Neutral Citation Number: [2021] CA (Bda) 18 Crim

Case No: Crim/2021/004

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
THE HON. MR ACTING JUSTICE WOLFFE
CASE NUMBER 2019: No. 034

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 03/12/2021

Before:

THE LORD PRESIDENT SIR CHRISTOPER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

- -

Between:

JAMES ROBERT RUMLEY

Appellant

- and -

THE QUEEN

Respondent

Mr. Saul Froomkin, Q.C., Christopher E. Swan & Co, for the Appellant

Ms. Cindy Clarke, the Director of Public Prosecutions, for the Respondent

Hearing Date : 4 November 2021
Judgment Date : November 2021

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APPROVED JUDGMENT

BELL JA:

Introduction

1. The appellant in this case, James Rumley, was unanimously convicted by a jury on three charges of unlawful importation of a firearm, contrary to section 3(1)(b) of the Firearms Act 1973 ("the Act"), on 25 November 2020 after a trial before Wolffe APJ. Each of the charges involved the importation of component parts of a firearm, which by the definition of a firearm contained in section 1(1) of the Act includes any component part thereof. On 14 December 2020 he was sentenced to 14 years' imprisonment in respect of each charge, such sentences to run concurrently. The sentencing judge gave relatively short reasons for the sentences imposed at the time of sentencing, but indicated to counsel at the time that he would render written reasons for the sentences, which would be sent to counsel in due course. This he did on 21 January 2021. The requisite time periods having expired, Rumley made application to this Court for extensions of time. At a hearing held on 7 October, I granted leave in respect of the appeal against conviction, and refused leave in respect of the appeal against sentence. Rumley renewed his application for leave to appeal against sentence to the full court on 28 October 2021.

The grounds of appeal against conviction

2. Counsel for Rumley advanced three grounds of appeal, being:

    (i) that the learned trial judge erred in law in refusing to sever the three counts aforesaid
    (ii) that the learned trial judge erred in law in admitting evidence which was prejudicial, irrelevant and of no probative value, and
    (iii) that the learned trial judge erred in law in directing the jury in respect of the burden of proof with respect to the presumption of knowledge contained in section 31(1)(a) of the Act.

3. Jury selection in the case took place on 9 November 2020, and trial counsel immediately made an application to sever the three counts contained in the indictment. The application was heard on 12 November 2020, the judge's ruling was given on 13 November, and on 16 November, the judge provided detailed written reasons for the ruling previously given. In his ruling, the judge set out the prosecution case against Rumley, and rehearsed the relevant law, starting with reference to section 489A(3) of the Criminal Code Act 1907 ("the Code"), which provides that:

> *"Where, before trial, or at any stage of a trial, the court is of the opinion that an accused person may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the accused person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment."*

4. The judge then turned to the authorities submitted by counsel on both sides, commenting that there was not much deviation between counsel as to the legal principles. He referred to the cases but said in terms that he did not propose to recite the facts of those cases. In reaching his decision, the judge referred also to section 480 of the Code, which is in the following terms:

> *"**Joinder of charges in indictment***
> *480 (1) A charge or charges for any indictable offence may be joined in the same indictment with any other such charge or charges or with a charge or charges for any summary offence which may lawfully be included in that indictment by virtue of section 13 and of the proviso to section 485(2)—*
>
> *(a) if those charges are founded on the same act or omission; or*
>
> *(b) if those charges are founded on separate acts or omissions which together constitute a series of acts done or omitted to be done in the prosecution of a single purpose; or*
>
> *(c) if those charges are founded on separate acts or omissions which together constitute a series of offences of the same or of a similar character,*
>
> *but shall not otherwise be so joined:*
>
> *Provided that no one count of an indictment shall charge an accused person with having committed two or more separate offences.*
>
> *(2) Notwithstanding anything in subsection (1), where it appears to the Court that an accused person is likely to be prejudiced by any joinder of charges against him, the Court—*
>
> *(a) may require the prosecutor to elect upon which one of the several charges he will proceed; or*
>
> *(b) may direct that the trial of the accused person be had separately upon each or any of the charges."*

5. The judge found that all three of the counts in the indictment were founded on separate acts which together did constitute a series of offences of the same or a similar character. Specifically, he referred to the overlapping evidential and cross-admissible features of the case in the following terms:

