The Court of Appeal for Bermuda

CRIMINAL APPEALS Nos. 21 & 23 of 2015 & 2 of 2016

Between:

DEVON HEWEY & DUJON REID-ANDERSON

Appellants/Respondents

-v-

THE QUEEN

Respondent/Appellant

Before: **Baker, President**
Bell, JA
Bernard, JA

Appearances: Mrs. Simone Smith-Bean, Smith Bean & Co., for Appellant Hewey
Ms. Arisha Flood, AAF & Associates, for the Appellant Reid-Anderson
Mr. Carrington Mahoney and Ms. Larissa Burgess, Department of Public Prosecutions, for the Crown

Date of Hearing: **16 November 2016**

Date of Judgment: **25 November 2016**

JUDGMENT

Perjury and Intimidation of a Witness – sentence – relevant factors

PRESIDENT

1. On 4 December 2015, Devon Hewey and Dujon Reid-Anderson were convicted of perjury, contrary to s119(1) of the Criminal Code Act 1907. Hewey was also convicted of Corruption of a Witness, contrary to s125(1)(b) of the Code and Fabricating evidence, contrary to s123(b) of the Code. Reid-Anderson was also convicted of a separate offence of Corruption of a Witness and one of Intimidating a Witness contrary to s125A of the Code. They appeal against conviction. There was a further count in the indictment against both appellants of Conspiracy to

Defeat Justice but no verdict was returned on this count as it was treated as an alternative offence to the perjury. There was a third defendant, Hewey's lawyer ("the Lawyer"), but he was acquitted on the direction of the judge at the conclusion of the evidence.

Facts

2. In summary the case against the appellants was that they had caused Lavon Thomas to give false evidence at the retrial of Hewey and a man called Cox, the jury having previously been unable to agree, in which it was alleged that they had attempted to murder Thomas. It is said that, following that trial Cox threatened Thomas' life. The false evidence was that Hewey was not one of the two men on a motorcycle from which shots were fired at Thomas. The shooting occurred on 24 March 2012 when Thomas was out with friends. He managed to escape without being hit. The gun appeared to jam.

3. Hewey was at all material times in custody but in May 2014, at the instigation of Hewey, Reid-Anderson began discussing the case with Thomas in a bid to help his cousin Hewey to "get off the case". Hewey was interested in how Thomas' account might be tailored to assist Hewey's defence. In due course, Reid-Anderson handed Thomas copies of his police statements that Hewey had given him, each with highlighted passages that might assist Hewey's defence. Accompanying the statements was a piece of yellow paper containing written instructions. Sometime in June 2014 Reid-Anderson told Thomas that Hewey would like his phone number to speak to him. Thomas gave his phone number to Hewey, who was in custody at Westgate. Very shortly afterwards Hewey phoned Thomas in a friendly manner to discuss ways in which his statement might be altered and offered him $3,500. This was followed by four or so telephone calls between then and when Thomas gave evidence at the trial.

4. Due to work commitments Thomas was unable to respond to various calls and WhatsApp messages sent to him by Reid-Anderson but on 4 July 2014 he was sent a very threatening voice note on WhatsApp. It is unnecessary to set out the

whole of this voice note but in summary it said that if his cousin went to jail because of Thomas he was going to have a problem: he would not be able to work or party in Somerset. It went on:

> "Yeah, I, I told you come link me for a reason, like, hear me. Cause I read your fucking statement, and my people's told me something to tell you cause our lawyers are gonna be asking you shit in court that I need you to say, and if you don't say it, there is going to be a fucking problem, I'm going to let you know that now, hear me?"

The voice note continued that if he let his cousin go down and the case was "all on you now" he was going to have a serious problem.

5. Shortly afterward Thomas received a second voice note offering to pay him but it also repeated that if he did not assist he was going to expose him to the whole of Somerset pointing out he would help Thomas if it was a member of his family. The voice note ended with a request to meet "so we can sort out this shite" and a question whether he was going to work with him or the police.

6. These voice notes caused Thomas concern for his own safety and he did not take the threats lightly. On each occasion thereafter he always told someone else of his concerns before meeting Reid-Anderson.

