[2009] CA (Bda) 10 Crim

The Court Of Appeal for Bermuda

Between:

CRIMINAL APPEAL No. 23 of 2007

SIDNEY O'NEIL GIBBONS

-and-

CRIMINAL APPEAL No. 24 of 2007

RONALD O'NEAL BEACH

Appellants

-V-

THE QUEEN

Respondent

Before: **Zacca, President**
Ward, JA
Auld, JA

Date of Hearing: **16 June 2009**
Date of Judgment: **19 June 2009**

Appearances: Mr J Perry, QC and Mr C. Attridge of Juris Law Chambers for Appellant, Gibbons
Mr L Peniston of Peniston Associates for Appellant, Beach
Mr R Welling of the Department of Public Prosecutions for the Respondent

JUDGMENT

Sir Austin Ward

1. On Wednesday, 30th May 2007, a telephonic reservation was made at Aunt Nea's Inn in St. George's Parish in the name of Sidney Gibbons. On the same date two men arrived at the Inn, referred to the reservation and paid $733 of which half was paid by the appellant, Gibbons for the room with bath en suite for the period of three days. The two men were the defendants, Gibbons and Green. They were later joined by a third man, namely, the appellant Beach.

2. On the first of June, 2007 they were present in the hotel suite when the police raided at 7 AM. Gibbons and Beach were in the room section of the suite and Green was in the bath. The three defendants were charged in Count 1 of the indictment dated the 23 July 2007 that they on the first of June 2007 had in their possession a controlled drug, namely, cocaine which was intended for supply. The weight of the cocaine was 28.7 grams with a street value of $9,000.

3. In Count 2 they were charged that on the first of June 2007 they were in possession of the controlled drug, namely, diamorphine, which was intended for supply. The weight of the drug was 12.87 grams with a street value of $9,000.

4. In Count 3 they were charged that on the first of June 2007 they had possession of a controlled drug, namely, cocaine which was to be found in two home-made cigarettes discovered in the bathroom. The amount of the cocaine was 0.1 grams.

5. Finally in Count 4, Beach alone was charged that he had in his possession a controlled drug, namely, diamorphine which was intended for supply. The drug was found during a search at the police station in the tongue of his left sneaker in the form of ten twists weighing 1.76 grams with a street value of $1,500.

6. The case as presented by the prosecution, and as accepted by the jury, was that they were engaged in a joint enterprise to supply controlled drugs to others. All three defendants were convicted; two of them, namely, Beach and Gibbons have appealed.

7. When the police entered the Loquats Room of the Aunt Nea's Inn where the two appellants were, they found a number of items on the floor and on the bed. Green at that time was in the bathroom. The items included small pieces of brown paper, plastic bags, some of which had the corners cut off, paper which can be used in the making of homemade cigarettes, "Cut Right" wax paper, plastic sandwich wraps, two wooden sticks like coffee stirring sticks with traces of cocaine, two pieces of brown paper with traces of white powder and one with traces of plant material, a pair of scissors with traces of powder, a piece of straw—items which led the police to believe that the room was being used for a cutting and bagging drugs' operation.

8. In the bathroom on top of the toilet tank were two homemade cigarettes, one of which was partially burnt, a decorated bowl with

a jewellery box inside and a large pink "Skittles" bag. Green was naked in the bathroom when the police arrived. He tried unsuccessfully to escape through the bathroom window. There was a scuffle in the bathroom between himself and a police officer. After he had dressed himself he was taken back into the bathroom where he moved to the point where the "Skittles" bag was. Later when he was in the main area of the Loquats Room, there dropped from his person behind him a bag containing $4,270 in cash and the pink "Skittles" bag which had been seen in the bathroom and which was subsequently found to contain the cocaine and diamorphine referred to in Counts 1 and 2 respectively.

9. The First Ground of the Perfected Grounds of Appeal for the appellant Gibbons is that he suffered unjustified prejudice such that it rendered his trial unfair in that he was represented by the same counsel who represented the co-defendant Beach. Further, the appellant was denied practical and effective representation. Beach later presented a similar ground of appeal.

10. The appellants, Gibbons and Beach, were represented at the trial by the same counsel, Mr. Woolridge, by their own deliberate choice. At pages three to five of the transcript, the learned trial judge raised the question of representation of the two accused by the same counsel having regard to the statements made to the police by the respective accused. Both appellants, Gibbons and Beach, confirmed that they wished to be represented by the same counsel. The complaint of unfairness by another counsel at this late stage has a hollow ring.

