In The Supreme Court of Bermuda

APPELLATE JURISDICTION
CRIMINAL APPEAL 2012: NO. 39

SHARON SMITH
Appellant

-v-

THE QUEEN
Respondent

EX TEMPORE J U D G M E N T
(In Court)

Date of hearing: April 19, 2013

Mr Kamal Worrell, Lions Chambers, for the Appellant
Ms Larissa R. Burgess, Office of the Director of Public Prosecutions, for the Respondent

Introductory

1. The Appellant appeals against her conviction before the Magistrates' Court (Worshipful Khamisi Tokunbo) on July 26, 2012 for offences of importing and possessing with intent to supply a controlled drug contrary to the Misuse of Drugs Act 1972.

2. The primary ground was that the Learned Magistrate failed to give an adequate statement with respect to his consideration of the Appellant's good character. The supplementary ground was the contention that, taking that defect into account and weighing up all the evidence the conviction could not be supported.

3. The third complaint was that the Appellant was not able with reasonable diligence to obtain documents capable of supporting her defence and on that basis the Appellant applied to this Court for fresh evidence to be admitted pursuant to section 16(2)(d) of the Criminal Appeal Act 1952. It was submitted that this evidence would contradict the Crown's theory as to the circumstantial evidence of the Appellant's knowledge of a controlled substance being in her possession.

Findings: the good character 'direction' issue

4. The issue of the good character direction was raised by Mr. Worrell in a way which this Court has not had to consider before. Before proceeding to consider the law, it is helpful to summarise the Prosecution case and the relevant portions of the Judgment of the Learned Magistrate dealing with the good character issue.

5. The Prosecution case was that the Appellant arrived at the LF Wade International Airport and when searched in Customs was found to have in her possession a gift bag containing bars of soap which, when cut open, revealed approximately $50,000 worth of cannabis resin. The items in question appeared to be concealed inside a laundry bag in a suitcase which the Appellant was carrying. When asked initially whether she was bringing any gifts for anybody, she said "no". The evidence about how she responded and her demeanour during the search was somewhat inconsistent in that only one officer suggested that her demeanour was consistent with guilt while the other Customs Officers simply indicated that she was calm and cooperative throughout. The Appellant was interviewed after her arrest and gave an account of how she came to be in possession of the illicit material which might be said to beggar belief in a number of respects.

6. Firstly it is common ground, I think, that she was for some years living in Ethiopia and that she travelled to London at the expense of a man named Sean[1] who sent her money in Ethiopia to assist her travel. She arrived in London heavily pregnant and, according to her, shortly thereafter made the acquaintance of another man named Sean (whom she described in very general terms) who befriended her. Having learned that she was planning to return to Bermuda, he requested her to take the gift package to give to unidentified friends in Bermuda. The way in which she explained the people to whom she was to deliver the items was not only vague but found by the Learned Magistrate to be inconsistent with her evidence at trial. Because when she gave her evidence at trial, despite having given fairly fulsome question and answer responses in interview prior to being charged, she testified for the first time that the recipients of the gifts were in fact at the Airport, waiting for her arrival. They had supposedly been given a picture to identify her when she came out of the Airport.

[1] The Appellant only named this man after being shown documentary evidence of his sending her money in Ethiopia. She initially claimed she could not recall the name of the man who met her upon arrival in London and first assigned the name 'Sean' to the man whom she subsequently happened to meet in a coffee shop in North London.

7. The way in which the good character issue was raised by the Defence appears to have been somewhat understated. The Record shows that in answer to counsel the Appellant indicated that she had never been in trouble with the Police before. That by necessary implication suggested that she was of good character. But good character does not appear to have been at the forefront of the Defence case, which instead appears to have been focused on the general question of her lack of knowledge and seeking to raise a reasonable doubt about the Prosecution case.

8. The Learned Magistrate did not fail to consider the good character issue. Nor did he fail to mention it. What he said was this at page 4 of his Judgment:

> "*Notwithstanding the evidence that the Defendant was a fully cooperative suspect with Customs and Police, answered all questions, signed exhibits and documents when requested and testified that she has never been in trouble with the Police, I did not find her to be an entirely credible witness.*" [emphasis added]

9. Mr. Worrell's criticism of this Judgment was a very well defined one. He took the Court to authorities which demonstrated that in fact the Bermuda Court of Appeal in *Formanchuk-R* [2004] Bda LR 24 has indicated that there are in fact two elements of a good character direction which must be given to a jury. The first limb of the good character direction is that good character should be taken into account when assessing credibility. The second limb is that good character should be taken into account when assessing whether the defendant in question is likely to have a propensity to commit the offence in question. The main difficulty that I had from the outset with Mr. Worrell's submission is that we are here not concerned with a jury direction but with a judgment in the Magistrates' Court.