"[12] It did not appear that Counsel for the Defendant were robustly submitting that the counts on the Indictment do not constitute a series of offences which are of the same or of a similar character. If they did then I should make it clear that I find that there is a sufficient nexus between all three of the counts on the Indictment in that they are founded on separate acts which together constitute a series of offences of the same or of a similar character. In this regard, I specifically refer to the following overlapping evidential and cross-admissible features of this case:

(i) All of the counts involve the importation of firearms parts in the same manner i.e. by the use of international couriers.
(ii) All of the firearm parts were imported from Pennsylvania. The firearm parts in respect of counts 2 and 3 were shipped from Pittsburg, Pennsylvania where the Defendant resides.
(iii) All of the firearm parts were shipped from a FedEx facility in Pennsylvania. Therefore, no other overseas courier company was used to allegedly send the firearm parts to Bermuda.
(iv) All of the firearms parts were shipped to the FedEx facility in Bermuda. Therefore, no other local courier company was used to allegedly receive and deliver the firearm parts once in Bermuda.
(v) All of the firearm parts were found in packages which were labelled to contain innocuous items.
(vi) The firearm parts in Counts 1 and 2 were addressed to persons who were allegedly unaware that they were being sent to them.
(vii) The firearm parts in Counts 2 and 3 were allegedly imported on the same day.

Therefore, the counts on the Indictment have commonality in time, place and circumstances, and it is for this reason that I find that the counts on the Indictment were properly joined."

The submissions of counsel

6. Mr Froomkin QC, Rumley's counsel, accepted in his written submissions that the judge had accurately reviewed the leading authorities and had extracted some of the relevant principles, but maintained that he had failed to apply them properly to the application before him. He urged that the evidence in respect of the three counts was not "cross admissible", stressing that the only live issue to be determined was whether Rumley had knowledge of the prohibited items in the three packages. Specifically, he criticised the judge for referring in his summation to the prosecution's reliance on similarities of the allegations between the counts, when the Crown had indicated that it was not relying upon "similar fact evidence", but rather was relying on a series of events. He also criticised the judge for having failed to caution the jury regarding the danger of misusing evidence which was admissible on one count but inadmissible on others. And while counsel was critical of the judge's reference to the similarity of the allegations, he had just cautioned the jury that they still had to consider the evidence of each count separately and reach a verdict on each

count separately. I pause to note that these later complaints did not go directly to the judge's ruling on severance.

7. For the Crown, Ms Clarke's starting position was that the discretion granted to the judge to order separate trials of different counts was a wide one, which would only be interfered with by the Court of Appeal if it could be shown that the judge's discretion was not exercised upon the usual and proper principles – see *Blackstock* [1980] 70 Criminal Appeal Reports 34. She maintained that there was no indication that the judge had misconceived the facts, misstated the law, or took into or left out of account something which he ought to have regarded or disregarded. She submitted that the judge had directed the jury properly on returning separate verdicts on each of the counts, and how to deal with the similarities of the allegations.

8. The second ground of appeal related to evidence which the Prosecution had led regarding prior instances when Rumley had shipped packages to Nyna Lightbourne, who was the mother of his daughter. Ms Lightbourne was the addressee of the package referred to in the second count. Mr Froomkin maintained that such evidence was prejudicial, irrelevant and of no probative value. The first of the three packages which were the subject of the charges had been sent on 3 June 2019, and the latter two sent separately on 14 October 2019. Evidence of calls between September 2018 and October 2019 and WhatsApp messages from May 2019 had been adduced, even though the package sent to Ms Lightbourne had been the second of the three packages. In response, Ms Clarke pointed out that at the time that this evidence was led, all that the Crown knew of Rumley's defence had been learned from his defence statement which reads "The defendant had no knowledge of the component parts of firearms in the packages". Accordingly, the Crown was unaware at the time that the evidence was led whether Rumley would in fact give evidence admitting that he was the person seen in the CCTV footage, sending the package in question.