11. It has been argued that the appellants were denied practical and effective representation. Beach in his interview had stated that the

ten twists of diamorphine found in his left sneaker were supplied to him by his co-defendants. But that statement was not admissible against them. However, there was an independent link between the large batch of heroin and that found in the ten twists held by Beach. The evidence also disclosed that the purity of the heroin found in Beach's left sneaker corresponded to the purity of the heroin found in the Loquat's Room at Aunt Nea's Inn. Both batches of the heroin contained the cutting agents or adulterants procaine and quinine. Further it was argued that their cases were inseparably tied to Green's case whose defence was that the controlled drugs and the money had been planted by the police. They were thus tarred by the same brush by running similar defences. Mr. Perry, Counsel for Gibbons on the appeal, has argued with hind sight that the case which should have been presented was that Green was in sole possession of the drugs in Counts 1, 2, and 3. Beach was in possession of the small quantity in Count 4 and Gibbons was not in possession of any drugs at all.

12. With respect to Beach, who on the appeal has been represented by Mr. Peniston, it has been argued that the conduct of his defence by his counsel Woolridge in adopting the defences of the co-accused Green, that the controlled drugs and the money had been planted by the police put him in a far worse position that would otherwise have been the case. Beach in his interview statement admitted that he was in possession of the diamorphine in Count 4 for his own use and that should have been his defence which hopefully would have bolstered his denials in Counts 1, 2 and 3.

13. In Fox v R Bermuda Criminal Appeal No. 19 of 2007, the Court held inter alia in quoting R v Clinton (1993) 97 Cr App Reports 320, RV Thakrar [2001] EWCA Crim. 1096, Boodram V The State

of Trinidad and Tobago [2001] UKPC 20 and R v Day [2003] EWCA 1060 that it could not be said that the conduct of defence Counsel was flagrantly incompetent, that the test of the conviction is the single test of safety, and the Court no longer has to concern itself with intermediate questions such as whether the advocacy has been flagrantly incompetent, and that there must be identifiable errors or irregularities in the trial which themselves rendered the process unfair or unsafe.

14. We have no reason to doubt that Counsel Mr. Woolridge presented a case based on his instructions, to which we have not been privy and in a manner regarded in his judgment to be the most effective way to protect his clients' interests. He tried hard to weaken the prosecution's case by focusing on inconsistencies among the prosecution's witnesses and on the unusual circumstances in which the controlled drugs and the cash were discovered. But the drugs paraphernalia in the Loquat's Room presented an insurmountable hurdle. We are not prepared to say that Counsel's conduct of the case was flagrantly incompetent, still less that it imperilled the safety or reasonableness of the conviction.

15. Ground Two of the Perfected Grounds of Appeal is that the learned judge erred in fact and in law in ruling that there was a case for the appellants to answer there being no proper evidential basis on which a jury, properly directed, could have properly concluded that the appellants were in possession of the drugs in all three counts of the indictment, let alone with intent to supply the drugs in Counts 1 and 2.

16. The two appellants were found in the room at the hotel with a lot of drugs paraphernalia in the presence of controlled drugs, cocaine and diamorphine and a large sum of money. Their presence there demanded an explanation. There was evidence that two of them had booked the room and that they were later visited by a third person. The three people were found in the room with bath attached under suspicious circumstances so that there was the proper evidential basis to demand that the case be answered. Pursuant to Section 27D of the Misuse of Drugs Act 1972 where the controlled drug equals or exceeds 1 gram the person who possessed it shall be presumed to have had possession of it with the intent to supply it. The weight of the cocaine was 28.7 grams and that of the diamorphine, 12.36 grams and 1.76 grams respectively. All three portions were in excess of 1 gram so that the presumption of supply was raised. An attempt has been made to distance Gibbons from Green, who was found in the bathroom, from the drugs paraphernalia in the bedroom, however, there was one hotel room with bath attached and all three defendants were there together in that setting with the drugs paraphernalia and all of them could be called to answer the charges.

17. Ground Three of the Perfected Grounds of Appeal is that the learned judge misdirected the jury in directing them that in certain cases evidence contained in a co-defendant's interview could be admissible against the appellant, if it could be supported by evidence outside the interview. The effect of this direction was inter alia to give substance to the incrimination of the appellant, Gibbons, by Beach in his out-of-court interview. Mr. Perry submitted quoting from Archbold paragraph 4 – 405 and paragraph 15 -368 et seq. that it is a fundamental rule of evidence that statements by one defendant either to the police or others are

not evidence against a co-defendant unless the co-defendant either expressly or by implication adopts the statement and thereby makes it his own.