10. Ms. Burgess in reply referred the Court to two recent Judgments which dealt with the way a Magistrate should deal with the good character issue. The earlier one is the case of *Joshua Crockwell-v- Fiona Miller* [2012] SC (Bda) 47 App (7 September 2012). In that case I concluded in paragraph 25 of my Judgment as follows:

> "*Further, the requirements of section 21 of the Summary Jurisdiction Act 1930 that every judgment "shall contain the point or points for determination, the decision thereon and the reasons for decision" were amply met in all the circumstances of the present case. The Appellant's submission to the contrary, based on the requirement that a judge expressly direct a jury on good character, is rejected: this was a trial before a legally qualified judge alone. Bearing in mind the Appellant's relative youth, the narrow ambit of his*

> *defence and the fact that this type of offence is often committed by persons of previous good character, it was not essential that express mention be made in the Judgment that good character had been taken into account in assessing the credibility of the Appellant.*" [emphasis added]

11. I made similar observations in paragraph 13 of my Judgment in *Brangman-v-Lyndon Raynor* [2012] SC (Bda) App (29 October, 2012) where I said:

> "*The Learned Magistrate clearly took into account the Appellant's previous good character but simply disbelieved him. There is no legal requirement for a jury-style direction on good character to be set out in a judgment delivered by a legally qualified Magistrate. This ground of appeal is also unmeritorious.*" [emphasis added]

12. The absence (in the present case) of any explicit reference to the second limb of the good character direction, namely the propensity issue, was responded to by Ms. Burgess in this way. She submitted that where propensity was not an issue of particular relevance there could be no legal requirement for the Magistrate to make express finding in relation to that issue. Mr. Worrell in reply sought to persuade the Court to have regard to the increased sentencing powers conferred on the Magistrates' Court since in or about 2005. He invited the Court, in effect, to apply a heightened level of scrutiny to the reasons that are given in Magistrates' Court.

13. In my judgment, and it may well be that the Court of Appeal may take a different view, where an issue such as propensity is not positively raised by the Defence it is not properly an issue which falls for determination for the purposes of section 21 of the Summary Jurisdiction Act 1930[2]. That section it seems to me is not intended to require Magistrates, no matter how great their sentencing powers may be, to deal with each and every issue, no matter how important, in a comprehensive way. The main function of the requirement that the issues for determination and the reasons for decision be set out is to enable a defendant to know that the key issues have been considered and to understand the reasons why a decision has been made in a particular way in relation to him.

14. In this case, it seems to me, the complaint about the way in which the Learned Magistrate dealt with the good character issue is more technical than substantive and in these circumstances I find that he has not erred in law and I reject this ground of appeal.

[2] There may, of course, be exceptional circumstances where a defendant omits to raise such an issue when its importance is so obvious that the Court's failure to expressly consider the point may be fatal.

Findings: was the decision against the weight of the evidence?

15. The second ground of appeal was the ground that, in effect, the decision was against the weight of the evidence. That ground was, on its face[3], not a seriously arguable ground of appeal. The cases where this Court could disturb a finding of guilt on the grounds that it was not open to the Magistrate to convict will generally be cases where a no case submission is made and held by this Court to have been wrongly rejected. In this case there was, in my view, substantial evidence supporting the Appellant's guilt. And I remain of that view notwithstanding the somewhat surprising view reached by the Court of Appeal to the contrary in the *Formanchuk* case[4].

Findings: should the conviction be set aside on the grounds of fresh evidence admitted on appeal?

16. The final ground of appeal related to the issue of the failure of the Prosecution to adduce evidence which could have been of assistance at trial. This ground of appeal fails because based on all the material before the Court the Appellant could with reasonable diligence have obtained the relevant evidence before the conclusion of her trial.

17. The way the application was framed, the issue to which the documents relate only became clear when the Appellant was cross-examined at trial. But in reality, it seems to me, this issue was firstly a marginal issue. Namely did she plan to stay in the United Kingdom upon her return from Ethiopia, or did she plan to come straight to Bermuda carrying drugs that she had brought from Ethiopia according to one theory of the case which was advanced by the Prosecution at trial. The Appellant had legal representation from around February 2012 and the trial took place in July. She was asked questions about her intentions when leaving Ethiopia and she did give answers about her obtaining financial assistance for returning to Bermuda. The documents she complains she did not have access to because they were taken from her upon her arrest merely confirmed the truth of some of her assertions made in interview. But these assertions were in no way central to her defence. If they really were of great significance it is difficult to see why she would not have instructed her lawyers to contact Hackney Council and obtain confirmation of the support that she was seeking and the attempts that she made upon arrival in the United Kingdom from Ethiopia to settle there.

18. And so that ground of appeal must also be rejected.

[3] And unsupported by any material misdirection on the law or facts.
[4] In *Formanchuk* the Court of Appeal held that the evidence was "*not overwhelming*" in the distinguishable context of declining to order a retrial for an appellant who had already served two years in custody.

Alternative findings: no substantial miscarriage of justice

19. Even if I had found that there had been some technical error of law with respect to the good character direction, I would nevertheless have dismissed the appeal on the grounds that no substantial miscarriage of justice occurred.

20. This was a case where the Learned Magistrate gave a Judgment which ran to some 4 ½ pages and dealt very clearly with all the principal issues. Mr. Worrell did also, it is true, very skilfully point to a number of minor faults which could be found with the judgment.

21. The Learned Magistrate, perhaps, did not mention certain inconsistencies between the Prosecution witnesses. But in my judgment, looking at the evidence as a whole, those inconsistencies were not material and it was open to him to disregard them. There is also a suggestion that the preliminary finding that the Learned Magistrate made about the Defendant having other luggage which was empty is not in fact supported by the evidence. But the real incriminating factor which he clearly placed weight on was not that there were other empty bags, but the way in which the gifts were stored which seemed, on any common sense view, to be an unusual way to pack gifts which were being sent for somebody's wedding[5].

Conclusion

22. And so for all of those reasons, this appeal must be dismissed.

Dated this 19th day of April, 2013 _____
IAN RC KAWALEY CJ

[5] The gifts were packed underneath soiled clothes in a laundry bag within a larger bag.