# In The Supreme Court of Bermuda

## APPELLATE JURISDICTION

## 2016: 120

BILLY ODOCH

Appellant

-v-

THE QUEEN

Respondent

## JUDGMENT

(in Court)[1]

*Appeal against conviction and sentence-possession of false instrument and obtaining passport by deception- equivocal plea-fear deportation-defence of duress-Criminal Code section 39-custodial sentence-credit for time in custody prior to sentence*

Date of hearing: May 11, 2016
Date of Reasons: June 7, 2016

Mr Kamal Worrell, Lion Chambers, for the Appellant
Mr Alan Richards, Office of the Director of Public Prosecutions, for the Respondent

**Introductory**

1. '*Nobody Knows My Name*' is a book title which the present case inevitably brings to mind. When the Appellant initially appeared in Court, his identity was unknown. By an Information dated July 29, 2015, he was charged under one name (Watson Ogon) with two aliases earning a mention (Alfred Thompson and William Gates). The six

[1] The present Judgment was circulated to counsel without a hearing.

offences all related to two false passports, one a UKBOTC passport and the other a Bermuda passport. On October 14, 2015, in the Magistrates' Court (Wor. Archibald Warner), he pleaded guilty to possession of a false instrument contrary to section 372(1) of the Criminal Code (in relation to the UKBOTC passport) and obtaining the Bermuda passport by deception contrary to section 345 of the Criminal Code, Counts 1 and 5, respectively. He was sentenced to two years imprisonment concurrently on each count, with no credit given for time spent in custody before sentence.

2. The Appellant appeals under a third name which he claimed as his true name when he last appeared before the Magistrates' Court (although three aliases are still also mentioned in the title of the appeal). However, according to British data records apparently placed before the Magistrates' Court[2] his real name is believed to be Watson Ogon (against which name six criminal convictions are registered); the name most recently used by the Appellant is merely one of 23 aliases which he has used in the past. It is not disputed that he is truly a Ugandan native and national. By Notice of Appeal dated October 18, 2015, and while still represented by Mr Mark Daniels, he appealed against his sentence. When that appeal was listed for hearing on April 15, 2016, he appeared represented by fresh counsel Mr Worrell, he sought an adjournment in order to:

    (a) file an application with a view to appealing his conviction; and

    (b) enable the Court to supplement the Record with the Learned Magistrate's sentencing remarks.

3. On April 26, 2016, the Appellant swore and filed an Affidavit in support of his application for an extension of time within which to appeal his conviction. That application and his appeal against conviction and sentence were heard together on May 11, 2016. Mr Richards for personal reasons was unable to fully respond to the Appellant's submissions. I afforded him time to file Written Submissions instead.

**Application for extension of time/appeal against conviction**

4. Mr Richards did not vigorously oppose the extension of time application, preferring to contest the appeal against conviction its merits. I accordingly grant the extension sought.

5. The Appellant complains that that the Learned Magistrate ought to have regarded the pleas entered as equivocal because the mitigation advanced disclosed the defence of extraordinary emergency under section 39 of the Criminal Code. Mr Worrell

[2] Appeal Record, pages 35-37.

submitted that this was a statutory counterpart to the common law defence of duress. Reliance was placed on the following submissions made on the Appellant's behalf in the Magistrates' Court:

> "*Because of fear of deportation to Uganda and its consequences, he acquired a Bermuda passport and then used same to get a UK passport….Fearing deportation from UK in 2009 and arranged to acquire a UK passport…Having arrived in Bermuda on 22nd December 2013. There he was simply remaining in Bermuda trying to figure out his intend [sic] to immediate status possibly his refugee or asylum status.*"

6. Mr Worrell relied upon four authorities:

   (1) *Archbold 2014* paragraph 17-130: that paragraph opens by citing a passage from the judgment from Simon Brown J in *R-v-Martin*, 88 Cr. App. R. 343(at 345-346):

> "*First, English law does, in extreme circumstances, recognise a defence of necessity. Most commonly this defence arises as duress, that is pressure upon the accused's will from the wrongful threats or violence of another. Equally however it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called 'duress of circumstances'. Secondly, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury. Third, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions: first, was the accused, or may he have been impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result? Second, if so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted. If the answer to both those questions was yes, then the jury would acquit: the defence of necessity would have been established*";