9. The third ground of appeal concerned the presumption of knowledge contained in section 31(1)(a) of the Act, which is in the following terms:

> *"31 (1) In a prosecution under this Act and without prejudice to any other provision of this Act—*
>
> *(a) where it is proved that a person imported anything containing a firearm or ammunition it shall be presumed, until the contrary is proved, that such person knew that such firearm or ammunition was contained in such thing"*

Specifically, Mr Froomkin submitted that the judge had erred in law in his direction to the jury regarding the burden and standard of proof in relation to the presumption, and submitted that the judge had failed to explain to the jury how the presumption operated in law. In fact, after the jury had been sent out, the judge had asked counsel if there were any matters arising from his summation, at which point Mr Warner, co-counsel with Ms Greening, had raised the question of the section 31 presumption, and had submitted that the judge had failed "to explain to the jury how

that presumption operates in law, with regard to the standard of proof or the burden of proof." The judge had recalled the jury, and had basically repeated the direction he had given previously, with an addition to which I will refer below. When, after the jury had left, he had asked counsel whether anything arose, Mr Warner had responded in the negative.

10. The gravamen of Mr Froomkin's complaint lay in relation to how the judge had addressed the burden of proof upon an accused where, as in Rumley's case, his defence was that he did not know that the packages had contained component parts of firearms. The burden was, it was submitted, an "evidential burden" as opposed to a "legal burden". That is to say that in order to rebut the presumption, an accused needs to adduce or point to evidence in support of his lack of knowledge so as to raise an issue as to whether he knew or not. Such evidence could derive from the prosecution case or from the accused himself. Once such evidence is adduced, the onus is on the Crown to prove knowledge beyond a reasonable doubt. Specifically, Mr Froomkin submitted, the accused need only raise a reasonable doubt in rebutting the presumption. The complaint about the judge's summation in the instant case is that his direction to the jury, set out in paragraphs 23 and 24 below, failed to inform the jury in that regard.

11. We did not understand it to be disputed that knowledge as to what was being imported is an ingredient of the offence (otherwise the presumption would be irrelevant for the purpose of determining guilt), and the burden on the accused under section 31(1)(a) of the Act should be read down so as not to offend the presumption of innocence under Article 6(2)(a) of the Constitution of Bermuda, having regard to the obligation in section 5 of the Bermuda Constitution Order 1968 to read and construe existing laws subject to "*such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution*".

12. For the Crown, Ms Clarke submitted that the general approach regarding alleged misdirections was that set out by Lord Alverstone in *Stoddart* [1909] 2 Cr App R 217 at page 246, in the following terms:

> *"Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice. Its work would become well-nigh impossible if it is to be supposed that, regardless of their real merits or of their effect upon the result, objections are to be raised and argued at great length which were never suggested at the trial and which are only the result of criticism directed to discover some possible ground for argument."*

13. Ms Clarke maintained that the judge had given model directions in the summation and that these had been repeated at counsel's request. The judge had reminded the jury of the essential elements to be proved in relation to each count, and that it was abundantly clear where the burden of proof lay in relation to the facts in issue. She added that even if this Court were to find error with the direction, looking at the facts as a whole, the only reasonable and proper verdict would be one of guilty.

14. In his oral submissions, Mr Froomkin conceded in relation to the severance issue that the three counts were capable of being joined if the Court found that they constituted a series of events, but not otherwise. He submitted that because the first package had been sent in June, and the latter two in October, that necessarily meant that they did not constitute a series of events. He also maintained that the judge had decided the issue on the basis of the cross-admissibility of the evidence, and submitted that the question to be considered was how discrete or inter-related were the facts giving rise to the counts.

15. Ms Clarke submitted that the Crown did not rely upon "propensity" or "similar fact" evidence per se, but that the evidence on one count needed to be analysed in the context of the evidence in another count. In relation to cross-admissibility, she submitted that arose in respect of counts 1 and 3 only on the basis of the use of the same FedEx facility, and in relation to counts 2 and 3 from the fact that the packages had been sent one day apart from different FedEx facilities. Those were the only cross-admissibility points, and the issue did not come up in the summing up, only in the argument on severance. When it was put to Ms Clarke that the first question was whether the evidence was admissible, and the second question whether, if admissible, it was prejudicial or probative, she replied that the Crown had not relied upon the evidence in question on the basis of propensity or similar fact, but as circumstantial evidence regarding the appellant's knowledge as to the contents of the packages.

16. In relation to the second ground, Mr Froomkin accepted that no objection had been taken to the evidence being given at trial, but maintained that the evidence in question was prejudicial. He was not, however, able to explain why that was so.

