The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 1 of 2008

Between:

BARRY EUGENE RAHMAN

Appellant

-V-

THE QUEEN

Respondent

Before: The Rt. Hon. Justice Zacca, President
The Hon. Justice Nazareth, JA
The Hon. Sir L. Austin Ward, JA

Date of Hearing: 20th November 2008
Date of Judgment: 19th March 2009

JUDGMENT

PRESIDENT:

1. On December 7, 2007, the appellant was convicted by the majority verdict of a jury for the offence of conspiracy to import a controlled drug, diamorphine, contrary to section 4(3) of the Misuse of Drugs Act 1972.

2. On February 8, 2008, the appellant was sentenced to seventeen years imprisonment with time spent in custody to be taken into account. The appellant has now appealed against his conviction and sentence.

3. The evidence before the jury was that on August 28, 2006 a man went to Gun Hill Shipping in New York and asked for a shipping tube in order to ship light bulbs to Bermuda. He later returned with the tube and an airway bill form filled out.

4. The airway bill had the shipper as Kevin Jones of a fictitious address in New York. The consignee was listed as Barry Rohan of the appellant's address at 13 East Shore Road in Somerset. The contact telephone number on the airway bill was 234-0014 which was the telephone number of one Kirk Grant of Dockyard, a friend of the appellant. On Tuesday, August 29, 2006, the box arrived in Bermuda. Narcotics agents inspected the box which turned out to contain a brown powder which was analysed by the government analyst and found to be diamorphine.

5. It was arranged with Mr. Curly, the manager of D.H.L. in Bermuda to make a controlled delivery of the box. Mr. Curly telephoned the number on the airway bill 234-0014 and spoke to a young woman. The next day August 30, he again called the number. He was given a telephone number 234-2820 which he called. This second number was the appellant's home number. Attempts to call 234-2820 were unsuccessful as no one was answering and no message was left.

6. Subsequently a male voice contacted Mr. Curly twice in regard to the package and gave him the number 234-2333 which was the appellant's grandmother's number. There was no evidence as to which telephone number this call came from.

On Friday, September 1, 2006, a male voice called D.H.L. to make arrangements for the package to be delivered that day. The man was able to quote the airway bill number. On the same day the appellant informed his grandmother, who resided at the same address as the appellant, that he was expecting a package and asked her to receive it on his behalf and gave her $40 with respect to the package.

7. The package did not arrive on the Friday nor on the Saturday and the $40 was returned to the appellant by his grandmother. On Tuesday, September 5, 2006, the appellant gave his grandmother $20 and again asked her to receive the package on his behalf. On that same date a man called Mr. Curly enquiring about the package and insisted that it be delivered to the address which was on it. The man's voice appeared to be the same as that of the man who had called on the Friday. Mr. Curly then called 234-2333 and spoke to what appeared to be an elderly person. He confirmed that the package would be delivered that day. He then drove with a member of his staff to 13 East Shore Road in Somerset where the package was delivered to the appellant's grandmother. The narcotics officers who were in plain clothes were on hand and saw the delivery being made. Having entered the house and whilst speaking to the grandmother the appellant entered the premises.

8. The appellant was cautioned and asked if he was expecting a package from D.H.L. The appellant replied "No, not really". He also said that he had asked his grandmother to receive the D.H.L. box on his behalf and that he was accepting it on behalf of his friend Kirk Grant.

9. D.C. Mathurin opened the box and showed the brown powder to the appellant and his grandmother and asked them what they could say about it. The grandmother replied that she knew nothing about it and only signed for it. The appellant nodded his head in a “yes” manner and did not reply. He said that he was surprised. The appellant appeared nervous, his hands and lips shook uncontrollably. The premises were searched. The appellant stated that he had $27,000 in his room. His room was searched and beneath a chest of drawers three bags were found containing a total of $43,000 in cash.

10. The appellant in his defence denied the charge. He said that he was asked to accept the package by Kirk Grant and the request came to him through one of his workers, Edward Richardson. Richardson gave evidence that he had been asked by Kirk Grant and passed on the message to the appellant. The appellant admitted that he had asked his grandmother to receive the package on his behalf on the Sunday. The appellant telephoned Kirk Grant and informed him that the package had not arrived. This was the Sunday before the package was delivered by D.H.L. The appellant also stated that he had no idea of what was in the package and he did not ask Grant as to its contents. He was not concerned as to why Grant wanted the package delivered to him.

11. We have set out the evidence in full because the main ground of appeal argued by Mr. Phipps for the appellant was that the evidence led by the Crown was incapable of supporting the allegation that the appellant was a party to an earlier agreement to import diamorphine. He further submitted that there was nothing in the evidence to show that the appellant knew or had reason to suspect that his name and address were on the package when he arranged for his grandmother to receive it on his behalf. There was also no evidence to show that the appellant knew or even had reason to suspect that the package contained diamorphine.