7. On 12 September 2014 Reid-Anderson sent Thomas a voice note to arrange a meeting with the Lawyer "and we guys line it up and sort this shit out with the Lawyer, and have our game plan you know." There followed a phone call from the lawyer to Reid-Anderson. But there is no record of the conversation. It was followed by a further voice note from Reid-Anderson to Thomas saying he'd had a call from the Lawyer who wanted to meet up on Sunday:

> "You know what I mean, so we can write down our game plan, like you know?..."

8. A meeting then took place on Sunday 14 September 2014 at West End Primary School at which the Lawyer introduced himself to Thomas as Hewey's lawyer. The evidence demonstrates that prior to this meeting Hewey, through his cousin Reid-

Anderson, had leant on Thomas to give false evidence and indeed had agreed to pay him to do so. The purpose of the meeting was to discuss in detail the questions Thomas was likely to be asked when he gave evidence and the answers he would give to them. The Lawyer secretly recorded the meeting and we have read a transcript.

9. After the meeting, and on the same day, the Lawyer made two calls to Westgate Correctional Facility and about half an hour later Hewey sent a text message to the lawyer:

> "Its Hewey checking on how you made out. I did not want to talk on de jail phone."

10. On 20 September 2014 Hewey spoke to Thomas for over 11 minutes. There is no record of the content of this conversation but Thomas' evidence was that this and two subsequent calls were to ensure he "stayed strong and stuck to his story."

11. The retrial of Hewey and Cox began on 22 September 2014 and Thomas gave evidence the following day. The critical aspect of his evidence was that Hewey was not one of the persons that he saw on the bike. He gave other evidence to fortify this conclusion.

12. Later that day Reid-Anderson sent a text message to the Lawyer which said:

> "I just wanna see how we looking."

The Lawyer replied:

> "So far so good bra."

13. On 3 November 2014 Hewey and Cox were found not guilty of the shooting on 24 March 2012.

Hewey's Grounds of Appeal

14. Mrs. Smith-Bean on behalf of Hewey sought to advance the following grounds of appeal:

1. That there was no case to answer on the perjury charge and it should have been withdrawn from the jury at the close of the prosecution's case;
2. That the judge erred in her direction to the jury on corroboration in respect of the perjury charge;
3. That the case against Hewey should have been stopped when the Lawyer was discharged at the close of the defence case; and
4. That the appellant was prejudiced by the trial judge's behaviour toward the appellant's counsel when the judge continued to interrupt and give unnecessary objections to counsel throughout the entire case. The learned judge adopted a dictatorial attitude and did not listen to counsel or allow counsel to fully ventilate the appellant's case. The conduct of the judge fell below the standard of a trier of fact prejudicing the accused and the outcome of the trial.

15. Neither of grounds 3 and 4 was in the original grounds of appeal and leave to amend was required to add them. Having heard argument we refused such leave. As to ground 3, the Lawyer was found not guilty by the jury on a very specific ground, see *R v Worrell* Criminal Appeal No 19 of 2015 relating to the Barristers' Code of Professional Conduct 1981. This had no relevance to the case against Hewey, which was a very strong one.

16. Turning to ground 4 this is a very serious allegation against the judge. Were there any substance in it we would have expected it to have been in the original grounds of appeal as Mrs. Smith-Bean was counsel representing Hewey at the trial. She would have been very familiar with what happened at the trial when, shortly thereafter, the grounds of appeal were prepared. This ground did not even appear in the amended notice of appeal in August 2016; it eventually surfaced in the re-amended grounds of appeal dated 21 September 2016.

17. In her written submissions of 17 October 2016, Mrs. Smith-Bean provided 16 references to sections in the transcript relied on in support of this ground. We asked her in argument to refer us to the one or ones that most strongly supported this ground of appeal but she was unable to do so, taking us instead chronologically though each one. None of these transcript references either individually or collectively remotely supports this ground of appeal. A judge has to keep control of the proceedings and make sure counsel stick to the point, are not repetitive or raise irrelevant matters. A good example of the problems the judge faced can be seen in Mrs. Smith-Bean's cross-examination of D.C. Donawa where the Judge had to reprimand Counsel in the presence of the Jury (p. 196). There is nothing in this ground and we refused leave to appeal on it.

