The Court of Appeal for Bermuda

CRIMINAL APPEAL No 10 of 2012

Between:

JANIS ZEGELIS

Appellant

-v-

THE QUEEN

Respondent

Before: **Zacca, President**
Evans, JA
Baker, JA

Appearances: Mr. Kamal Worrell for the Appellant
Mr. Rory Field, Ms. Cindy Clarke, and Ms. Takiyah Burgess for the Respondent

Date of Hearing: **12 & 13 March 2014**

Date of Reasons: **24 March 2014**

JUDGMENT

Evans, JA

1. The Appellant is a Latvian national. He was convicted of six offences including the unlawful importation into Bermuda and possession of a controlled drug, cocaine, and of a firearm with ammunition, after trial before Justice Carlisle Greaves and a jury in June 2012. He was sentenced to a total of twenty five years imprisonment. He now appeals against his conviction.

2. He was sailing single-handed in a boat named "Arturs" which arrived in Bermuda at St. George`s Parish on 21 July 2011. He told the harbour and customs

authorities that the boat was not carrying prohibited drugs or firearms, and he signed declarations to that effect. He said that the boat needed repairs, and these were begun. Eleven days later, on 1 August 2011, police and customs officers discovered in the boat, first, a total of 166 packages which on examination were found to contain 164.13 kilograms of cocaine with a value in Bermuda of between $17 million and $48 million, depending on how it was marketed, and secondly, a 9mm Berretta semi-automatic pistol with two magazines and boxes of ammunition.

3. He was charged later that day. He did not deny knowing that the drugs were in the boat, and when he was being driven to Hamilton Police Station after his arrest he said, according to the evidence of D/Sgt. Bhagwan, that after sailing from Trinidad he met another boat, by arrangement, and the drugs were loaded on board. At the trial, the Appellant denied saying that. His evidence was that he discovered the drugs and the gun on board only sometime after sailing from Trinidad, when he needed to access storage space in the forward cabin in order to carry out repairs to a defective water hose. He said that he was shocked and concerned by the discovery, and when he was off the Dominican Republic he called the man who, he said, had arranged the purchase of the boat and had hired him to sail it to Europe. He said that he was told not to worry and to go "straight to the Denmark Channel", and that he replied with an ultimatum – either that man, whom the Judge called his "boss", should get someone to collect them "or he will throw them into the sea". But he said that his boss "threatened him and his family, telling him he knows where his family lives and where his children`s school [is] and that he will find them and kill them, and then find him and kill him [also]". He said that he knew that the boss had good connections and that the threat was no joke, and that after speaking by phone to his mother, who was in the Dominican Republic, he decided to continue the voyage.

4. About four days later, he had chain plate problems with the boat and thought of returning to the Dominican Republic, but after a further call to his mother he decided against that and continued the voyage, having carried out some

temporary repairs. Then the boat was overtaken by a major storm, associated with Hurricane Brett, and he was afraid that the unsecured mast would damage the boat and cause it to sink. He said that the boat was broken and he was deeply stressed: "it was sure death". He hailed a passing cargo ship named "Brianna" (there was an issue as to whether he sent out a distress call) and, he said, the captain advised him to abandon his boat and get aboard the ship; but he told the captain that he did not wish to do that, he only wanted someone from Bermuda to give him a tow. He was then about 50 miles off Bermuda. He made his way there and arrived "eventually".

5. Meanwhile, he exchanged numerous emails with his mother, still in the Dominican Republic. Some but not all of these were produced in evidence, and they included references to "sausages" and the "iron toy" meaning, it was accepted, the drugs and the gun. That code was pre-arranged between them in order to avoid detection on the airwaves.

6. He denied telling D/Sgt. Bhagwan that the drugs were loaded onto his boat at sea. He said that that must have happened without his knowledge at Trinidad, when he was told by the man who hired him to take a few days` rest at a hotel with his Trinidadian girlfriend after completing work on the boat and before commencing his voyage. He denied saying that he was to be paid $2 million to deliver the drugs, but he added "Bhagwan didn`t believe him so he said $2 billion" and the Judge commented to the jury "if you believe that". He said that he told D/Sgt. Bhagwan about the gun and confirmed that it was a Beretta, and that he denied being a drug runner, he was "only delivering boat".