12. Mr. Phipps also submitted that there was no evidence in the case to prove that the appellant had placed his name and address on the package or that this was done at his request or was authorized by him. He argued that the evidence was inadmissible as proof of the appellant's involvement in the conspiracy charged.

13. Counsel for the Crown relied on the case of ***Fox v R*** [CR Appeal No. 6 of 2001] delivered on November 26, 2001, a decision of the Bermuda Court of Appeal. He submitted that the verdict of the jury was supported by the evidence which was admissible and there was no miscarriage of justice.

14. Mr. Phipps submitted that the facts in Fox's case was substantially different and was decided on the facts of that case. In any event he argued that the proposition laid down in that case was too wide and exclusory.

15. In ***Fox v The Queen*** (supra), Cons JA in delivering the judgment of the Court stated at p.7:

> *"However, we must not be taken to say that a receiver can never be found guilty of importing. There may be cases where particular evidence will justify an inference that in that particular case the receiver was in fact himself also the principal, or one of the principals to the importation. But that is not the present case.*
>
> *We envisage that cases where the Crown will be able to ask the jury to draw that inference will be few and far between. But in the common case where the Crown's case shows no more than that the defendant, either himself or through others picked up, or was about to pick up drugs which had already been unlawfully imported, the Crown may quite properly invite there jury to infer from that alone that the defendant had been party to a conspiracy that the drugs should be so imported. Indeed, in the absence of any satisfactory explanation, it would be strong evidence of the defendant's guilt i.e. if he had not agreed expressly or otherwise to the drugs being imported, why was he picking up the drugs? The picking up of the drugs would not, of course, be an act in furtherance of the conspiracy, as were*

> *the acts of the speed boat crew in Tse Hung-lit. The conspiracy, by then, would of necessity have already run its course. But it would be an act which pointed to the defendant's earlier agreement."*

16. We are satisfied that the facts of this case falls within the reasons for the decision in Fox's case and we are prepared to say that the decision arrived at in that case was correct.

17. Having regard to the evidence presented and the jury's rejection of the defence, we are satisfied that any reasonable jury, properly directed, would have come to the conclusion that the appellant was a party to a conspiracy to bringing drugs into Bermuda.

18. A second ground of appeal argued by Mr. Phipps was that the learned trial judge misdirected the jury by a failure to tell them that the evidence of the appellant's name and address on the package was not capable of supporting an inference that the appellant was a party to the conspiracy charged.

19. We are of the view that this evidence was only a part of the prosecution's case and was evidence which could be considered by the jury in assessing the totality of the evidence in coming to their verdict.

20. Having regard to the totality of the directions to the jury we are satisfied that there has been no miscarriage of justice.

21. A third ground of appeal was to the effect that the evidence as to the appearance of the appellant's name and address on the package was inadmissible as evidence from which to infer that the appellant was a party to the conspiracy. This evidence was admissible as part of the prosecution's case and we therefore found no merit in this ground of appeal.

Sentence

22. Application was made to the Court for leave to appeal against the sentence of 17 years imposed on the appellant.

In passing sentence the learned trial judge said:

> *"The Court finds that the appropriate range of sentence, based on the drug and the value is between eight and twelve years. Ten years the Court finds is appropriate in your case. The up lift required by section 27B of the Misuse of Drugs Act takes the sentence up to fifteen years and the ten additional years that the law imposes for the offence of conspiracy, I accept is not warranted on the argument presented by Mr. Bailey; however, as a person who has a prior conviction, the increase required for an offence of conspiracy cannot be altogether ignored, so, therefore, an additional two years will be imposed, bringing the total sentence of imprisonment, if I can add correctly, to seventeen years."*

23. In Geisha Ann Alomar [2003] L.R. 38 a sentence of 4 ½ years for the offence of importation of 148.3 grams of the controlled drug diamorphine, i.e. heroin, was increased by the Court of Appeal to 8 years. This was on a guilty plea. The Court stated that sentences for such an offence was in the range of 10-12 years.

24. Section 27B of the Misuse of Drugs Act 1922 which was inserted by 2005 26 s 8 and became effective on 4th August 2005, provided:

> *"In sentencing a person convicted for an offence involving a controlled drug prescribed under schedule 5, the Court shall have regard to –*
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> *(a) the street value of the controlled drugs; and*
> *(b) the destructive effect on society of the controlled drugs prescribed under schedule 5 and add an increased sentence of fifty percent to the basic sentence."*

25. We find no error in the way the learned trial judge calculated the sentence imposed. The sentence was an exercise of the trial judge's discretion and we are unable to say that the sentence was manifestly excessive or harsh.

26. For the above reasons the appeal against conviction was dismissed and the conviction affirmed. The application for leave to appeal against the sentence was refused.

Signed

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Zacca, President

Signed

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Nazareth, JA

Signed

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Ward, JA