**Evidence and procedure**

**1. Bad character** – *R. v Reece* [2020] EWCA Crim 44, [2020] Crim.L.R. 450, CA, 24 January 2020.

The appellant was convicted of various offences in respect of conspiracies to import and supply drugs. During his trial, bad character evidence in respect of a previous conviction for a drug-related offence in Belgium was admitted. In his own evidence-in-chief and cross-examination, the appellant suggested that he had not knowingly committed the earlier offence. The judge did not mention the appellant’s suggestion when dealing with the bad character evidence in his summing-up.

The fundamental difficulty with this appeal lay in the terms of section 74(3) of the *Police and Criminal Evidence Act* 1984. That provision makes it clear that the fact of a conviction, either in the UK or in another EU member state, is, without more, proof of the fact that someone did commit the offence of which they were convicted. It is not conclusive; but a presumption is created. The burden of proof then lies on the defence to prove that the offence was not, in fact, committed. That is on the usual standard of proof, where the law imposes a burden on the defence, rather than on the prosecution, namely, the balance of probabilities: *R v Carr-Briant* [1943] K.B. 607, CCA. Here, the reality was that the appellant had not challenged his guilt at all. His own evidence at trial raised a possible question mark, which led the judge to intervene to clarify the position. The appellant did clarify the position and everyone moved on. The judge then put the issues before the jury and summed the case up to them in a balanced way. He was not required to repeat every detail of what the appellant had said in his evidence. The appellant’s counsel had not asked for any direction to be given about section 74(3) or for the standard directions on bad character to be modified. Even if there had been any error, it would not have affected the safety of the convictions as there was a great deal of evidence pointing to the appellant’s guilt.

***Archbold* 2020 reference**: 1984 Act, s.74, § 9-82.

Commentary by Matt Thomason at [2020] Crim.L.R. 451.

COMMENT:

The court disposed of this appeal by focussing on the terms of section 74(3) of the 1984 Act. However, that section only applies “where evidence is admissible of the fact that the accused has committed an offence”. The starting point therefore ought to be whether the conviction was properly admitted under section 101(1)(d) of the *Criminal Justice Act* 2003 (CLW/03/45/40).

The Belgian conviction was for “offences described as being ‘possessor controlled drug’” (at [22]). At the time of the previous offences, the appellant was in the company of a co-conspirator in the present case. The circumstances of the offences, which were also admitted in evidence, were “that they had travelled from the United Kingdom to Europe in a van to deliver some furniture before returning to the UK. On the Dutch/Belgium border they were stopped and searched and were found in possession of a bag in which was 16.64 kilograms of cannabis and 7.316 kilograms of cocaine.”

The appellant stated in evidence at trial that he had no knowledge of the drugs to which the conviction related. He claimed that two holdall bags had been thrown into the back of the van, which he believed contained tools. When asked why he had pleaded guilty to the offence, he explained: “Well, because they actually found some drugs … in the back of the van, so, you know, I had to admit my part in it. That’s what I was advised to do, I think, over there.” (at [16]).

As Matt Thomason explains in his commentary in the Criminal Law Review, whether the Belgian conviction demonstrated propensity to commit offences of the type charged in the instant proceedings turns on the meaning of “possession” under Belgian law. If possession of drugs is an offence of strict liability in Belgium, a conviction for such an offence could not of itself demonstrate propensity to import or be ‘involved with controlled drugs.

Of course, the Crown might still seek to adduce the conviction and assert that the defendant knew perfectly well that there were drugs in the holdall bags, but such knowledge would be for the jury to determine and they would have to be satisfied of it to the criminal standard. Permission to adduce evidence of the conviction in that situation might well have been refused on the basis it was likely to involve satellite litigation. Alternatively, the Crown might seek to use the conviction merely to establish a propensity to associate with a known drug dealer, but that would be likely to give rise to an application to exclude the evidence under section 101(3) of the 2003 Act, and the question of fairness would have to be considered, given the absence of proof of knowledge of the drugs on the previous occasion.

As it was, there was no information before either the trial judge or the Court of Appeal as to the definition of the Belgian offence. The latter noted that “to prove that matter one way or the other would have required expert evidence to be adduced” (at [36]). Instead, counsel for the appellant conceded that the conviction had been properly admitted and argued that the jury ought to have been given directions as to how to approach the issue of the defendant’s knowledge of the drugs. The court held this was not required because section 74(3) of the 1984 Act makes clear that the fact of a conviction is proof that a defendant committed the offence of which he was convicted unless the contrary is proved. The appellant had not challenged his guilt, so the statutory presumption had not been displaced.

While section 74 came into play once it was conceded that the previous conviction was admissible, it is not clear why this meant the burden of proof switched to the defendant. Section 74 provides that proof of a conviction by or before a court in any member state is proof that the defendant committed “that offence”. It is not proof that he committed the English equivalent of that offence (which may comprise different elements or definitions). It is therefore difficult to see how either the trial court or the Court of Appeal could properly proceed without knowing the ingredients of the Belgian offence of “possessor controlled drug”.

In 2011, the Association of Chief Police Officers Criminal Records Office (ACRO) launched its Mutual Understanding of Criminal Records Information (MUCRI) project. The project’s final report highlighted that “translating legal ideas across jurisdictions” was a key issue for EU member states in relation to the exchange of criminal conviction information, “because words which appear simple in terms of translation may have very different legal meanings attached in different jurisdictions” (see <https://www.ird.lt/uploads/documents/files/tarptautinis-bendradarbiavimas/keitimasis-teistumo-duomenimis-su-uzsienio-salimis/mucri/MUCRI_final_report.pdf>). At the time of the report, the CPS submitted that it was not necessary for them to convert or match an offence precisely to a UK offence, as the CPS “would conduct research, for example consulting academic texts from the relevant jurisdiction or contacting the European Judicial Network for clarification on the legal aspects of, for example, the component parts of a particular offence” (MUCRI Project Final Report, p.66). It is unfortunate that this did not happen in the present case.

It should be noted that, following EU “IP completion day” (currently 31 December 2020), the section 74 presumption will no longer apply to convictions from an EU member state (Criminal Justice (Amendment etc) (EU Exit) Regulations 2019 (SI 2019/780) (CLW/19/14/9), reg. 29(3)(a), subject to transitional provisions and savings specified in reg. 31). In the meantime, it is suggested that a prosecutor seeking to rely on a conviction from an EU member state ought to be able to explain the elements of the offence to the trial judge. Defence advocates should take clear instructions about EU convictions and, if it is suggested that an offence has a different definition in the relevant member state to the corresponding offence in England and Wales, that should to be highlighted in advance of trial so that admissibility decisions and judicial directions can be tailored accordingly.

**Natalie Wortley**