17. In relation to the direction regarding section 31 and the burden of proof point, Mr Froomkin reviewed the manner in which the judge had addressed the point in his summation. He then turned to the authorities, starting with the case of *Attorney-General of Hong Kong v Lee* [1993] UKPC 20. That was concerned with two cases where the relevant statutes contained a provision relating to possession of stolen property (section 30 of the Summary Offences Ordinance) and drug trafficking (section 25 of the Drug Trafficking (Recovery of Proceeds) Ordinance). Section 30 included a provision where it was incumbent on a person charged with having in his possession anything which may reasonably be suspected of having been stolen, to give an account, to the satisfaction of the magistrate, as to how he came by the same. Section 25 provided a defence to a person charged in relation to the proceeds of drug trafficking if he did not know or suspect that the arrangement related to any person's proceeds of drug trafficking.

18. In his judgment on behalf of the Board, Lord Woolf described the relevant element of section 30 as not being a special defence, but an ingredient of the offence, which placed the burden on the defendant; and he highlighted the very special nature of the section. This was held to contravene Article 11(1) of the Hong Kong Bill of Rights Ordinance, which provides for the presumption of innocence. In relation to the special defence under section 25, Lord Woolf had stated (page 7) that "*in relation to that special defence, the legal or persuasive burden of proof is on a defendant, the standard required being proof on a balance of probabilities*". That was held not to offend Article 11(1) of the same Ordinance.

19. In the course of his judgment, Lord Woolf cited (page 13) the following passage from Dickson CJC in *R v Oakes* [1986] 26 DLR (4th) 200, with which he said their Lordships agreed:

> *"In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence…. If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue."*

20. Mr Froomkin also relied upon the case of *Sheldrake* [2004] UKHL 43. Mr Sheldrake was convicted by the justices at Colchester of being in charge of a motor car in a public place, at a time when the proportion of alcohol in his breath exceeded the prescribed limit. The relevant statute (section 5(2) of the Road Traffic Act 1988) afforded a defence for the person charged to prove that at the time he was alleged to have committed the offence, there was no likelihood of his driving the vehicle in question while the proportion of alcohol in his breath exceeded the prescribed limit. At Mr Sheldrake's request, the justices stated a case for the opinion of the High Court, which by a majority allowed the appeal and quashed the conviction. Before the House of Lords, Sheldrake's counsel argued that the effect of section 5(2) was to impose upon a defendant a burden to disprove an important ingredient of the offence which, if not disproved, will be presumed against him. Thus, it was argued, the presumption of innocence was seriously infringed.

21. Lord Bingham started his judgment by referring to the section (and I will omit references to the provision of the Terrorism Act 2000, which was considered at the same time) as imposing a legal or persuasive burden on a defendant in criminal proceedings to prove the matters specified in the subsection if he is to be exonerated from liability on the grounds provided. That meant that he must, to be exonerated, establish those matters on the balance of probabilities. But in considering such a reverse burden, Lord Bingham stated that the first question for consideration was whether the provision in question does, unjustifiably, infringe the presumption of innocence. If it does, the further question that arises is whether the provision can and should be read down in accordance with the court's interpretive obligation under section 3 of the UK Human Rights Act 1988, so as to impose an evidential and not a legal burden on the defendant, noting that an evidential burden

is not a burden of proof. It is, he said, "*a burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact. If an issue is properly raised, it is for the prosecutor to prove, beyond reasonable doubt, that that ground of exoneration does not avail the defendant*". In that case the House, by a majority, decided in respect of the offence under the Road Traffic Act that the burden on the appellant was a legal and not just an evidentiary one, and that it did not fall to be read down under the Human Rights Act. In the case of the offence under the Terrorism Act it reached the decision that the burden was a legal one, but that the relevant provision should be read and given effect to as imposing an evidential burden only.

22. Mr Froomkin turned next to the case of *R v M* [2007] EWCA Crim 3228, which concerned the offence of controlled drugs under section 28(3) of the UK Misuse of Drugs Act 1973, and relied particularly on the following paragraphs contained in the judgment of Longmore LJ:

> *"[2]* In *R v Lambert [2002] 2 AC 545 the House of Lords considered whether sub-section (3) was incompatible with the European Convention on Human Rights insofar as it imposed the burden of proving absence of belief and reasonable suspicion on the defendant in apparent contravention of the Article 6 provision that everyone is to be presumed innocent until proved guilty. The House of Lords resolved that the question by deciding that the word "prove" in the sub-section was to read as an evidential burden of proof rather than a legal burden of proof. In other words the defendant had to put forward sufficient evidence to satisfy the court that he or she neither believed nor reasonably suspected that the substance was a controlled drug, but once there was sufficient evidence of that, the burden of proving that he or she did, in fact, believe or suspect that the substance was a controlled drug remained with the Crown.*
>
> *…*
>
> *[11] If a judge decides to leave to a jury the question whether a defendant has discharged the evidential of raising sufficient persuasive evidence that she did not know or suspect that the substance of which she had possession was a controlled drug, as well as the question of whether the Crown has discharged the legal burden of proving that the defendant did in fact know or had reason to suspect that the substance was a controlled drug, a much more careful direction is needed than that supplied by the judge. At a minimum, such direction must explain the difference between an evidential burden and a legal burden of proof in terms that a jury can understand. It must then also explain that the evidential burden can be discharged on a balance or probabilities, but the legal burden on the Crown has to be discharged to a criminal burden of making the jury sure. Without some such careful explanation, a direction that the burden on the defendant "does not detract from the fact that the Crown must prove her guilt" is, with respect to HHJ McKittrick, not readily understandable."*

23. Against that background, Mr Froomkin referred to that part of the summation where the judge had dealt with the effect of the presumption contained in paragraph 31 of the Act. After referring to the fact that, as he had said earlier, the onus was on the prosecution to prove its case, and that this

burden did not shift to the accused in the course of the trial, since the accused did not have the burden of proving anything, the judge said (page 83 of the Record of Appeal) the following:

> *"The Accused's defence is that he did not have any knowledge, whatsoever, about the Components of a firearm being in any of the packages sent from FedEx. Whether or not you accept that defence, after consideration of all the evidence, is a matter for you.*
>
> *Now, in deciding whether the accused had knowledge of a firearm being in the FedEx packages, there are certain presumptions that you can take …. (and the judge then set out section 31)*
>
> *The Prosecution say that the Accused sent, or caused to be sent each of the FedEx packages containing the component parts of a firearm. Therefore, unless or until the contrary is proved by the accused, you shall presume that the Accused knew that the FedEx packages contained component parts of a firearm.*
>
> *Bear in mind, though, that in respect of the Oxygenics shower head package, which contained the Taurus grip, that's Count One, the Accused is saying that it was as a part of his job at Postmates that he went to FedEx with Karen Guskey, so that she may send her package to a Jerome Harvey in Bermuda.*
>
> *It is a matter for you as to whether you accept this evidence of the Accused and, if you do, then it could be said that the Accused has rebutted the presumption in respect of Count One.*
>
> *In Respect of Count Two, the Power Built tool case, and Count Three, the bag with the small parts, the Accused accepts that he sent, or caused these packages to be sent to Bermuda via FedEx."*

24. The judge repeated this passage in virtually identical terms when asked to do so by defence counsel, closing with the following passage:

> *"But I also must remind you, and let you know as well – and again, I've said this already and I'll say it again, -- that in every criminal case, as it is in this case, the onus or burden of proving the case rests upon the prosecution. It is still the duty of the prosecution to prove that the accused is guilty of the charges. This onus or burden of proof does not shift to the accused in - in a criminal case, since every accused is presumed innocence until he's proven guilty. Thus, if the Accused is to be found guilty in this case, the Prosecution must still prove it. The Accused bears no burden of proving anything and it is not his task to prove his innocence. Okay?"*

25. Mr Froomkin maintained that there should be a retrial on the basis of the judge's treatment of the presumption, as set out above, alone.

26. The next case upon which Mr Froomkin relied was *R v Choudhury and Abbas* [2008] EWCA Crim 3179. That case concerned possession of drugs, where the equivalent English section to section 31 of the Act was section 28 of the Misuse of Drugs Act 1971, which provides that it is a defence for the accused to prove that he neither knew of nor suspected, nor had reason to suspect that, to apply it to that case, the contents of the holdall were controlled drugs. The Recorder had given a direction to the jury that if they were satisfied about certain matters that the prosecution had established, then the onus of proving that the defendant whose case they were considering did not know that the contents of the holdall contained drugs moves to the defendant and it is for the defendant to prove that he did not know, believe or suspect that the holdalls contained drugs. The Recorder did continue to explain that the onus on the defendant was one of a balance of probabilities, but, in the direction which he gave to the jury, suggested that the burden of proof was on the accused, as opposed to the accused having an evidential burden. The appellate court took the view that the direction constituted an error involving a violation of Article 6(2) of the European Convention on Human Rights, that there was a possibility that the jury had been misled by the erroneous direction, and that accordingly the convictions were unsafe and the convictions were therefore quashed.

