any prohibition or restriction is for the time being in force under or by virtue of any enactment.

[10] Section 170(2) makes it an offence if any person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion (a) of any duty chargeable on the goods; (b) of any prohibition or restriction for the time being in force with respect to the goods under or by virtue of any enactment; or (c) of any provision of the Customs and Excise Acts 1979 applicable to the goods.

[11] The difference between offences under section 170(1) and 170(2) was considered by the Court of Appeal in England and Wales in R v Neal & others [1984] 3 All ER 156 and in R v Coughlan, unreported 12 May 1997. In R v Neal & others Griffiths LJ stated that

> "The language of subsection (1) is so embracing and casts the net so wide that one is left to wonder what purpose is served by subsection (2), for it is difficult to think of any behaviour aimed at defrauding the customs and excise that would not be caught by subsection (1)."

He went on to state that

> "We are satisfied that it (that is subsection (2)) was inserted by the draftsman with the intention of casting his net as widely as words enabled him…"

[12] The indictment contained four counts. The appellant was charged with two offences under section 170(1)(b). The first, count 1, was in relation to the events of 2 July 2012 and the second, count 3, was in relation to the events of 9 November 2012. In addition the appellant was charged with two offences under section 170(2) of the 1979 Act. Again the first, count 2, was in relation to the events of 2 July 2012 and the second, count 4, was in relation to the events of 9 November 2012.

[13] On count 1 the "Statement of Offence" was:

> "Knowingly concerned In Carrying, Removing, Keeping or Dealing With Goods With Intent To Defraud, contrary to Section 170(1)(b) of the Customs and Excise Management Act 1979."

The "Particulars of Offence" were:

> "PATRICK CORRIGAN, on the 2nd of July 2012, in the County Court Division of Craigavon, were (*sic*) in any way knowingly concerned in carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with such goods as are defined in Section 170(1)(a) (i-iii) of the Customs and Excise Management Act 1979, namely 1,100,000 cigarettes, and that you did so with intent to defraud Her Majesty of any duty payable on the said goods or to evade any such prohibition or restriction with respect to the said goods."

It can be seen that count 1 did not specify the manner in which the prosecution alleged that the appellant had committed the offence. For instance, there was no attempt to specify whether the goods had been unlawfully removed from a warehouse or whether they were goods chargeable with a duty which has not been paid but rather the technique was adopted of repeating the words of the subsection.

It is preferable in an appropriate case to specify with precision the nature of the offence alleged to have been committed.

[14] On 9 September 2012 on arraignment the appellant pleaded not guilty to counts 1 and 2 which related to the events of 2 July 2012. In relation to the events of 9 November 2012 the appellant accepted that the pressure to which he had been subjected to commit the offence did not amount to the defence of duress. For that reason he pleaded guilty to count 3. In view of the fact that count 4 also related to the events of 9 November 2012 and that he had accepted responsibility for those events by pleading guilty to count 3, he pleaded not guilty to count 4.

[15] On 4 November 2013 the appellant's trial commenced and as he had pleaded guilty to count 3, it was ordered that count 4, be left on the books not to be proceeded with without leave of the Crown Court or the Court of Appeal. It was also ordered that count 2 be left on the books on the same terms. Accordingly the trial continued solely in relation to count 1.

[16] There was no issue at trial in relation to the prosecution evidence that the cigarettes, being tobacco products, were goods chargeable to a duty and that the duty had not been paid. There was also no issue at trial that the appellant was carrying the cigarettes. It appears that the case was prosecuted and defended on the sole issue whether the appellant knew that the contents in the back of the Mercedes Sprinter van were cigarettes rather than shoes. The prosecution alleged that from the circumstances it could be inferred beyond reasonable doubt that the appellant was knowingly concerned with the necessary intent. The appellant's defence was that he was an innocent, naïve, dupe who was misled by Mr McNulty about what was in the van, that he did not know that he was transporting cigarettes but rather he believed that he was transporting shoes and that he did not know the nature or purpose of the enterprise.

[17] At the trial the prosecution made an application that the conviction for the offence on 9 November 2012 should be admitted as evidence of bad character under Article 6(1)(c) (important explanatory evidence) or under Article 6(1)(d) (important matter in issue) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order"). The application was opposed by the appellant who also applied under Article 6(3) to exclude the evidence on the basis that it would have such an adverse effect on the fairness of the proceeding that the court ought not to admit it. The Learned Trial Judge rejected the application under Article 6(1)(c) but acceded to the application under Article 6(1)(d) and declined to exclude the evidence under Article 6(3). The method of introducing the evidence of the appellant's conviction on count 3 was to allow the appellant's interview in relation to that offence to be read in evidence. Accordingly, the jury heard not only that the appellant had been convicted on count 3 but also that his explanation at the time during interview was that he had been pressurised to commit this offence. The appellant also gave

evidence at the trial and this was also the explanation that he provided to the jury in relation to the events of 9 November 2012.

