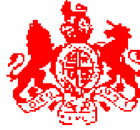

The Court of Appeal for Bermuda

CRIMINAL APPEAL No 2 of 2015

Between:

GEORGE DARRIN VIRGIL

Appellant

-v-

THE QUEEN

Respondent

Before: **Baker, President**
Bell, JA
Kawaley, JA (Acting)

Appearances: Mr. Larry Mussenden, Mussenden Subair Limited, for the Appellant
Ms. Cindy Clarke and Ms. Takiyah Burgess, Department of Public Prosecutions, for the Respondent

Date of Hearing & Decision: **11 March 2016**

Date of Reasons: **18 March 2016**

REASONS

Appeal against conviction-conspiracy to import controlled drugs-conspiracy to supply controlled drugs- circumstantial evidence- sufficiency of evidence-fairness of summing up-safeness of conviction

Kawaley, JA (Acting)

Introductory

1. Conspiracies to import into and supply controlled drugs in Bermuda are not transparent transactions intended to be exposed to the light of public scrutiny.

They are an exercise in concealment and subterfuge, often reflecting a hidden, 'shadow', dimension of apparently legitimate commercial operations. Absent a confession, or perhaps the election of a conspirator to give evidence for the Crown or to implicate a co-accused, prosecutions for such offences will rarely be grounded in direct evidence of what actually occurred. The Prosecution will typically have to lay charges relying primarily on circumstantial evidence. It is for the trial judge to determine whether there is sufficient evidence upon which a properly directed jury could safely convict. It is for the jury to determine whether or not the Prosecution's evidence, together with any incriminating evidence given by one co-defendant against another, satisfies them of an alleged conspirator's guilt. It is against this general background that the present appeal fell to be determined.

2. The Appellant was convicted on 2 March 2015 in the Supreme Court (Greaves J, sitting with a jury) on an Amended Indictment which charged him with conspiring to import and conspiring to supply cannabis between a date unknown and 27 November 2012, and between a date unknown and 30 November 2012, respectively. One of his initially seven co-Defendants pled guilty early on in the trial to conspiring to supply cannabis. All Defendants made submissions that there was no case to answer which were rejected at the end of the Crown's case. At the close of the Defence case, the trial judge directed the jury to acquit three of the Appellant's remaining six co-Defendants (Edwards, Trott and Tucker). The remaining three co-Defendants were acquitted by the jury. The Appellant, the only Defendant who elected not to give evidence in his own defence, was the only person convicted by the jury. On 15 April 2015, the Appellant was sentenced to 10 years' imprisonment, concurrently, on each of the two counts. He appealed only against his convictions.

3. On 11 March 2011 this Court dismissed the Appellant's appeal. These are the reasons for that decision.

The Prosecution case

The shipment and the arrest[1]

4. On 26 November 2012, a shipment of iron plates, pipes and "I-beams" arrived in Bermuda. The consignment was shipped by North York Iron in Canada and the importer was Swandell Welding & Steel Erection ("Swandell"). The Appellant and the Defendant Edwards had both been employees of Swandell although by the date the shipment arrived, the company had not been active for some months and their employment had been terminated. A Customs inspection revealed rectangular objects were inside each of the five steel plates. The Police carried out covert surveillance of the delivery, which they allowed to proceed.

5. The Defendant Tucker was given money by the Appellant to clear the shipment through Customs which she did. Delivery was fixed for 29 November and Bermuda Forwarders was instructed to deliver the shipment of steel to a garden area in Abbott's Cliff. The Appellant and the Defendant Anderson (who pleaded guilty in the course of the trial) assisted the Defendant Jefferis to unload the cargo. The Appellant then called Scrap Iron Trucking to move the steel shipment to another destination. The pipes and beams were taken to a Southside workshop. The suspicious steel plates were taken to a body shop at 15 Limehouse Lane owned by two brothers, the Gibbons Defendants. The Appellant paid the trucker. The Police then attended the Gibbons' residence where the steel plates were found in the driveway and arrested the Appellant inside the residence, together with all of his eventual co-Defendants except Tucker, who was not there. Using welding equipment similar to that at Limehouse Lane, the Police opened the steel plates over the next few days. Inside they found 180 compressed packages containing 119.6 kilograms (263 pounds) of cannabis with a street value of nearly $6 million.

[1] These facts are taken from the helpful summary set out in the 'Case for the Respondent'.