7. The Judge directed the jury "if you are of the view that Bhagwan was .....interrogating him at that point, without the assistance of counsel and so on, you are entitled to reject anything that Bhagwan said". Similarly, if they considered that the conversation might have been unfair to the Appellant.

8. The Appellant was interviewed by police officers in the presence of his then counsel on two occasions: first, on 2 August 2011 at 2.47pm. and secondly on 4 August 2011 at 11.50am. At the first interview he was asked for "his side of the story" and replied –

> "So, the only thing what I want comment is that, that these things not supposed to come into Bermuda. How you know I have a, I think it`s pretty big reason not to continue my.....I start in Trinidad....and my destination was Latvia, Riga.....So I lost my chain plates.....so I prepare some emergency, emergency fittings, holdings to, come in the closer place, and the place was Bermuda.....".

Asked about the firearm and the ammunition, he said that he bought it to protect himself, like a lot of sailboat captains do, to protect themselves. He bought them in Margarita (an island off Venezuela). In the second interview, he said "That`s the reason why I have illegal firearm on the boat", and that he had owned it "Some two years". He said nothing about the loading of the drugs.

9. At the trial, the Appellant raised a defence of "duress or compulsion or extraordinary emergency", based on threats that he said were made to him following his discovery of the drugs in the course of the voyage, coupled with the boat`s need for repairs following the storm. The Judge quoted his evidence as follows -".... both his life and his family`s life was threatened. They were going to be killed. He knew that boss he was dealing with, a man of connections, wide and far, with suspicious wealth. This was a serious matter. He believed that he and his family would be killed. And that is the belief that dwelled with him from the moment of that and remains up to this day. It is the reason why even now he will not disclose any name, or any place to find anybody.....So acting under that belief, he continued his journey, even in the midst of a storm and a damaged boat, so great was his fear for his own life at the hands of his boss, and for the life of his family at the hands of his boss, he could not take the opportunity to withdraw, even when it was presented.....He never intended to import any drugs or firearm into Bermuda. But he did so of necessity and fear.".

10. The Judge directed the jury that this defence made it necessary for them to consider three separate sections of the Bermuda Criminal Code (Criminal Code Act 1907). First, section 39 –

> **"Extraordinary emergencies**
> 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."

He said that the question was "Has the prosecution satisfied you that the circumstances which confronted the Defendant did not amount to a sudden, extraordinary emergency?". If the prosecution had not, were they "satisfied beyond reasonable doubt that his actions in the circumstances was outside what you could reasonably expect of an ordinary person with ordinary powers of self-control?"

11. Secondly, section 47 –

> **"Acts done in resistance to violence**
> 47. Without prejudice to any other provision of this Act, a person is not criminally responsible for an act or omission where the act or omission is reasonably necessary for the purpose of resisting actual violence threatened to him or to another person in his presence."

The Judge directed the jury that the onus was on the prosecution to prove (a) that violence was not threatened to the Defendant at all, or to another person who was in his presence, or (b) that the act or omission done by the Defendant was not reasonably necessary in order to resist the threatened violence".

12. Thirdly, section 48. This reads-

> **"Acts done for the purpose of self-preservation**
> Without prejudice to any other provision of this Act, a person is not criminally responsible for an act or omission where he does the act or makes the omission for the purpose of saving himself from immediate death or grievous bodily harm threatened to be inflicted upon him by some

> person actually present and in a position to execute the threats, and believing himself to be unable otherwise to escape the carrying out of the threats into execution: ...
> Provided that the foregoing provisions of this section shall not have effect so as to justify or excuse.....
> (c) an act done, or omission made, by a person who has by entering into an unlawful association or conspiracy rendered himself liable to have such threats made to him."

13. The Judge directed the jury that the onus was on the prosecution to prove "(a) that no threat of death or serious harm was made to the defendant; or (b) that the person making the threat was not present or in a position to carry it out", and (c) that the Defendant "failed to avail himself of some other opportunity which was reasonably open to him to render the threat ineffective".

14. In addition to these three statutory defences, the Judge said this about a possible fourth defence which would arise if it was accepted, "as it should be", that "the drugs were never to be for Bermuda, they were going to Latvia, or at least the Denmark Channel. So the Defendant was just passing through because he was driven in here by a storm which damaged his boat". He then gave the following direction –

> "In my view that is not a defence, in law. Whether the drugs were intended for Bermuda or not is not a defence",
> and he called it an "emotional defence".