[18] The appellant's evidence at trial in relation to count 1 was that at the end of May beginning of June 2012, he met John McNulty, in Dundalk by chance. He had known Mr McNulty when they both had been driving lorries. They talked and upon Mr McNulty finding out that the appellant was doing nothing he indicated that he might be able to get the appellant an odd run down to Belfast and that there would be £100 quid in it. The appellant stated that he enquired as to what he would be transporting and he was told that it was "runners". He agreed to undertake this work. Subsequently Mr McNulty called to his house and asked him would he be willing to do a run. He replied, "Yes" and Mr McNulty said that there would be a load of trainers on it – shoes. The appellant was instructed to drive to York Gate in Belfast, that he was to collect the van in the car park of the pub in Jonesborough and that the keys would be on the wheel. He was told that the van would be loaded and that he was just to drive it. Upon arrival in York Gate he was to put the keys on the drivers visor and walk away and to come back in about half an hour and take the van back to the pub car park in Jonesborough.

[19] The trial concluded on 7 November 2013 with the jury returning a unanimous verdict of guilty on count 1.

The Grounds of Appeal

[20] The appellant's grounds of appeal can be summarised as follows:-

(a) The Learned Trial Judge erred in admitting under Article 6(1)(d) of the 2004 Order as bad character evidence, the appellant's conviction on count 3 in relation to a matter in issue between the appellant and the prosecution as to whether the appellant had a propensity on 2 July 2012 to commit offences of the kind with which he is charged.

(b) In the alternative the Learned Trial Judge erred in not excluding the bad character evidence under Articles 6(3) or 8(3) of the 2004 Order or under Article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989.

(c) In the alternative the Learned Trial Judge failed to adequately direct the jury in relation to bad character evidence in that they were not directed that the conviction on Count 3 could only amount to a propensity on 2 July 2012 to commit offences of the kind with which he was charged if the prosecution had proved beyond reasonable doubt that the defendant's evidence was incorrect that he committed the offence on 9 November 2012 under pressure.

(d) The Learned Trial Judge's charge to the jury lacked balance in that there was an over emphasis on aspects of the case which were adverse to the appellant.

(e) The Learned Trial Judge misdirected the jury in relation to the mental element of the offence under section 170(2)(b) of the 1979.

Bad Character Evidence

[21] The provisions of the 2004 Order which apply to applications to admit evidence of bad character on the basis that the evidence is relevant to an important matter in issue, namely whether the appellant has a propensity to commit offences of the kind with which he is charged, are, so far as material, as follows:

> **"6.** (1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if … (d) it is relevant to an important matter in issue between the defendant and the prosecution, …
>
> …
>
> (3) The court must not admit evidence under paragraph (1)(d) … if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
>
> (4) On an application to exclude evidence under paragraph (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.
>
> …
>
> **8.** (1) For the purposes of Article 6(1)(d) the matters in issue between the defendant and the prosecution include (a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence; …
>
> (2) Where paragraph (1)(a) applies, a defendant's propensity to commit offences of the kind with which he

is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of (a) an offence of the same description as the one with which he is charged, or

…

(3) Paragraph (2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for it to apply in his case.

(4) For the purposes of paragraph (2)—

(a) two offences are of the same description as each other if the statement of the offence in a complaint or indictment would, in each case, be in the same terms; …

…

(6) Only prosecution evidence is admissible under Article 6(1)(d).

17. (1) In this Part—

"bad character" is to be read in accordance with Article 3;

…

"important matter" means a matter of substantial importance in the context of the case as a whole;"

[22] On appeal it is only in limited circumstances that this court will hold that evidence of bad character should not have been admitted at the trial. Those circumstances were defined in R v Hanson [2005] EWCA Crim 824 as follows:

"15. If a judge has directed himself or herself correctly, this court will be very slow to interfere with a ruling either as to admissibility or as to the consequences of non-compliance with the regulations for the giving of notice of intention to rely on bad character evidence. It will not interfere unless the judge's judgment as to the capacity of prior events to establish propensity is plainly wrong, or discretion has been exercised unreasonably in the Wednesbury sense: *Associated Provincial Picture Houses v*

Wednesbury Corpn [1948] 1 KB 223 (compare *R v Makanjuola* [1995] 1 WLR 1348 , 1351)."