6. The facts revealed by investigations in Canada were essentially agreed. A Nicky Maraj organised the shipment from Canada to Bermuda. An unidentified person ordered the steel from North York Steel on 8 November 2012 and an unidentified trucker collected the steel on 12 November 2012 and delivered it to Mississauga Transportation Resources Inc ("MTR") the next day where it remained in secure bonding. On 15 November 2012, Melbourne Trucking moved it another secure location. On 19 November 2012, the truck driver transported the shipment directly to Port Elizabeth in New Jersey for shipment to Bermuda.

Circumstantial evidence incriminating the Appellant

7. The Appellant admitted when interviewed by the Police following his arrest that he entered into arrangements to bring the steel sheets into Bermuda and to supply them to a customer but denied any knowledge that they contained illegal drugs. There was, as Mr Mussenden fairly pointed out, no direct evidence adduced that the Appellant was knowingly involved in a conspiracy to import and supply cannabis. However, a number of striking evidential strands pointed to the Appellant's guilt in the absence of a plausible explanation on his part. Indeed, the Prosecution case was that the Appellant was a "kingpin" in the conspiracy.

8. As far as the evidence adduced by the Prosecution as part of its own case is concerned, these strongly incriminating strands included the following allegations which were not seriously subject to dispute:

   (a) the Appellant was shown by phone records to be at the centre of a matrix of telephone calls to each of his co-Defendants, and received numerous calls from Nicky Maraj (the Canadian shipment organiser) between May

2012 and November 2012 when the shipment arrived in Bermuda;

(b) numerous phone calls were made to, *inter alia*, Nicky Maraj from a phone registered in the name Kevin Ingham, a fictitious person whom the Appellant claimed was the Swandell customer to whom the steel shipment was to be delivered;

(c) the calls from Maraj to the Appellant and from the Ingham phone to Maraj included calls made throughout the shipment period;

(d) the Appellant was personally involved in a delivery exercise which was inconsistent with a legitimate commercial transaction and strongly suggested that he was well aware that there was no Swandell customer at all and that the steel plates contained illegal drugs. Most strikingly:

(i) the Appellant was seen by Police helping to offload the steel consignment in a remote garden area where the Bermuda Forwarder's truck was instructed by Tucker to deliver it;

(ii) the Appellant called an additional trucker to take the 'innocent' portions of the cargo to one location and the steel sheets containing the drugs to a second location and paid the driver;

(iii) the Appellant was present at the location where the steel sheets were delivered, a location which had welding equipment capable of opening the steel sheets and removing the concealed cannabis;

(iv) the steel sheets containing the illegal drugs were not delivered to the premises of Swandell or to the property of a Swandell customer using the name Ingham. They were delivered to persons with whom the Appellant had been in telephone contact over the preceding months, persons who were, apparently, known to him.

9. Unsurprisingly, Greaves J ruled that the Appellant had a case to answer. The Crown's case against the Appellant was then fortified by the evidence given by some of his co-Defendants, while the Appellant elected not to testify. Most damningly:

(a) Tucker explained that her involvement with organising clearance and delivery of the shipment when it arrived in Bermuda was solely by way of following the Appellant's instructions, as she was his subordinate in the context of their employment with Swandell ;

(b) Corte Gibbons testified that earlier in the week of their arrest, the Appellant contacted him and told him that he had some steel coming in which he needed to have stored and cut.

The Appellant's case

10. The Appellant's case at trial, as Mr Mussenden made clear in the course of the present appeal, was essentially simple. There was no or no sufficient evidence that the Appellant had the requisite guilty knowledge that he had been involved in importing anything other than steel. This was his case when interviewed by the Police, after his arrest. This was the case advanced at trial through cross-examination.

11. The Appellant, whose case was advanced through cross-examination, sought to exculpate himself in two main ways. Firstly, he sought to minimize his own involvement and to establish that the shipment was indeed intended for a Swandell customer named Ingham. Secondly he sought to suggest, based on the fact that the Police took five days to extract the drugs from the steel plates, that there was no opportunity for the drugs to have been inserted into the steel plates once they left the manufacturing plant as the Prosecution suggested probably occurred.

12. Tucker's evidence in her own defence, if accepted, exposed as a myth the idea of the shipment being for a third party customer named Ingham and confirmed that she only acted on the Appellant's instructions. Corte Gibbons' evidence, if accepted, proved that the Appellant knew that the steel plates had hidden contents because he delivered the plates to the Gibbons brothers with the expressed aim of having them cut. As Ms Clarke rightly pointed out in reply, the Prosecution were not required to prove how the cannabis was concealed inside the steel or when. Discrediting their theory that the drugs were inserted into the plates while the shipment was en route could not undermine any essential elements of the offences with which the Appellant was charged.

The grounds of appeal

13. There were two main complaints underpinning the formal grounds of appeal. Firstly, complaint was made about the judge's rulings at the end of the Prosecution and Defence case. Secondly, complaint was made about the fairness of the judge's summing-up.