27. In reply, Ms Clarke, dealing firstly with the severance point, pointed out that the evidence of cross-admissibility between counts 1 and 3 was the use of the same FedEx facility, and in relation to counts 2 and 3 that they had been sent one day apart from different FedEx facilities. She said that was the only cross-admissibility point. She emphasised that the issue had not come up in the judge's summing up, because it had only arisen when the severance issue had been argued. She maintained that the cross-admissibility had been sufficient for joinder.

28. It is to be noted that in sentencing Rumley, the judge had referred to the fact that the component firearms parts were "different but related", such that when constructed together the component parts made up two fully functioning firearms, so that Rumley had effectively shipped fully functioning firearms. In another section of his sentencing remarks, the judge had referred to the component parts being consistent with the make-up of a fully functioning Glock-type firearm. Before this Court, Rumley had interjected and asserted that the evidence was that the parts needed machining for this to be possible. Ms Clarke maintained that the evidence (that of PS Thomas, who was described in the summation as the armourer and firearms ammunition expert) was that one functioning firearm could be made without machining, and one more with such an exercise.

29. Ms Clarke was not pressed to deal with the second ground of appeal, and in relation to the third ground, she accepted that the directions given to the jury were not as full as they should have been. She described section 31 of the Act as not being a defence, but rather a presumption, which still left the onus on the Crown to prove its case. And she noted that the judge had erred in the appellant's favour when saying in his summation that the appellant "did not bear the burden of proving anything".

30. Finally in relation to this ground of appeal, Ms Clarke submitted that the Crown's case against Rumley was overwhelming, and that if this ground of appeal was made out, the Court should exercise the proviso contained in section 21(1)(a) of the Court of Appeal Act 1964 ("the Proviso").

Findings

31. In relation to severance, I think the references to cross-admissibility in the judge's ruling could be confusing, save in relation to the importance of requiring separate consideration of the evidence in relation to the three different counts. The reality is that the three instances of importation of component firearm parts were, in this case, clearly a series of offences of the same character, and the notion that it would have been appropriate for there to be three separate trials in respect of the three importations borders on the absurd. While Mr Froomkin stressed the time lapse between the first and subsequent importations, I think that is overstated. The delay was relatively short, and could be seen to be an attempt to avoid the link between the three packages, of the same nature as the appellant's use of different FedEx facilities a day apart, in respect of the sending of the second and third packages. Clearly, one package in isolation would be viewed rather differently than three packages where the contents were capable of being used together to make two functioning firearms. And, as submitted by Ms Clarke, the judge's exercise of discretion cannot be said to have been improper in any way. He rightly took into account the features of the three importations which had commonality of time, place and circumstance, as set out in paragraph 5 above. In my judgement he was right to refuse to order severance of the three counts, which were indeed a series of offences of the same or a similar character, and right to find that there was no aspect of potential prejudice which could not be dealt with by appropriate directions from the bench. I would dismiss this ground of appeal.

32. In relation to the second ground, the first factor seems to me to be that until the appellant gave evidence, the prosecution had no way of knowing whether the appellant would admit to being the sender of the three packages, and hence it is entirely understandable that they would seek to adduce evidence linking the appellant with the sending of previous packages, with a view to establishing him as the sender of the second package. But the real key in my view lies in the complete absence of prejudice arising from this evidence (and Mr Froomkin was unable to point to any), and it is for that reason that I would dismiss this ground.

33. The issue of the judge's direction is more difficult, and it is unfortunate that counsel who raised the issue did not indicate more clearly the difficulty with the judge's original direction to the jury. But it is not surprising that Longmore LJ should have said in *R v M* that "the difference between the evidential and legal standard of proof is one that juries find elusive if not baffling". Even his suggested direction, that the evidential burden of proof can be discharged on a balance of probabilities, but the legal burden on the Crown has to be discharged to a criminal burden of making the jury sure, may not be readily understood by a jury.

