In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2016: 57

KEISHUN TROTT

Appellant

-v-

THE QUEEN

Respondent

JUDGMENT

(in Court)[1]

Appeal against conviction in Magistrates' Court-counterfeit currencies offences-sufficiency of findings and reasons for decision-Criminal Jurisdiction and Procedure Act 2015, section 83(5)-Criminal Code, sections 165(1)(a) and 166(2)

Date of hearing: November 2, 2016
Date of Judgment: November 23, 2016

Mr. Arion Mapp, Christopher's, for the Appellants
Ms. Victoria Greening, Office of the Director of Public Prosecutions, for the Respondents

[1] The present judgment was circulated to the parties without a hearing.

Introductory

1. The Appellant appeals against his conviction on May 11, 2016 in the Magistrates' Court (Wor. Tyrone Chin) of two offences of tendering counterfeit currency and one offence of delivering counterfeit currency, contrary to sections 165(1)(a), 166(1) and 166(2) of the Criminal Code. The Appellant was charged on an Information dated May 4, 2015 with committing these offences on July 20 and 21, 2014.

2. There were three grounds of appeal:

   (1) the Learned Magistrate erred in ruling there was no case to answer;

   (2) the Learned Magistrate erred in relation to the admissibility of identification evidence;

   (3) the Learned Magistrate erred in relation to admissibility of unfair evidence.

3. In the course of the appeal it became clear that the main issue for the Court to determine was whether or not sufficient findings had been recorded to explain the decision to convict the Appellant despite various arguments advanced by his counsel. This was far from a straightforward case where it was possible to infer from the fact that the Defence case had been rejected that no miscarriage of justice had occurred.

The Magistrates' Court proceedings

<u>The Prosecution case</u>

4. The main Prosecution witness was a female acquaintance of the Appellant who was initially arrested herself having tendered a counterfeit note she said she was given by the Appellant to a supermarket. Ms Bremar described visiting 'The Beach' and 'Ice Queen with the Appellant where other independent witnesses testified the Appellant tendered counterfeit notes.

5. Objection was made at trial to a 'dock identification' of the Appellant by an employee of the Beach. This was potentially significant because the Appellant's case was that he used his credit card to pay for drinks after another man had tendered the counterfeit note. Of course, the Crown's case was that he was the man who tendered the note and when it was rejected used his credit card instead.

6. The Appellant was identified by CTV footage as being the man who tendered a counterfeit note at 'Ice Queen'. However, the Appellant argued (implausibly, it seemed to me) that this evidence was unreliable. More potentially significant was the fact that due to a disclosure glitch, the BMA employee who certified the note tendered

at the 'Beach' to be a forgery, there was no expert evidence to prove that this note was in fact counterfeit. The Crown relied on circumstantial evidence (principally the evidence in relation to The Beach incident) instead to prove this second charge.

The Defence case

7. The Defence case was advanced by way of putting the Crown to strict proof. It had the following main elements to it:

    (a) objection was made to the admissibility of all evidence relating to the note tendered at Ice Queen on the grounds that it was more prejudicial than probative;

    (b) objection was made to the admissibility of the CCTV footage at Ice Queen;

    (c) objection was made to the dock identification by The Beach witness Olsen who did not describe the man who presented the note in his witness statement;

    (d) a no case submission was made at the end of the Prosecution case;

    (e) in written closing submissions it was argued that:

        (i) the Prosecution case was wholly circumstantial on the question of the Appellant's knowledge that the notes were false and this element was not proved,

        (ii) the Ice Queen offence required expert evidence which was lacking;

        (iii) Ms Bremar was herself caught red-handed and had a motive to incriminate the Appellant.

The Rulings and Judgment

8. The objection to the dock identification was overruled on the grounds that the witness had pointed out the man who presented the note to his manager (who testified that that the same man presented the Appellant's credit card for payment instead when the note was rejected). The application to exclude the evidence relating to the Ice Queen note was refused on the grounds that it was too late to object after exhibits had been initially admitted. The no case submission was rejected on the grounds that triable issues had been established by the Crown.

9. The Judgment summarised the evidence and then set out the following findings:

> "*The Crown offered no evidence as to Counts 3 and 4.*
>
> *The Court notes that two separate $100 Bermuda notes (serial number 242219) were tendered at the Beach and at the Ice Queen. The Court with strong inference draws* [sic] *that both are counterfeit $100 notes. The court having heard evidence from the Crown finds the Defendant, Keishun Trott:*
>
> *1) Guilty beyond reasonable doubt that he did on 21st July 2014 in Pembroke Parish namely The Beach restaurant and bar pass or tender as genuine a thing which is and which he knew or believed to be counterfeit currency, namely Bermuda $100 note contrary to section 165(1)(a) of the Criminal Code;*
>
> *2) Guilty beyond reasonable doubt that he did on 21st July 2014 in Pembroke Parish namely The Beach restaurant and bar known or believed* [sic] *to be counterfeit currency, namely Bermuda $100 note intending either to pass or tender it as genuine contrary to section 166(1) of the Criminal Code;*
>
> 3) *Guilty beyond reasonable doubt that he did on 20th July 2014 in Pembroke Parish namely at the Ice Queen restaurant and bar knew or believed* [sic] *to be counterfeit currency, namely Bermuda $100 note contrary to section 165(1)(a) of the Criminal Code.*"

Merits of Grounds of Appeal

Ground 1

10. There was clearly a case to answer in that, depending on what view the Magistrates' Court took of the evidence, there was strong evidence of the Appellant's guilt on all charges which were pursued against him.