18. As to the remaining grounds, on Ground 1 the starting point is that the charge against Hewey was counselling or procuring Thomas to give false evidence that Hewey was not a person on the bike from which shots were fired at him. The case against Hewey depended essentially on whether the jury believed Thomas. Hewey was, of course, physically distant from Thomas in that he was incarcerated at Westgate. However he had key contact with Thomas first in the phone call when he offered Thomas $3,500 and second in telephone calls in September to ensure he stayed strong and stuck to his story. Also there was Hewey's text message to the Lawyer asking how the meeting at the school went and not wanting to talk on the prison phone.

19. The thrust of Mrs. Smith-Bean's submission was that there was no evidence to go to the jury that Thomas' evidence was false. He was doing no more than sticking to this original statement which in no way implicated Hewey. This in my judgment is demonstrably incorrect. Thomas' statements were sent from Hewey via Reid-Anderson to Thomas highlighting passages that might be utilised to assist Hewey's defence together with the piece of yellow paper attached with Hewey's written instructions. Thereafter Hewey spoke to Thomas about changing his statements and giving ideas about the changes that could be made. Although contact in person was between Reid-Anderson and Thomas because Hewey was

in custody, there was clear evidence that Hewey was directing operations overall and maintaining a close interest in what was happening. When Thomas eventually came to give his evidence it was strikingly similar to what was on the yellow piece of paper. He was positive that Hewey was not on the bike and gave fabricated reasons in support of this. In his original statement he had given quite detailed descriptions of the men on the bike but said he had never seen either of them before and would not be able to identify them if he was to see them again. Put shortly, Thomas' evidence had changed from simple non-identification of Hewey to positive evidence that it could not have been him with reasons for his conclusion. As Mr. Mahoney for the Crown put it, his evidence was not the same. In short Hewey procured materially different evidence from him. There is nothing in this ground of appeal.

20. Next it is submitted that the legal requirements for corroboration on a charge of perjury was not met. We dealt with this point in our judgment in *R v Worrell* at paras 49 and 50. Although what the Court said in that judgment was not necessary for the decision we see no need to depart from it in the present appeal. Mrs. Smith-Bean submits that Ms. Donawa was not independent and therefore did not qualify to provide the necessary corroboration. She cross-examined her at length but there was no issue or evidence at the trial that her evidence was tainted. She was not the case officer in either the attempted murder or the present case and it was never suggested her evidence could not be believed. The contention that she could not provide corroboration for evidence of perjury fails.

Reid Anderson's Grounds

21. Ms. Flood on behalf of Reid-Anderson sought to advance five grounds of appeal. These were:

    1. Whether there was a wrongful admission of evidence/wrongful exclusion of evidence regarding the voice notes;

2. Whether there was a serious and material non-disclosure on the part of the Crown regarding the phone of Lavon Thomas;
3. Whether there was misconduct on the part of the police in failing to extract the data and/or failing to request assistance to extract the data from the phone of Lavon Thomas, in the light of the fact that the police were provided with the security code by Mr. Thomas;
4. Whether the judge erred in failing to accept the submission of no case to answer of the appellant at the close of both the prosecution and the defence cases;
5. Whether the conviction for perjury was debarred based on the double jeopardy rule that the prosecution was retrying the original charge based on the charge of perjury.

22. The first three grounds of appeal all related to the issue about the voice notes. It was Ms. Flood's submission that the voice notes should not have been admitted in evidence without the voice note responses of Thomas and indeed the whole picture that would emerge from examination of his phone. The voice notes put in evidence without the data from Thomas' phone were not reliable. Furthermore, their prejudicial effect outweighed their probative value.