Nevertheless, he left it to the jury:

> "But in the end you are the jurors and you determine what the true facts are and you determine whether that defence of "in transit", if you accept and you think that`s a sufficient reason to acquit, or whether you reject it".

Miss Clarke for the prosecution asked the Judge in the absence of the jury whether he was inviting the jury to acquit on that basis, and he repeated that he was leaving the issue to them.

15. After a two-hour retirement, the jury returned to ask two written questions –

"(1) Can we hear the direction on the three sections, 39, 47 and 48 covering duress again, from the judge; and
(2) Can we have copies of the three sections?"

After a full discussion with counsel, the Judge gave a further direction, taking the second question first and declining the request for the jury to be given copies of the three sections, on the ground that it was their duty to act on his directions as to the law. Turning to the first question, he gave a full summary of the Defendant`s evidence, then dealt with each of the three sections in turn. With regard to section 39, he said that the question was, "What was the sudden or extraordinary emergency" that made it necessary to bring the drugs or the firearm into Bermuda, either as the result of the storm or of the threats said to have been made "down by the Dominican Republic", and he concluded "So that`s section 39, necessity".

16. The Judge gave a detailed further direction on the terms and application of section 47. The burden was on the prosecution to prove that "the violence was not threatened to the Defendant"; his family were not present, and so that part of the section "fell away"; and if it was, that the act done by the Defendant was not reasonably necessary in order to resist the threatened violence. The prosecution alleged that he was not compelled to bring the drugs into Bermuda; many other options were open to him.

17. Again, section 48 was read out in full, pointing out that it required a threat of "immediate" death or grievous bodily harm, made by a person who was "actually present", and moreover that the prosecution could rely on the proviso if, as they alleged, he was involved in the loading of the drugs on board his vessel and party to an agreement to carry them to Latvia. He reminded the jury that the burden of proof was on the prosecution – "So they`re saying, this defence, even though he has raised it, is not available to him because they have disproved it". Furthermore, he reminded them that the prosecution was relying on proviso (c), which he quoted. He then directed the jury to consider each of the sections in

turn and that any one of them could justify an acquittal. "So the prosecution has to disprove all the defences before you can convict him".

18. The Judge went on to consider the "in transit" defence – "you didn't ask the question, but I raised the fourth one again", concluding with "But I told you that as a matter of law, it does not exist. That's a matter for you, then". The jury retired again at 4:40 pm and returned at 5:07 pm with unanimous verdicts of guilty on all six counts.

19. We should say at this stage that in our view the Judge ought not to have left this issue to the jury, when he had directed them that in his judgment it could not provide a defence in law. He should have taken the responsibility of directing the jury that they could not acquit on that basis. However, we cannot say that by leaving it to the jury the Judge prejudiced the Appellant; rather, the reverse.

20. The first ground of appeal was that the Judge "misdirected the jury in relation to the defence of duress". That was in the original Notice of Appeal dated 25 June 2012 lodged by Mr. Pettingill who was defence counsel at the trial. Mr. Worrell's written submission raised two issues in support of this ground of appeal. First, "it would appear that sections 47 and 48 did not ...apply [on the facts of this case]", and that by directing the jury in relation to those defences the Judge "invited confusion into their deliberations". Secondly, that the Judge was wrong not to have provided the jury with copies of the relevant sections.

21. In his oral submissions, Mr. Worrell ranged widely over the issues raised by all three sections, and at times he appeared to accept that one or both of sections 47 and 48 in fact might be relevant. His submission that the Judge "invited confusion" by leaving all three defences to the jury faced the difficulty that there was extensive discussion between the Judge and defence counsel, in the absence of the jury, in the course of which the Judge made it clear that he was doing so at the request of the defence. He clearly directed the jury that the defences were separate and should be considered separately, and that any one of them might

lead to the Appellant`s acquittal. In our judgment, no valid criticism can be made of the fact that all three defences were left to the jury.

22. Apart from that specific matter, it was not clear to the Court what misdirection was alleged in relation to any of the three individual sections. In our judgment, the Judge`s directions on the three defences based on sections 39, 47 and 48 were entirely correct, and there was ample evidence supporting the jury`s conclusion that none of the sections provides a defence in the circumstances of the case.