(2) *R-v-Martin*, 88 Cr. App. R. 343 itself, where the judge was held to have wrongly ruled before the plea was entered that the defence of duress was unavailable;

(3) *R-v-South Sefton Justices, ex parte Rabaca* (1986) The Times LR February 20th, 1986: "*The justices failed to detect in the mitigation material which showed the inappropriateness of the plea to the whole charge and did not consider whether to exercise their discretion to invite a change of plea*";

(4) *Daniels-v-R* [2006] Bda LR 78: in this case the accused in interview claimed that he had purchased a firearm to prevent it being sold to a young boy and intended to hand it in to the Police. Leading counsel at trial applied to vacate the plea on the grounds that he had not appreciated the Bermudian equivalent of the common law defence of duress. As trial judge, I refused leave. The Court of Appeal held that I ought to have permitted the plea to be vacated. Mantell JA stated (at pages 3-4):

> "*13. Section 39 of the 1907 Act reads as follows:—*
>
> > *Extraordinary emergencies*
> >
> > *39 Subject to the express provisions of this Act relating to acts done or omissions made upon compulsion or provocation or in self-defence, a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary powers of self-control could not reasonably be expected to act otherwise*
>
> *14. It is in the same terms as provisions in the criminal codes of Queensland and Western Australia. In Queensland the parallel provision is Section 25 of the Criminal Code said by the Chief Justice at the time of drafting to give "effect to the principle that no man is expected (for the purposes of the criminal law, at the all events) to be*

*wiser or better than all mankind. It is conceived that it is a rule of the common law, as it undoubtedly is a rule upon which any jury would desire to act." In the Western Australian case of Dunjey v. Cross [2002] WASCA 14 Miller, J cited those words with approval and observed that the code seemed to reflect the common law defence of necessity. If that be the case, as we believe it is, and its applies equally to Section 39, as we believe it does, then it would seem to this Court that on the basis of his interview as expanded by his instructions and, if not before, as confirmed by his evidence the Appellant did have a defence under Section 39 that he was entitled to run and have summed up to the Jury. Accordingly, we are of the opinion that there did come a stage when the Appellant should have been permitted to vacate his plea within the undoubted discretion of the Judge even if that was to lead to a re-trial. Indeed, though it was not argued, we incline to the view that the plea of guilty was equivocal in that if the Appellants account had been included in a written basis of plea or advanced in mitigation without the intervention of a trial it would be the conventional practice to treat the plea as such. (see Reg v. Durham Quarter Sessions, Ex parte Virgo [1952] 2 QB 1 and S v Recorder of Manchester [1971] AC 481 15 .)*"

7. Mr Richards rightly submitted that the authorities governing setting aside an equivocal plea on appeal demonstrated that the only relevant question was whether or not the Magistrates' Court ought to have considered inviting the Appellant to change his plea because what was advanced in mitigation made it clear that the plea was equivocal: *R-v-Marylebone Justices, ex parte Westminster* [1971] 1 WLR 567; *R-v-Rochdale Justices ex p Allwork* 73 Cr. App. R. 319[3]. I agree that the present case,

[3] I have accordingly ignored as extraneous the April 2016 Uganda newspaper article and the Appellant's own letter which were exhibited to his Affidavit.

unlike *Daniels* and *Martin*, was not one where an appellant had sought to pursue a defence but was denied by a ruling of the chance to do so. Most significantly Crown Counsel argued that:

(a) the defence of duress involved considerations extraneous to the ingredients of the offences charged;

(b) in paragraph 13 of the Respondent's Written Submissions, it was submitted that a fear of deportation from the UK to Uganda in 2009 prompted the Appellant to obtain a false passport in 2013, the same year using that false passport the Appellant returned to Uganda twice. As the Appellant's extract from *Archbold 2014* (paragraph 17-131) stated in relation to the common law defence of necessity:

> "*(i) there must be an objectively ascertainable extraneous influence, (ii) the defence is confined to cases where there is an imminent danger of physical injury, rather than continuing pain, and (iii) the defence required imminence and immediacy, whereas the conduct under consideration involved a deliberately considered course of action over a substantial period of time, involving continuous or regular breaches of the law* (emphasis added)";

(c) taking into account the fact that pleas were entered on the fourth occasion that the Appellant had appeared in court with counsel together with all the other relevant surrounding circumstances, there was no reason for the Learned Senior Magistrate to consider the plea was equivocal.