34. But the real problem with Longmore LJ's direction is that in saying that the evidential burden equates to a burden of proof means that an accused has to put forward sufficient evidence to satisfy the jury that he did not believe that (using the facts of this case) the three packages contained component parts of firearms, but once that has been done so, it is for the Crown to make the jury sure that the accused did in fact so believe. In such circumstances, the position is necessarily

reached where the two tests are in conflict. The application of such tests leads to an impossible onus being placed on the Crown; if the accused has established on a balance of probabilities that he did not believe that the packages contained component parts of firearms, then it necessarily follows that it is not possible for the Crown to establish beyond a reasonable doubt that he did.

35. That takes me back to the manner in which Lord Bingham explained the principle in *Sheldrake*, which to my mind is much easier for the average juror to understand than Longmore LJ's proposed direction. Not only is Lord Bingham's analysis of the manner in which to approach the issue to be preferred, Longmore LJ's analysis, and his proposed direction are, in my view, wrong, not least because of the conundrum identified in the preceding paragraph. The problem no doubt stems from the use of the word "proved" in section 31. In this context, "prove" means no more than produce evidence which raises an issue, and hence references to the burden of proof as being on an accused are likely to confuse rather than assist.

36. In this case, the judge followed his recitation of section 31 of the Act with the statement that … "*Therefore, unless or until the contrary is proved by the accused, you shall presume that the accused knew that the FedEx packages contained component parts of a firearm*". But he gave the jury no guidance as to the difference between the evidential burden, raising an issue on the accused and the burden of proof on the Crown. His reference to the presumption applying unless the contrary is proved by the accused, together with his earlier observation that whether or not they accepted the accused's defence that he did not know about the components of the firearm being in the packages, after consideration of all the evidence, was a matter for them, was likely to convey to the jury that there was a burden of proof on the accused, when an evidential burden is not a burden of proof, as Lord Bingham has made clear. At the end of the case he then repeated this direction with the addition of the paragraph that I have set out in paragraph 24 above.

37. It does seem to me that the judge's failure to explain the nature and limited extent of the burden on the accused is problematic, particularly when viewed against the language of the authorities. I am not without sympathy for the judge, and I note that he said, many times, and repeated at the end of his summation after his repetition of what he had said earlier about the presumption that it was for the prosecution to prove its case, as indeed it was. But at the same time, the judge's terminology in respect of the presumption, which portrayed it as involving a burden of proof rather than an evidentiary burden causes me to feel bound to hold that this ground of appeal is made out.

38. However, I regard this as a case where it is appropriate to apply the Proviso. The case against Rumley was, as Ms Clarke submitted, overwhelming. There was no question but that he was the sender of the three packages. That was his own evidence. The first two packages were sent to persons who had no knowledge of them (one, a childhood friend with whom Rumley had not been in contact for some time, and the other, the mother of his child) and who had not sought their delivery. The third package was sent to Rumley's address in Bermuda, though not addressed to him, but to a non-existent person using Rumley's forenames only, which he said was due to an error on the part of the FedEx employee involved. There were any number of further features on Rumley's version of events which were, on their face, difficult to accept. First, while Rumley

maintained that he had no knowledge of the contents of any of the packages, his palm print was found on the inner contents of the first package. Secondly, there was the use of two different FedEx facilities for sending the second and third packages, within a relatively short time frame. Next, Rumley said that he knew only the first name (Steve) of the addressee of the second package, (which purported to contain only a compressor kit), and did not know his address, which is why he had sent the package to Ms Lightbourne. Next, he said that he had shipped the third package on behalf of a friend because it was the lightest item in his luggage, and he wanted to avoid spending money on shipping heavier items. So it can readily be understood why a jury should unanimously reject Rumley's version of events.

39. In short, the case against Rumley was indeed overwhelming, and his purported explanations lacked any basis in reality. In all the circumstances, I am satisfied that no substantial miscarriage of justice would in fact occur by the application of the Proviso. I cannot believe that the jury, properly directed that the burden on the accused, under the presumption, was an evidential one and not a probative one, would or might have reached any different verdict: nor, particularly in the light of the paragraph that the judge added at the end of his summing up, can I believe that the jury only convicted the appellant because they thought that he had failed to satisfy them on the balance of probabilities of his ignorance. I would therefore apply the Proviso, and for that reason would dismiss the appeal against conviction.

Sentence

40. As previously mentioned, I had refused leave to appeal against the sentences imposed by the trial judge of 14 years in respect of each count, to run concurrently. But the application for leave to appeal against sentence was renewed to the full court, so that application must now be considered.