Ground 2

11. This ground of appeal had technical merit. The objection to the dock identification was apparently rejected because the identifying witness' identification in the dock was corroborated by the evidence of his manager who said that he received a credit card payment from the same man who the witness pointed out to him as the man who had tendered the counterfeit note. The position on one view was that the Appellant was sufficiently identified without the need to rely on the dock identification. In these circumstances the disputed identification evidence should not have been relied upon

at all because, standing by itself, this evidence had no probative value as the identifying witness did not apparently know the Appellant and had not described him in his Witness Statement.

12. The Learned Magistrate ought to have upheld the objection to this identification rather than rejecting it. His reasons for rejecting the objection did not support the rejection of the objection which, on the face of it, probably ought to have been upheld. Those reasons supported the potential alternative finding at the end of the trial that the identity of the Appellant was sufficiently established by (a) the two Beach witnesses' other evidence, and (b) the evidence of Ms Bremar that the Appellant gave her a counterfeit note. No substantial injustice flowed from this error of law, however.

Ground 3

13. The complaint that the objection that Exhibit 5 (the note tendered at Ice Queen) should be excluded because of the absence of expert evidence proving it was a counterfeit note also had technical merit. The Learned Magistrate at any point before delivering judgment could have decided that any evidence placed before him was inadmissible, providing he gave the Crown an opportunity to deal with any objection raised[2].

14. Mr Mapp did raise his objection late, but in circumstances which enabled the Court to deal with objection on its merits after hearing Crown Counsel. Ms Greening submitted that if the Court would not permit her to reopen her case to tender the missing expert evidence, then the Court could rely on circumstantial evidence. The note tendered at Ice Queen had the same serial number as the note tendered at the Beach which the expert said was counterfeit. The Learned Magistrate ought to have accepted Crown Counsel's submissions and rejected the objection to this evidence on its merits. The same applies to the objections about the CCTV evidence, which were not seriously pursued in the course of the present appeal.

15. As in the case of Ground 2, it is difficult to see any substantial prejudice flowing from this error of law as either. Nevertheless, having decided to admit the evidence in relation to Ice Queen, it was important for the final judgment to deal with the submission made by the Appellant's counsel in closing that the absence of expert evidence was fatal to the Prosecution's case.

Conclusion on merits of original grounds of appeal

16. Mr Mapp succeeded in establishing two out of three meritorious grounds of appeal. However, Ms Greening succeeding in establishing that the Prosecution case was a strong one and that no substantial injustice flowed from what were essential technical

[2] An objection to the admission of CCTV evidence was sensibly not pursued on appeal.

errors. This seemed a potentially suitable case for dismissing the appeal applying the proviso to section 18 (1) of the Criminal Appeal Act, apart from concerns about the adequacy of the findings recorded at the end of the trial.

Adequacy of findings/reasons

17. Exploring these grounds of appeal in the course of the appeal through interchanges between Bench and Bar resulted in attention turning to the adequacy of the findings reached and the reasons given for the convictions entered against the Appellant. Section 83 of the Criminal Jurisdiction and Procedure Act 2015 provides as follows:

> "*(5) The record of proceedings must include the magistrates' court's final judgment in writing, which will include—*
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> *(a) the point or points for determination;*
>
> *(b) the decision made on such points; and*
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> *(c) the reasons for the decisions.*

18. The Judgment in the present case fails to comply with all three of the requirements of section 83(5).

(a) none of the main points for determination based on Defence Counsel's objections and closing submissions were expressly identified, namely:

(1) whether the Appellant was sufficiently identified at The Beach, the dock identification apart,

(2) whether there was sufficient evidence that the Appellant knew the notes were counterfeit, even if it was proved they actually were counterfeit,

(3) what weight could be placed on the evidence of Ms Bremar, given her obvious potential motivation to implicate the Appellant to save herself from prosecution;

(b) because the points for determination were not expressly identified, it is impossible to safely infer that in finding that each charge was proved the Learned Magistrate consciously addressed these key issues. The charges and issues were not so straightforward that this Court can confidently rely on implicit findings based on a clear rejection of the Defence case and acceptance of the Prosecution case;

(c) it follows from the fact that no express decision was made on the main issues in contention that no reasons were given for them.