8. I am bound to find that there was nothing in the mitigation advanced in the Magistrates' Court, which made the plea equivocal. There was no inconsistency between asserting a generalised fear of deportation and admitting to unlawfully acquiring two passports. Most crucially, there was no hint in the mitigation of a

"*sudden or extraordinary emergency that an ordinary person possessing ordinary powers of self-control could not reasonably be expected to act otherwise"* (Criminal Code, section 39). As the Lord Chief Justice opined in *R-v-Rochdale Justices ex p Allwork* 73 Cr. App. R. 319 (at 323) in a passage upon which Mr Richards aptly relied:

> "*The fact that the defendant has subsequently thought better of the plea, or has in some way changed his mind, is not sufficient on its own. It must be apparent to the justices that the defendant is saying 'I am guilty but': for instance, I plead guilty to stealing, but I thought the article was mine,' that type of evidence. If there is no such evidence, then that is the end of the matter.*"

9. Mr Worrell came close to persuading me that the facts in *Daniels -v-R* [2006] Bda LR 78 were closely aligned with the facts here so that merely mentioning facts capable of supporting a defence of duress under section 39 in mitigation might be enough. However, the crucial difference between the facts in *Daniels* and the facts here was that the requirements of imminence (to use the language used in the persuasive English authorities) or the need for a "*sudden or extraordinary emergency*" (to use the governing Bermudian statutory language) was present in that case, and missing here. Moreover the Court of Appeal's 'finding' that the plea in *Daniels* was "equivocal" was strictly *obiter*, with Mantell J admitting that this point "*was not argued*".

10. Further and in any event, that *obiter* view was, in any event, clearly influenced by an unusual constellation of facts not present here:

    (1) Leading Counsel from England admitted that he had not considered the defence under section 39 of the Criminal Code when advising the appellant in that case to plead guilty; and (more critically still)

    (2) the defence was explicitly supported by statements made by the appellant to the Police after his arrest which, even if improbable, on their face potentially supported the crucial requirement that there be a "*sudden or extraordinary emergency*".

11. In his reply submissions, Mr Worrell was unable to improve the force of his argument that the material before the Magistrates' Court ought to have caused the Learned Magistrate to regard the plea as equivocal. However he did make the sound submission that the words of section 39 ("*sudden or extraordinary emergency*") mean that immediacy is not an invariable requirement. A circumstance which is "*extraordinary*" but not "*sudden*" potentially qualifies. There was in any event

nothing "extraordinary" about the fear of deportation. This fear is, for far too many persons who have found safe but temporary havens away from troubled lands, an unhappily common occurrence at the present time.

12. However, it is important to keep in mind that what is under present consideration is not whether a defence which has been raised is arguable but whether the mere mention of a generalised fear of deportation in mitigation made the relevant pleas equivocal. In my judgment the mere mention of such fear did not have that effect.

**Disposition of appeal against conviction**

13. The appeal against conviction is accordingly dismissed.

**Disposition of appeal against sentence**

14. The only arguable complaint about the sentences imposed which Mr Worrell advanced was that time spent in custody ought to have been taken into account. No written or oral reasons were given by the then Learned Senior Magistrate for departing from what Mr Richards, when pressed by the Court, conceded was the usual rule of imposing a sentence which gives credit for time spent in custody.

15. The appeal against sentence is accordingly allowed to this very limited extent. The sentences of two years imprisonment are confirmed but the Order that time should start running from the date of sentence (October 14, 2015) is set aside and substituted with an Order that time spent in custody shall be taken into account.

Dated this 7th day of June 2016 _____
IAN RC KAWALEY CJ