14. Mr Mussenden attacked not simply the ruling that the Appellant had a case to answer, but also the rulings that Tucker had a case to answer and the decision to entertain fresh submissions of no case on behalf of all Defendants at the close of their respective cases, and to accede to the renewed submissions as regards Edwards, Trott and Tucker as well. These decisions were made in the exercise of the judge's discretion. We agree with Ms Clarke that this Court can only interfere with such discretionary decisions if satisfied that the trial judge exercised his discretion in an impermissible manner.

15. In light of the evidence summarised above, we were bound to conclude that the criticisms made of the trial judge's no case rulings were entirely without merit. As far as the Appellant's own case is concerned, it was not properly open to the judge to withdraw the case against him from the jury at any stage. We were assisted on the proper approach to a case based on circumstantial evidence by the following passage found in the Australian High Court decision in *R-v-Hillier* (2007) 233 ALR 63, to which Ms Clarke referred:

> "*46. The case against Mr Hillier was a circumstantial case. It has often been said that a jury cannot be satisfied beyond reasonable doubt on circumstantial evidence unless no other explanation than guilt is reasonably compatible with the circumstances. It is of critical importance to recognise, however, that in considering a circumstantial case, all of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence.*

47. The force of that proposition is well illustrated by the decision in Plomp v The Queen. There, this Court held that the motive of the accused to murder his wife (he having proposed marriage to another woman on the representation of his being a widower) was one circumstance to be taken into account in deciding whether he had killed his wife while they were surfing alone together, at dusk, in apparently good conditions. His application for special leave to appeal against conviction was refused upon the basis that it was open to the jury to be satisfied beyond reasonable doubt that he had murdered his wife.

48. Often enough, in a circumstantial case, there will be evidence of matters which, looked at in isolation from other evidence, would yield an inference compatible with the innocence of the accused. But neither at trial, nor on appeal, is a circumstantial case to be considered piecemeal. As Gibbs CJ and Mason J said in Chamberlain [No 2]:

> *'At the end of the trial the jury must consider all the evidence, and in doing so they may find that one piece of evidence resolves their doubts as to another. For example, the jury, considering the evidence of one witness by itself, may doubt whether it is truthful, but other evidence may provide corroboration, and when the jury considers the evidence as a whole they may decide that the witness should be believed. Again, the quality of evidence of identification may be poor, but other evidence may support its correctness; in such a case the jury should not be told to look at the evidence of each witness 'separately in, so to speak, a hermetically sealed compartment'; they should consider the accumulation of the evidence cf Weeder v The Queen.'*

Similarly, in a case depending on circumstantial evidence, the jury should not reject one circumstance because, considered alone, no inference of guilt can be drawn from it. It is well established that the jury must consider 'the weight which is to be given to the united force of all the circumstances put together': per Lord Cairns, in Belhaven

and Stenton Peerage[2]*, cited in Reg v Van Beelen; and see Thomas v The Queen and cases there cited.'*

And as Dixon CJ said in Plomp:

> *'All the circumstances of the case must be weighed in judging whether there is evidence upon which a jury may reasonably be satisfied beyond reasonable doubt of the commission of the crime charged. There may be many cases where it is extremely dangerous to rely heavily on the existence of a motive, where an unexplained death or disappearance of a person is not otherwise proved to be attributable to the accused; but all such considerations must be dealt with on the facts of the particular case. I cannot think, however, that in a case where the prosecution is based on circumstantial evidence any part of the circumstances can be put on one side as relating to motive only and therefore not to be weighed as part of the proofs of what was done.' (emphasis added)"*

16. It understandable that the Appellant was disappointed that the Defendant Tucker's no case submission was initially rejected but then accepted at the end of the case when she had given highly incriminating evidence against the Appellant. The Prosecution had no right to appeal against the directed acquittal of Tucker which was based on a ruling grounded in mixed questions of fact and law[3]. The Crown's position was that the learned judge was correct to leave the case against Tucker to the jury in the first instance, even if he was wrong to withdraw it at the end of her case. We accept this submission. As the judge's decision to direct the jury to acquit Tucker is not appealable we see no need to comment further on it.

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[3] Section 17of the Court of Appeal Act 1964 was subsequently amended with effect from 6 November 2015 to permit Prosecution appeals against rulings of no case to answer and other rulings resulting in the termination of proceedings against an accused person.

17. The Appellant cannot complain about the fact that Tucker gave evidence against him in her own defence because she clearly had a case to answer. It was she that cleared the consignment containing controlled drugs through Customs and arranged for its delivery. She was linked by telephone records to the Appellant and he was involved in receiving the delivery. The Appellant has no standing to complain about Tucker's eventual directed acquittal or to suggest that this decision caused him prejudice.