23. The contention that the Judge was wrong to refuse the jury`s request to have copies of the sections must also be rejected. The Judge told them his reasons. These were that it was his duty to explain the law to them, and theirs to accept his directions, including the meaning and effect of the statutory provisions. It is not for the jury to read and interpret the statutory provisions as they may think fit.

24. Mr. Worrell submitted that the Judge`s further directions in answer to the jury`s question were "ringing in their ears" when they retired for the second time, and that it is significant that they reached their verdicts soon afterwards. We do not see the relevance of this, unless a clear misdirection is identified, which it has not been. And in any event we consider it unwise to speculate as to what the jury`s processes of deliberation were.

25. The first ground of appeal therefore is dismissed.

26. The second ground, in the original Notice of Appeal, was that the Judge misdirected the jury in regard to the relationship between the drugs charges and the firearm charges. That ground was not maintained at the hearing, and it is dismissed.

27. On 13 February 2014 Mr. Worrell submitted an amended Notice of Appeal on behalf of the Appellant. It was not supported by affidavit or other evidence, in any form, notwithstanding that it made several new allegations concerning the facts as well as the law. No application for leave to extend the time for lodging Grounds of Appeal was made until Mr. Worrell was prompted to do so at the hearing of the appeal. The Court then gave leave to add Grounds Nos. 3 – 12 in the Amended Notice, and these were considered by the Court. They remained unsupported by affidavit or other evidence, and no application was made to adduce evidence in their support.

28. Grounds 3,5,7,8 and 10 were concerned with different aspects of the introduction of DNA evidence at the hearing. There was unchallenged evidence that traces of the Defendant`s DNA were found on the outside of some of the packages containing cocaine that were recovered from the fore cabin of the boat. The Defendant explained this by saying that when he moved the mattress "he discovered the packages, which he didn`t move, but probably touched, and a box and a pouch which he opened and saw a gun". The expert evidence relied upon by the prosecution was read to the jury by prosecution counsel, with the agreement of the Defendant`s counsel.

29. Mr. Worrell`s contentions are (1) that the Judge "erred by ordering the Appellant to provide the prosecution with a further sample of his DNA" (ground 3); (2) that the Judge "erred in law by allowing the prosecution to read to the jury what was purported to be facts agreed between Defence and Prosecution Counsel which facts purported to express opinion evidence" (ground 5); (3) that the prosecution "failed in their duty of fairness in that they omitted to adduce in evidence" either photographs or witness evidence showing that the packages of cocaine were placed on the Appellant`s bedding area aboard his vessel "so as to raise the issue of possible DNA transference or contamination" (grounds 7 and 8); and under the heading "Constitutional", that the Judge`s order requiring the Appellant to provide a further sample of his DNA was "an unlawful infringement upon his right to respect for privacy of his person" (ground 10).

30. We cannot see any merit in any of these grounds of appeal. First, no objection was taken to the Judge`s order requiring the Appellant to provide a further sample of his DNA, either by him or by counsel on his behalf; secondly, the expert evidence was read to the jury by prosecuting counsel in accordance with the normal and perfectly fair procedure adopted by the Courts, and with the agreement of defence counsel; third, Mr. Worrell told us that the possibility of DNA contamination from the Appellant`s bedding was a theory of his own, not based on any scientific knowledge or expertise; and fourthly, it was not supported by any expert evidence offered in support of the Amended Notice of Appeal.

31. We cannot find any support for this theory or possibility in the evidence given at the trial, nor that grounds could exist for permitting fresh evidence at this stage, if such evidence were available. We therefore dismiss these grounds of appeal.

32. Ground 4 alleged that the Judge "erred by repeatedly referring in his summing-up to the Appellant`s former employer as "the boss man" and "the boss" as such references in the circumstances of the case was inappropriate and likely to have had a prejudicial effect as against the Appellant."

33. The Judge twice explained to the jury why he used the word "boss". "I use the word only as a shortcut for the person who hired him, which is the term the Defendant used, he always say the person who hired him". "...The Defendant is saying he worked as a charter captain in the Caribbean.....with this person who hired him. This person bought a boat. He said "we" bought a boat, he and the person bought a boat, at the suggestion of the boss-man. I call him the boss, not the Sparangivi, right, for convenience. When they went to St. Lucia. All right?".