19. The only issue which was explicitly identified and decided was the question of whether or not the note tendered at Ice Queen was proven to be counterfeit in the absence of expert evidence. The clearly expressed finding was that the fact that the second note had the same serial number as the note proven to be counterfeit was sufficiently probative of this issue. That inference was straightforward to draw. More complicated was the issue of the Appellant's knowledge of the notes' falsity, as this issue depended to a large extent on the evidence of a witness whose evidence needed to be approached with considerable care. The Judgment was reserved from March 16, 2016 until May 11, 2016 to permit both counsel to tender written submissions. This signifies that the case was not a straightforward one and that the Learned Magistrate had the time to not only carefully consider but also adjudicate the issues which fell to be determined.

20. Having reserved judgment myself, I have identified two further minor matters which amount to nothing in their own right but which also in a cumulative way add to anxieties about the number of irregularities which occurred. Firstly, the summary findings that each charge has been proved in relation two of three charges omits the *actus reus* in each case: having in custody or under control (Count 2) and pass or tender (Count 3). Secondly the Judgment incorrectly states that the Crown offered no evidence on Counts 3 and 4. The true position is that no evidence was offered on counts 4 and 5. By reference to the sections of the Criminal Code recited, it can be confirmed that convictions were indeed entered in respect of Counts 1, 2 and 3 and that the Crown offered no evidence on Counts 4 and 5.

21. The principles governing a failure to record findings and provide adequate reasons under the statutory provisions then in force were described in the following way by L.A. Ward CJ (as he then was) in *Outerbridge-v-Grant (Police Sergeant)* [1997] Bda LR at pages 2, 4:

"In Joell -v- Plant , Appellate Jurisdiction 1983 No. 15 Collett PJ said:

> *'Crown Counsel in argument referred me to other decisions of this Court in its appellate jurisdiction namely <u>DeGrilla -v- Brown No. 50/81 Haynes -v-Flook No. 19/82 and Robinson -v- Commissioner of Police No. 20/81</u> to support his contention that the requirements of section 21 are merely directory and not mandatory. But the word used in that section is "shall" and that*

word ought in relation to the duty it imposes on a Magistrate, to be construed as imperative—see section 8 of the Interpretation Act 1951. I can therefore only reconcile the decisions to the effect that this obligation is merely directory as laying down that even if the judgment does not in a particular case comply, it may be possible to apply the proviso to section 18(1) of the Criminal Appeal Act 1952 so as to dismiss the appeal on the ground that no substantial miscarriage of justice has in fact occurred. To do so however, the appeal court must be satisfied that if the irregularity had not occurred the outcome would nevertheless have been the same; R -v- Haddly (1944) 29 CAR 182 Stirland -v- DPP (1944) AC 315 .'

I respectfully adopt that statement of the law.

In Plant -v- Simmons Criminal Appeal No. 1 of 1986 Volume 21, page 156 , the duty of a Magistrate was discussed inter alia. There the Court held that the Magistrate had a duty to make a detailed analysis of the evidence and specific findings of fact…

In the absence of specific findings of fact by the learned Magistrate and on reviewing the record, this Court is unable to say that the evidence was so overwhelming that no substantial miscarriage of justice has occurred. The appeal must therefore be allowed and the conviction quashed."

22. The position under section 83(5) of the Criminal jurisdiction and Procedure Act 2015 appears to me to be the same. A failure to record findings and reasons does not without more vitiate a conviction. In all the circumstances of the present case,

however, it is impossible for this Court to conclude that despite this series of unfortunate legal lapses, none of which individually would have made the conviction unsafe, no serious miscarriage of justice has occurred. However, these irregularities in the trial Judgment were not contributed to by the Prosecution to any or any material extent. In the present case, unlike in *Outerbridge-v-Grant (Police Sergeant)*, despite the absence of adequate findings or reasons it is possible to fairly conclude that the Crown case was far from a weak one. So while the convictions must be quashed and set aside and the appeal allowed, I consider (as foreshadowed at the hearing of the present appeal) that this matter should be remitted to the Magistrates' Court to be retried before a different Magistrate. The following provisions in section 18 of the Criminal Appeal Act 1952 confer a broad discretion on the Court in this regard:

> "*(5)Notwithstanding anything in subsections (1) to (4), where it appears to the Supreme Court that by reason of any imperfection or irregularity—*
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> *(a) in the constitution of the court of summary jurisdiction; or*
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> *(b) in any criminal proceedings before the court of summary jurisdiction; or*
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> *(c) in any other matter, an appellant who is appealing under section 3 against his conviction of an offence could not lawfully have been convicted by that court of summary jurisdiction of that offence,*
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> *then in any such case the Supreme Court, instead of allowing or dismissing the appeal, may order a new trial of the appellant before a court of summary jurisdiction.*"

Disposition of appeal

23. Despite the literal language of section 18(5), which implies that the matter can only be remitted for retrial without allowing the appeal and quashing the convictions, in my judgment the appropriate and customary Order in present circumstances is to (1) allow the appeal and quash the convictions, but also (2) to remit the matter for a new trial (should the Prosecution wish to pursue one) in the Magistrates' Court before another Magistrate.

Dated this 23rd November, 2016 _____
IAN RC KAWALEY