Accordingly, on this appeal and in relation to the decision to admit the evidence of the conviction on count 3 the issue is as to whether the Learned Trial Judge has directed herself correctly as to the capacity of the conviction on count 3 to establish propensity, or whether her discretion has been exercised unreasonably in the Wednesbury sense.

[23] The three essential questions for the Learned Trial Judge in relation to the application to admit the conviction on count 3 were those identified in R v Hanson [2005] EWCA Crim 824, namely:

> "(1) Does the history of conviction(s) establish a propensity to commit offences of the kind charged?
>
> (2) Does that propensity make it more likely that the defendant committed the offence charged?
>
> (3) Is it unjust to rely on the conviction(s) of the same description…and, in any event, will the proceedings be unfair if they are admitted?"

[24] In this case the answer to those questions raised a number of discrete issues. First, whether the events which occurred on 9 November 2012 after the events on 2 July 2012 which was the matter of trial, could be admitted under Article 6(1)(d). This point arose in relation to equivalent legislation in England and Wales in the case of R v Adenusi [2006] EWCA 1059 and the decision and reasoning in that case was affirmed in R v Norris [2013] EWCA Crim 712. In R v Adenusi Lord Justice Hooper giving the judgment of the Court of Appeal stated at paragraph 13:

> "Does it then matter for the purposes of (Article 6 and 8) that the offences took place five days after the offences which are the subject matter of the trial? *What the jury have to concentrate on is of course the defendant's propensity at the time that he is alleged to have committed the offences with which he is being tried.* We can see no justification for saying that as a matter of law one is not entitled to determine propensity at the time of committing the offences by reference to offences committed thereafter. Whether or not offences committed thereafter assist the jury to decide on the issue of propensity is a matter for the jury subject always to the duty of the judge to ensure a fair trial (eg under (Article 6(3)). In those circumstances

> we see no merit in this appeal and it is dismissed." (*emphasis added and also the quotation adapted to refer to the 2004 Order*)

Accordingly, the conviction on count 3 in relation to the events which occurred on 9 November 2012 could establish propensity to commit the offence as at 2 July 2012 despite the fact that the events of 9 November 2012 occurred after the events of 2 July 2012.

[25] The second issue raised was whether one conviction could establish a propensity, that is to say a tendency. The answer is that it may, but whether it does so or not will depend on the particular circumstances of the case. There is no minimum number of events or convictions necessary to demonstrate a propensity. The fewer the number of events or convictions the weaker is likely to be the evidence of propensity. Accordingly and as is apparent from R v Hanson, more caution has to be exercised by a trial judge before admitting in evidence one single conviction though the precise circumstances in which this can or should be done are not prescribed. In R v Hanson at paragraph 9 it was stated that:

> "There is no minimum number of events necessary to demonstrate such a propensity. The fewer the number of convictions the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category will often not show propensity. But it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged: compare *Director of Public Prosecutions v P* [1991] 2 AC 447 , 460-461. Child sexual abuse or fire setting are comparatively clear examples of such unusual behaviour but we attempt no exhaustive list. Circumstances demonstrating probative force are not confined to those sharing striking similarity. So, a single conviction for shoplifting, will not, without more, be admissible to show propensity to steal. But if the modus operandi has significant features shared by the offence charged it may show propensity."

It can be seen from that passage that the Court was providing examples of situations where a single conviction may show propensity.

[26] In this case there were considerable similarities between what occurred on 9 November 2012 and the events which occurred on 2 July 2012. On both occasions the appellant went to the pub car park in Jonesborough where there was a van which he was to drive to the shopping centre in York Gate. On his arrival at York

Gate he was to put the keys to the van under the visor and leave the van for a period of 30 minutes. Upon his return he was to drive back to the pub car park in Jonesborough. They were sufficient to lend support to the proposition that the appellant had a propensity to commit offences of this nature.

[27] The third issue raised was whether the events of 9 November 2012 established merely that the appellant had a propensity to commit an offence of this kind when pressure was applied to him to which he succumbed. We consider that the events of 9 November 2012 could demonstrate a propensity to commit the same offence on 2 July 2012 provided the jury were sure that the appellant's explanation of succumbing to pressure was false. Accordingly, the learned trial judge could leave the issue of propensity to the jury.