34. It is not clear what other single word the Judge might have used, to avoid repeating "the man who hired him". The ground of appeal uses "employer" but that does not appear in any the trial documents that we have. The objection appears to be that "boss" and "boss-man" carry with them a suggestion that the

Appellant was a member of a drug-smuggling gang headed by that person. But that overlooks the fact that it was central to the Defendant`s case that the person he said had threatened him was in charge of a drug-smuggling operation and had international connections which made the threats serious and likely to be carried out. Referring to him as "the boss" did not prejudice the Appellant, it might even be said to have aided his defence. This ground of appeal therefore is dismissed.

35. Ground 6, under the heading "Errors of Procedure", alleged that the prosecution failed to disclose to the defence "all of the email messages obtained from the Appellant`s computers". It appears from the Judge`s Summation that not all of the messages sent or allegedly sent by the Defendant from the boat were produced in evidence, but there is no indication that these were required to be produced before or at the trial, nor whether they existed in fact, nor whether, if produced, they would be relevant to any issues at the trial. So far as we are aware, the matter was never gone into at the trial, and there is no basis for saying that the prosecution failed to make proper disclosure to the defence. In the absence of such evidence, this ground must be dismissed also.

36. Finally, under the heading "Constitutional", grounds 9, 11 and 12 contended that various of the Appellant`s constitutional rights were infringed, in various ways. The first was that he was entitled to be informed "that a failure to declare any firearms in his possession would render him in violation of Bermuda law and liable to punishment accordingly"(ground 9). The evidence showed that he was asked these questions by customs and harbour officials on arrival at St. George`s, and that he was asked to and did complete the appropriate declaration. We do not consider that he was entitled to be told expressly that honest answers were required by the law.

37. Ground 11 alleged a number of alleged breaches which Mr. Worrell accepted were advanced without instructions from his client. They were not supported by any evidence already before the Court, nor by any application to introduce fresh evidence at this stage. These grounds must be dismissed.

38. Ground 12 is open to the same objections. It reads-

> "12. That the Appellant was effectively discriminated against on the ground of his language, place of origin and/or nationality."

For this reason, it was alleged that he was deprived of his constitutional rights. The seriousness of this allegation requires separate comment from us.

39. The facts are (1) at no stage in his initial dealings with customs and harbour authorities did the Appellant suggest that he was at a disadvantage by reason of any language difficulty; (2) similarly, the record of his police interviews shows that he was expressly asked whether he was content to have them conducted in English, and he agreed: his counsel was present on both occasions; (3) we received evidence from counsel who represented him at the trial, Mr. Pettingill, that his dealings with the Appellant throughout were conducted both in English and in his native language, with the assistance of an interpreter, and that the Defendant never complained about their ability to communicate with each other; (4) the trial was conducted in English: a sworn interpreter was available to assist the Defendant and sat beside him throughout; and (5) Mr. Worrell accepted that he has communicated with the Defendant in English and without requiring an interpreter, since he was first instructed in June 2013.

40. This ground of appeal is entirely without merit, and in our judgment it should never have been advanced.

41. This Court refused leave for a further 31 grounds of appeal (paragraphs 13 – 44 of the draft Amended Notice of Appeal). These were under the heading "Conduct of Counsel" and all contained criticisms of counsel previously instructed on the Defendant`s behalf, including Mr. Pettingill who appeared at the trial. The Court refused leave because these allegations were unsupported by evidence and because in many instances they alleged that counsel was "defective" in failing to put forward defences based on what were suggested as additional grounds of appeal in paragraphs 1 – 12 of the Amended Notice. As indicated above, we

cannot find merit in any of those grounds, and in those respects there is no basis for the criticisms that were made.

42. We should add that we have received affidavits from the counsel concerned, including Mr. Pettingill, and that in our view there is no basis for any of the allegations made against him in relation to the conduct of the trial. Certain other allegations were made against him and other counsel previously instructed by or on behalf of the Appellant, but these were unconnected with the conduct of the trial and the safety of the jury`s verdict, and they are not matters for us. We should also record that Mr. Worrell applied at the outset for a short adjournment of the appeal, to enable him to take instructions regarding counsels` affidavits, but it was unclear why this was necessary for the purposes of the appeal, and the application was refused.

43. The appeal against conviction therefore is dismissed. There is no appeal against sentence in this case.

Evans, JA

Zacca, P

Baker, JA