18. The complaint that the judge's summing-up was unbalanced and unfair to the Appellant and amounted to a prosecution speech is not supported by an objective analysis of the summing-up as a whole. For instance:

    (a) Mr Mussenden complained that the judge repeatedly gave examples of evidence incriminating the Appellant. However, all that the judge was essentially doing was listing examples of evidence given by the Appellant's co-Defendants which incriminated him, with appropriate warnings that:

        (i) out-of-court statements by co-accused against each other were inadmissible, and

        (ii) in-court statements by the Appellant's co-accused against him were admissible but should be treated with care;

    (b) Complaint was made about the judge making errors in reviewing some of the facts and in explaining the Appellant's defence. The trial lasted several weeks, started with eight Defendants and was sent to the jury with four Defendants. It is unsurprising if minor slips

occurred. The summation started on 2 May 2015 and concluded on 27 June 2015. At the end of the summation, Mr Mussenden drew certain comparatively minor inaccuracies to the attention of the judge, who recalled the jury and corrected the mistakes complained of by counsel;

(c) Complaint was also made that the judge "pitted" Jefferis against the Appellant and favouring Jefferis over the Appellant. These complaints lacked substance. The Appellant's own case involved seeking to implicate Jefferis, and Jefferis implicated the Appellant. So "pitting" Jefferis against the Appellant was a natural way of explaining the respective Defendants' cases;

(d) Complaint was also made about the supposed failure of the judge to appreciate the importance of the Appellant's case that there was insufficient time for the cannabis to be inserted inside the steel while the shipment was en route from Canada to the port in the United States, as the Prosecution at trial theorised had occurred. As noted above, this limb of the defence was not simply highly speculative, it also ignored the important point that how and when the drugs were concealed in the steel plates did not have to be proved as an essential element of the Crown's case;

(e) It is true that the judge on more than one occasion raised queries about whether certain questions put by counsel in cross-examination were based on the Appellant's instructions. Mr Mussenden fairly complained that the

issue of instructions had not been explored at trial and might not have been understood by the jury. It would have been preferable for the judge to simply point out that the case put by counsel in cross-examination was not supported by any evidence. But as the judge repeatedly reminded the jury that it was up to them to decide what they made of the evidence, no material prejudice flowed from the passing comments of which the Appellant complained in this and other respects;

(f) The Appellant's counsel submitted that the fact that the unrepresented Jefferis in his closing speech was permitted to criticise the Appellant for not giving evidence was a "fatal blow" to a fair trial for the Appellant, even though the judge later correctly directed the jury as to the Appellant's right to silence. In fact it appears that the judge made this point during the closing speech. It is difficult to see how the fact that a co-Defendant whose case involved implicating the Appellant launched a further attack on him in his closing speech can be viewed as a "fatal blow" to the Appellant's case. It would have been obvious to the jury that each of the other Defendants had elected to give evidence when they were not required to do so and that the Appellant was the only one who elected not do so. Greaves J gave the following flawless direction on this issue:

> "*In this case, Mr. Virgil chose not to give any evidence. That he chose to do so is his right. He is not bound to say a single thing in his defence. The prosecution brought him here. It is the prosecution who has to prove its case. He is entitled to require the prosecution to do that, without any answer from him. You must*

> *therefore draw no adverse inference or conclusion against him because he did not testify.*
>
> *And you recall that during the address by Mr. Jefferis I cautioned you about that when he sought to make arguments that there was something wrong with that. It is not wrong. It is a constitutional right that every person in this country has. You cannot draw any adverse inference against him for exercising it.*"

Conclusion

19. Mr Mussenden made valiant efforts to establish that the circumstantial evidence was weak and that the present appeal was to that extent distinguishable from the corresponding evidence considered by this Court in *Lottimore and Hatherley-v-The Queen* [2015] Bda LR 5. However here, as in that case, "[t]*here was a strong circumstantial case against* [the Appellant], *unchallenged by any evidence from* [him]"[4]. The jury was entitled to find that:

    (1) the Appellant directed the importation of the steel plates knowing that they contained a controlled drug (and that that drug was cannabis), and with a view to supplying the cannabis to others; and

    (2) he was acting pursuant to an agreement made with persons not before the Court.

[4] Baker JA at paragraph 41.

20. We were satisfied that the Appellant's convictions on both counts of the Amended Indictment were safe and for these reasons on 11 March 2016 dismissed his appeal against conviction.

Signed

Kawaley, JA

Signed

Baker, P

Signed

Bell, JA