18. At page 62 of the summation the learned trial judge directed the jury that where one co-accused gave evidence or made a statement which tended to implicate another co-accused, the jury must be cautious and must examine that evidence with particular care bearing in mind that a co-accused, in saying what he did say may have been more concerned in protecting himself than about speaking the truth. He added that the evidence of a co-accused is evidence against the person who has given it only unless the person against whom it is given confirms or adopts it or unless there is some independent evidence which supports it.

19. At page 124 of the summation at line 19 the learned judge said:

> "*You will recall that I have told you that the general rule is that what one co-accused has said about another is evidence against that person who has said it only. It is only evidence against the other co-accused where that other co-accused has accepted or adopted it, or where you find some independent evidence to support it. The rule applies therefore in this case. Whenever and wherever Defendant Gibbons appears to have said something about Mr. Beach and/or Mr. Green, and whenever Mr. Beach or Green, who has said nothing, has said anything about Mr. Gibbons, or appeared to have said anything, and vice-versa, and so on, the rule applies.*"

20. The learned judge could have said simply that nothing that Beach said against Gibbons is evidence against Gibbons. It was not necessary to enunciate what he regarded as the full rule in the circumstances of this case. Nevertheless, in looking at the directions as a whole, the jury could have been left in no doubt that nothing said by Beach was evidence against Gibbons.

21. Ground 4 of the Perfected Grounds of Appeal is that the learned trial judge erred in giving a direction that alleged lies could be probative of guilt. The foundation for the said lies was a challenge by prosecuting counsel which the defendant did not accept and which was met by the retort that the appellant was lying. It is submitted that a direction on lies only arises if there is a proved lie or an accepted lie which in any event must be material and probative of guilt and not simply where there is a challenge by the prosecution which is not accepted.

22. At page 63 line 16 of the summation the trial judge said:

> *"..the prosecution relies on what it says are lies told by the defendant, Gibbons in particular, while he was testifying, as showing that he is guilty of the offence."*

The learned trial judge then gave a form of *Lucas direction* as regards lies. Where there are no proven lies but only suggestions, then the direction is both otiose and confusing.

23. There was a suggestion put to Gibbons that he had lied. Lest the jury should be misled by a false process of reasoning to conclude that any lie, however made, could be used against the maker, it would have been better for the learned judge to explain to the jury

that people lie for a variety of reasons other than because of consciousness of guilt. Thus, although the *Lucas direction* was not strictly necessary, the appellant Gibbons suffered no prejudice by the giving of it.

24. It would have been more helpful if the learned judge had identified the potential lies. But the essential part of the direction is that any lie relied upon must be shown to be because of a guilty conscience. Thus to explain that persons tell lies for a variety of reasons was not to the prejudice of the appellant Gibbons.

25. Ground Five of the Perfected Grounds of Appeal is that the learned judge erred in the direction in respect of the necessary mental element in proof of possession of the prohibited drug intended for supply. Mr. Perry submitted that the learned judge gave a direction in accordance with Section 29 of the Misuse of Drugs Act 1972 when section 29 had no role to play in the appellant's case given that he was denying possession, not that he was in possession and was mistaken as to the nature of that which he possessed. The direction in terms of section 29 had, he suggested, the effect of diluting the prosecution's obligation to prove knowledge and thus possession.

26. At page 68 line 24 et seq. of the summation the learned trial judge directed the jury.

> *"The prosecution must prove that the defendant was in possession, the defendant whose case you are considering was in possession of the drugs in that room during the time of their occupation of that room in the sense that he either had actual control or custody of the drug at the time, or by his*

enabling or assisting or encouraging the other or others, to possess it, and that he knew, or suspected, or had reason to suspect that the commodities were controlled drugs, and that during that time he intended to supply or did or aided or assisted in the supply with the intent to supply."

27. From that direction the jury would have understood that possession is the exercise of dominion or control over the thing possessed and that it has a physical element and a mental element of knowledge. Mr. Perry QC referred to R v Searle [1971] Crim. L.R. 592 where it was held that knowledge of the existence of drugs was not enough to establish joint possession. The question was what was the common intention of the parties? In the instant case the common intention can be inferred from the drugs' paraphernalia on the floor and on the bed in the room occupied by the three defendants.

28. Section 29 of the Misuse of Drugs Act 1972 sets out the defence of knowledge and it states that it shall be a defence for the accused to prove that he neither knew of, nor suspected, nor had reason to suspect, the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.

29. At page 77 line 10 of the summation the learned trial judge set out the defences of each defendant; namely, that the drugs were never in his custody, that he was never in possession of any drugs, and that he had no knowledge of the drugs and he continued at line 14

"..that is the defence they did not know that there were drugs there they did not suspect that there were any drugs and they had no reason to suspect that there were any drugs and they had no intent to supply any drugs in respect of the supply charges."