41. The jury delivered its guilty verdicts on 26 November 2020, and counsel made submissions on the appropriate sentence to the judge on 14 December. Shortly thereafter the judge imposed sentences of 14 years in respect of each count, to run concurrently. He gave short reasons for his decision at the time, but closed by saying that he would render written reasons for his sentence which would be sent to counsel in due course. This he did in the form of a detailed ruling dated 21 January 2021.

42. Mr Froomkin began with a complaint at the judge's delay in producing his written reasons, one of just over 5 weeks, which included a holiday period. I do not think there is anything to this complaint. The judge had obviously had time following the conclusion of the trial within which to consider the appropriate sentence, and the written reasons no doubt reflected the views that he held at the time of sentence. In the event, the written reasons were full, and covered the relevant law on mandatory minimum sentences. The judge noted that Bermuda jurisprudence was not replete with importation of firearms offences, but he referred to those cases which had been cited to him by the Crown. He rehearsed the submissions of counsel, noting that the Crown had sought a sentence of between 14 and 15 years, and that defence counsel had submitted that the appropriate sentence was between 11 and 12 years. He commented on the fact that firearms offences had become "all too prevalent in Bermuda", and stated that he could not extract any compelling mitigating factors

from the factual matrix of the case other than that the accused was of previous good character as a first time offender. He referred to the fact that the accused had pleaded not guilty, and had been found guilty by the unanimous verdict of the jury, which he commented registered the jury's wholesale rejection of the accused's apparent defence that he had no knowledge of the presence of the component parts in the three packages. He dealt in terms with counsel's argument that the importation of component parts should be seen as less serious than the importation of a fully functioning firearm, which he said might have had some credence if the accused had imported component parts on only one occasion, whereas this accused had imported the component parts of two firearms on three separate occasions. He regarded the degree of planning involved as being "highly sophisticated", and referred to the ability to construct two firearms previously referred to, noting also that the serial numbers had been removed, something which he described as being for the purpose of avoiding detection and tracing, and which, if not done by the accused, must have been done by someone else with his knowledge. In commenting on the fact that the component parts could be assembled into two functioning firearms, the judge noted that it was then possible for those to be used for a criminal purpose either by the accused or someone else.

43. The judge then explained how he had reached his sentence. He had had regard to sections 53 to 55 of the Code, and the fundamental principle of proportionality contained therein, and said that he saw no viable avenue not to apply the mandatory minimum sentence of 12 years' imprisonment, but rather that there were several compelling reasons to sentence the accused to more than the specified minimum. The accused had pleaded not guilty; he had shown no regret or remorse. He had used intricate and sophisticated means to commit the offences, and he must or should have known that the component parts were intended for a criminal purpose.

44. Mr Froomkin submitted that there was no evidence that the appellant had removed the serial numbers, but the judge did not say that he did. His comment was that either Rumley had done so or that such had been done by someone else with his knowledge. Mr Froomkin stressed that the appellant had no previous convictions, to which Ms Clarke responded that the 12 year sentence set out in the relevant part of the Act was expressly for a first offence, the minimum for a second offence being 17 years. He also urged that the importation of a firearm part should be treated differently than the importation of a firearm. The difficulty with that argument is that the Act defines a firearm as including a component part, so that effectively there is no difference between the two. Further, as was pointed out in argument, the importation of two firearms might be thought to take the sentence some way above the minimum. As to remorse, Mr Froomkin submitted that it should not be said that he showed no remorse when he maintained his innocence, to which the response is that an accused gets a reduction in sentence for showing remorse and pleading guilty, and not otherwise - see paragraphs 15 to 17 of the recent case of *R v Omar Davy*, Court of Appeal judgment dated 29 April 2021.

45. Particularly given that the sentencing suggested by the appellant's counsel was one of 11 to 12 years, a sentence of 14 years cannot properly be described as manifestly excessive. But neither do I think that the sentence was in fact excessive. The offences were extremely serious. There is no legitimate purpose for which the component parts could have been imported into Bermuda, and in

my view the judge was fully entitled to find that the component firearms parts, when constructed into fully functioning firearms, must have been intended for a criminal purpose. The judge carefully considered matters, and gave full and relevant reasons. I would therefore refuse the appellant's renewed application for leave to appeal against the sentences of 14 years' imprisonment imposed by the judge.

GLOSTER, JA

46. I agree.

CLARKE, P

47. I also agree.