[28] The fourth issue raised was whether in the exercise of discretion the conviction on count 3 should not be admitted in evidence. Whether the conviction on count 3 could amount to propensity involved the jury rejecting the appellant's explanation so that they had no doubt that his explanation of pressure as the motivating factor in November 2012 was false. The issue was not complex and there was no unfairness in leaving it to the jury. We do not accept that this court should intervene on the basis that the exercise of discretion was Wednesbury unreasonable.

[29] The grounds of appeal relating to the admission of the bad character evidence are not upheld. However we should add this. If evidence of propensity is admitted it becomes important that the jury receive careful guidance about its relevance to the count(s) in the indictment and how they might use it and how they should approach it generally. The jury were not directed that they could only find that the events of 9 November 2012 established a propensity as at 2 July 2012 if they rejected and had no reasonable doubt in relation to the appellant's explanation that he succumbed to pressure to commit the offence on 9 November 2012. We consider that the jury should have received that direction.

The balance of the Learned Trial Judge's charge

[30] We deal with this aspect of the appeal briefly. The following guidance was given by Simon Brown LJ in R v Nelson [1997] Crim LR 234:

> "Every defendant, we repeat, has the right to have his defence, whatever it may be, faithfully and accurately placed before the jury. But that is not to say that he is entitled to have it rehearsed blandly and uncritically in the summing up. No defendant has the right to demand that the judge shall conceal from the jury such difficulties and deficiencies as are apparent in his case. Of course, the judge must remain impartial. But if common sense and reason demonstrate that a given defence is riddled with

> implausibilities, inconsistencies and illogicalities … there is no reason for the judge to withhold from the jury the benefit of his own powers of logic and analysis. Why should pointing out those matters be thought to smack of partiality? To play a case straight down the middle requires only that a judge gives full and fair weight to the evidence and arguments of each side. The judge is not required to top up the case for one side so as to correct any substantial imbalance. He has no duty to cloud the merits either by obscuring the strengths of one side or the weaknesses of the other. Impartiality means no more and no less than that the judge shall fairly state and analyse the case for both sides. Justice moreover requires that he assists the jury to reach a logical and reasoned conclusion on the evidence."

[31] We consider that the Learned Trial Judge was putting before the jury matters for their consideration and in doing so was doing exactly what she was required to do.

The mental element of the offence

[32] The fourth ground of appeal alleged that the trial judge misdirected the jury in answer to a question from the jury in relation to the knowledge required to establish the commission of the offence. It was submitted that in explaining to the jury the meaning of the word 'knowingly', the trial judge had equated the concept of knowledge with suspicion or failed to draw a sufficient distinction between them. In her summing-up the trial judge began by explaining the constituent elements of the offence.

> "Firstly that Mr Corrigan was concerned in carrying 1.2 million cigarettes on 2 July 2012. Secondly that he did that knowingly and, thirdly that his intention was to defraud the Crown of any duty payable on the cigarettes. You are probably going to concentrate, I suggest to you, but it is a matter for you, you are probably going to concentrate on the second of those elements, knowingly, and therefore I want to say something to you about the law, the criminal law on knowledge. A person may have actual knowledge of something - and that's the first question you have to ask, whether the defendant had actual knowledge that he was carrying cigarettes.

The trial judge then dealt with the evidence which might suggest that the appellant had actual knowledge that he was transporting cigarettes. She then said –

> What would be the position if you decided no you are not satisfied that he had actual knowledge. You would then have to consider whether you are satisfied that Mr Corrigan deliberately closed his eyes to the obvious because he didn't want to be told the truth, namely that he was carrying cigarettes, or that he deliberately refrained from inquiring because he suspected that truth but he didn't wish to have his suspicions confirmed.

The trial judge then reminded the jury about the appellant's account and returned to the issue of knowledge or wilful blindness.

> ……. you would be entitled to consider, if you accept that account, whether from that account you can conclude that he was deliberately closing his eyes to what was obvious because he didn't want to be told the truth about the cigarettes or he was suspicious but he didn't make a further inquiry because he didn't want his suspicions to be confirmed. It will be open to you, provided you exercise caution, to base a finding that the defendant had the necessary knowledge if you are satisfied that he blinded himself to the obvious or didn't inquire lest his suspicions would be confirmed. That's what I want to say about knowledge and you will apply that test of knowledge in deciding whether you are satisfied on the prosecution evidence that he knew."

[33] The charge also included the following:-

> "The key question then is: Did he know, in the sense that I have defined knowledge to you, actual knowledge or deliberately blinding himself to the obvious or deliberately refraining from asking questions, are you satisfied beyond reasonable doubt that he had knowledge in either of those two senses of what he was carrying?"