We have found that the directions given were appropriate in the circumstances and comprehensive and we dismiss this ground of appeal.

30. The Sixth Ground of Appeal is that the learned judge erred in giving a direction in terms of section 27 of the Criminal Code Act 1907 based upon section 27 (1)(a)(b)(c) inter alia.

    1. Without indicating to the jury that the alleged aiding etc. must have been done with the intention to aid in the commission of the offence; and,

    2. When the indictment did not specifically plead the case on that basis the direction was all the more defective because there was evidence that the appellant (Gibbons) had contributed to the payment for the room at Aunt Nea's Inn. It is not without significance that after retirement the jury returned and asked for guidance on section 27—all that the learned judge did was to reprise his earlier direction by simply re-reading the statutory provision.

31. The prosecution's case was one of a joint enterprise. However, the jury had been warned that each defendant had to be treated separately and each count in the indictment likewise had to be

treated separately. Nevertheless, the case for the prosecution was that the three defendants were working in concert and that it was a joint enterprise to possess the controlled drugs with the intention of supplying them.

32. The indictment did not read being concerned together, but it was nonetheless implicit in the charge. As long as they were working together towards a particular end, a direction under section 27 of the Criminal Code, which extends criminal responsibility to any person who is a party to an offence, was appropriate. Whether they were acting together was a question of fact for the jury.
This ground of appeal also fails.

33. Ground Seven of the Perfected Grounds of Appeal is that the learned judge erred in his direction to the jury in respect of the money (lifestyle evidence) as being probative of guilt in the appellant Gibbons') case. It is submitted that the wad of money, save for $30 in the wallet in the drawer beside the bed, was not found in the appellant's possession and there was no evidence that he was in joint possession thereof and that therefore a direction in respect of lifestyle evidence did not arise. In fact it was the Crown's case in cross examination of the appellant that the money was Green's and that he paid for Aunt Nea's Inn and Clearview Guest Apartments. Furthermore, and in any event, if such a direction was appropriate, the learned trial judge ought to have given the direction in accordance with Grant which he failed to do.

34. The direction in Grant [1996] 1Cr. App. R. 73 is that the jury should be directed that any innocent explanation put forward by the accused must be rejected before they can regard the finding of the money as relevant to the offence. Lord Taylor CJ also added at

page 78 b that it is a matter for the jury to decide whether the presence of money, in other circumstances, is indicative of an ongoing trading in drugs, so that the presence of the drugs at the time of the arrest is capable of being construed as possession with intent to supply.

35. In the Loquat's Room of Aunt Nea's Inn the dangerous drugs, Cocaine and diamorphine, were found as well as drugs paraphernalia used in the preparation of drugs for supply and $4270 in cash. The jury could reasonably have found that in all the circumstances there was potent evidence of an ongoing trading in controlled drugs by the three men who were found in the hotel room. The lifestyle evidence was probative of the guilt of the appellants.

36. The Eighth Ground of Appeal is that in all the circumstances the appellant Gibbons' conviction on each count is unreasonable and cannot be supported having regard to the evidence and is contrary to law. The learned judge directed the jury by identifying legal principles which he considered appropriate to the case, some wrongly others inadequately. But he failed to direct the jury by reference to the legal principles as they related to the facts in the appellants' case.

37. This general ground of appeal is not supported by the evidence. The learned trial judge directed the jury properly in most cases. Where he failed to do so, looking at the summation as a whole, such failure cannot be said to be fatal. The verdict of the jury can be supported having regard to the evidence and there has been no miscarriage of justice. The appeals are hereby dismissed.

38. As to sentence with respect to Counts 1 and 2 where there was evidence of trading or preparation for trading in hard drugs by supplying them to others, sentences of imprisonment for 8 years cannot be said to be manifestly excessive bearing in mind the uplift pursuant to section 27D of the Misuse of Drugs Act 1972 as amended. With respect to Count 4 which affects Beach only, it has been argued that the quantity of diamorphine with a street value of $1,500 should not attract a sentence of imprisonment of 8 years and is therefore manifestly excessive. We are persuaded that that argument has some merit and we will vary the sentence on Count 4 by reducing it to a term of imprisonment of three (3) years. The sentences imposed on Counts 1, 2 and 3 are confirmed.

39. The appeals against conviction are dismissed. The sentences on counts 1, 2 and 3 are confirmed. That on Count 4 is varied as stated above.

Signed

Ward, JA

Signed

Zacca, President

Signed

Auld, JA