23. The voice notes were plainly relevant to an issue in the case. They were accepted by Reid-Anderson as his and he also had the opportunity of speaking to any other messages that he may have sent to Thomas that he felt were relevant to issues in the trial. Any communication between the two men could have been put to Thomas. The voice notes were in fact sent by Thomas by email to DI Redfern who had them copied to a CD which was adduced in evidence. There were issues as to whether anything could, in the circumstances, be downloaded from Thomas' phone. On the assumption for present purposes that it could, I am unpersuaded that the defence application amounted to any more than a fishing

expedition. Ms. Flood relied on *T v R* [2012] EWCA Crim 2358, but that was a very different case to the present one and involved nondisclosure by a defendant and his failure to comply with the Criminal Procedure Rules. The present case involves a witness. The Crown was not in possession of material that was potentially detrimental to the Crown's case or of assistance to the defence and was not under any duty to make further speculative investigations. Putting matters at their highest in favour of the appellant the judge had a discretion. The defence was not able to give any reasons why they required additional information from Thomas' mobile phone other than they were entitled to know what was on it. That is not so and the judge was fully entitled to refuse the application.

24. This appellant's third ground adds nothing to his first and second.

25. As to the fourth ground, the Crown's case against Reid-Anderson depended largely on the evidence of Thomas. There was more than ample evidence to leave to the jury both before and after the defence case.

26. We found it difficult to follow the fifth ground of appeal. The trial was not concerned with whether Hewey was on the bike. The issue was whether Hewey, and in particular in relation to Reid-Anderson's ground of appeal, he counselled or procured Thomas to commit perjury. The factual evidence was directed to Reid-Anderson's conduct leading up to the trial whether he was trying to cause Thomas to give evidence that is false. There is in my judgment no substance in this ground.

Sentence

27. The Crown seeks leave to appeal against the total sentence imposed on Hewey of 6 years' imprisonment and that imposed on Reid-Anderson of 3 years' imprisonment on the ground that the sentences are manifestly inadequate. Leave was refused by the judge but we grant leave.

28. In Hewey's case the sentence was comprised of 6 years for the three offences to run concurrently but consecutively to his eligibility for parole in respect of a separate life sentence for pre-meditated murder. In Reid-Anderson's case the sentence was 3 years on each count concurrently.

29. The learned judge rightly observed that the maximum term for each of the three offences is 10 years' imprisonment. She also rightly observed that the offences are serious because they strike at the foundation of the criminal justice system. She might have added that this is of particular gravity in a small and close community such as Bermuda. It was an aggravating factor that Thomas was selected because he was vulnerable.

30. The judge concluded that Hewey was the instigator of the offences and bore the greater measure of responsibility. She heard the evidence at the trial but we doubt whether his greater measure of responsibility justified a sentence of half the length for Reid-Anderson who showed himself more than willing to do Hewey's bidding. The judge also reduced the sentence on Reid-Anderson from 4 years to 3 years because he was effectively of previous good character and a first time offender. In our view previous good character is not a mitigating circumstance in offences of this nature which are deliberately targeted at the heart of the criminal justice system and involve threats and inducements of the kind made to Thomas.

31. We have been referred to a number of authorities. None has been of great assistance because each case in this area depends very much on its own particular facts and, fortunately, there has been no similar case in Bermuda. The nature of the case in this small community is such that deterrent sentences are required. The prosecution submitted that the range was 7 to 8 years. The relevant features to be taken into account in this case in our view are:

    - The youth and vulnerability of Thomas
    - The period over which the offences were committed and their persistence

- The degree of planning
- The serious nature of the trial in which the false evidence was given
- The considerable significance of the false evidence to the outcome of the trial
- The involvement of more than one defendant and an attorney.

32. In our judgment the appropriate sentence for Hewey would have been one of 7 years' imprisonment. We think the sentence of 6 years was on the low side but not so low as to be regarded as manifestly inadequate. On the other hand we think the sentence of 3 years in the case of Reid-Anderson was far too low and did not adequately reflect the features we have set out above or the need for deterrent sentence for offences of this kind.

33. Had a sentence of 7 years been imposed on Hewey we would have expected a sentence of 6 years for Reid-Anderson to reflect that he was not the instigator, albeit an enthusiastic participant. Bearing in mind the sentence for Hewey is to remain at 6 years we increase the sentence for Reid-Anderson to one of 5 years so as to continue to reflect the difference in responsibility. The sentences will remain as concurrent on each count.

Baker, P

Bell, JA

Bernard, JA