[34] Upon the jury retiring to consider their verdict Mr Greene requisitioned in relation to the charge stating that in respect of knowledge there was a conflation or a risk of conflation between general suspicion and knowledge. The Learned Trial Judge indicated that she would give a further direction to the jury stating:

> "I will just say that the suspicion, I am just going to say when they are looking at the area of blinding his eyes to

> the truth or suspicion that it has to be suspicion about that it was cigarettes, that's all I am going to say."

Mr Greene replied "Yes indeed." The jury were brought back and the Learned Trial Judge directed the jury as follows:

> "Then just to make clear that when I was talking to you about knowledge and did he have actual knowledge and the issue of blinding himself to the obvious or not making enquiries even though he was suspicious, that has to be that his suspicion has to be that it was cigarettes or that he was deliberately blinding himself to the obvious that it was cigarettes."

[35] The Learned Trial Judge then received a question from the jury in which they asked:

> "Is it enough that he considered cigarettes as a possibility amongst other illegal goods and dismissed it with others? Does that qualify as knowledge?"

[36] The Learned Trial Judge's direction in response was:

> "You do not need to consider what other goods he might have suspected. The only question for you is on this issue are you satisfied that he suspected cigarettes and deliberately refrained from enquiry because he did not want to have that suspicion confirmed?"

[37] The offence with which the appellant was charged, contrary to Section 170(1)(b), was being knowingly concerned in carrying goods which were chargeable with a duty which had not been paid and doing so with intent to defraud Her Majesty of any duty payable. Therefore the jury had to be satisfied beyond a reasonable doubt that the appellant knew he was carrying goods on which duty had not been paid and that he did so with the necessary intent to defraud. It is not essential that the prosecution prove that the appellant knew the exact nature of the goods he was carrying provided he knew that duty was chargeable on them and that it had not been paid. In most cases knowledge of the actual goods may assist the jury in determining whether the appellant was knowingly concerned in the carrying of the goods and that he did so with intent to defraud. Thus, as in most cases, this case was prosecuted and defended on the issue of the knowledge of the appellant about the presence of the cigarettes in his van, he having stated that he was carrying shoes. What the prosecution has to prove beyond reasonable doubt is knowledge of the nature and purpose of the enterprise and that the appellant knew that his activity of, for instance carrying the goods, was to further the end of deliberately intending to

breach the requirement to pay the duty. Proof of knowledge can be by direct evidence, such as for instance, admissions made by the defendant during police interviews or alternatively by inferences from primary facts. A circumstance or a number of circumstances may lead to the conclusion that the defendant had a guilty mind. One of the circumstances might be that *the appellant* was suspicious and failed to make any enquiry or failed to carry out any investigations of his own. The failure to make an enquiry or the failure to carry out any investigation by, for instance, checking the content of the load can also be taken into account by the jury in arriving at a conclusion as to whether the prosecution have established, beyond reasonable doubt that the defendant had a guilty mind. In this case checking the rear of the van would have revealed the smell of tobacco. Even if there was no smell the jury might have wished to consider whether the unmarked nature of the boxes would have increased the appellant's suspicions. The jury can be directed that in common sense and in law knowledge can be inferred because *the appellant* deliberately shut his eyes to the obvious or refrained from inquiry because *he* suspected the truth but did not want his suspicions confirmed. That is the process by which a guilty mind is established but that does not mean that suspicion without enquiry necessarily establishes a guilty mind. The jury should be directed that suspicion alone is not enough and they have to be sure from all the circumstances that the appellant was knowingly concerned to further the end of deliberately intending to breach the requirement to pay the duty.

[38] At trial counsel stated that what was required was knowledge that the goods were cigarettes and, accordingly, the learned trial judge gave directions on that basis to the jury. However, we consider that the direction which ought to have been given should have made clear to the jury that the prosecution had to prove knowledge of the nature and purpose of the enterprise, namely the transportation of goods on which duty was not paid, and that the appellant knew that his activity of, for instance carrying the goods, was to further the end of deliberately intending to breach the requirement to pay the duty.

[39] We also consider that the jury ought to have been but was not directed that suspicion alone is not sufficient. The obligation on the prosecution is to prove knowledge.

Conclusion

[40] The test in relation to allowing appeals was set out by this court in *R v Pollock* [2004] NICA 34. Applying that test and given that the trial judge's charge did not adequately direct the jury we quash the conviction on count 1.