The Court of Appeal for Bermuda

CRIMINAL APPEALS Nos. 2 & 10 of 2013

Between:

EVERETT JAHNI BEAN

RANDOLPH ANTHONY SIMONS

Appellants

-v-

THE QUEEN

Respondent

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

Appearances: Mr. Richard Horseman and Mrs. Simone Smith-Bean for the First Appellant
Ms. Shade Subair for the Second Appellant
Mr. Carrington Mahoney and Ms. Karen King for the Respondent

Date of Hearing: **3 & 4 March 2014**

Date of Judgment: **25 March 2014**

JUDGMENTS

PRESIDENT

1. The appellants were convicted by the verdict of a jury on the charge of conspiracy to import a controlled drug, namely cocaine. The appellant Bean was sentenced to 15 years imprisonment and Simons to 12 years imprisonment. From these convictions, they have appealed.

Prosecution's Case

2. A UPS box shipped from Trinidad destined for Bermuda was intercepted by U.S Customs Officers in Puerto Rico. The box was addressed to Mr. Dennis O'Brien of

6 Jones Village, Khyber Pass, Warwick WK07. The tracking number being #550132634 and telephone number (441) 518-1105.

3. The box contained an air compressor which was opened and two packages containing a white powered substance weighing 2,410 grams. The substance was cocaine. The Bermuda Police was contacted and box was repackaged without the packages and shipped on to Bermuda. The con-signer of the shipment was listed as Carl Robertson of 50 Hiliare Trace, Gasparillo, Trinidad.

4. On January 6, 2011, the consignment arrived in Bermuda and customs officers attended to it at the airport.

5. On January 7, 2011 the consignment was collected by the CEO of the courier firm IBC (International Bonded Couriers) Mr. Rick Craft and taken to his office on Park Road in Hamilton. At about 4:15 pm the same day, the appellant Randolph Simons went to IBC asking about the consignment but left without it.

6. On January 8, 2011 at about 9:00 am appellant Simons returned to IBC asking about the consignment. The police were informed and the box was delivered to him. On reaching outside he was held by the police.

7. DC Jackson, a police officer, arrived in the area of the IBC at about 7:30 am prior to the delivery of the consignment. He took up a position on Park Road in the immediate vicinity of IBC. He observed a man on a motorbike at about 9:00 am riding slowly who appeared to be holding an object in his left hand.

8. DC Jackson saw appellant Simons exit IBC with the consignment. He identified himself as a police officer, arrested him for conspiracy to import a controlled drug. The appellant replied "I just came to collect a package". He was asked with whom he was travelling and the appellant replied "Mr. Bean on red bike." DC Jackson seized a Blackberry cell phone from the appellant and inspected it. He discovered a text message from a telephone number (441) 518-1105 which stated "Yo, don't do it." Another message said "I am going to let them deliver it."

9. The appellant was taken back to the Hamilton Police Station. DC Jackson went back to the vehicle which had transported the appellant and on the floor where the appellant had been sitting found a piece of a torn yellow paper with numbers

on it similar to those on the consignment. The paper was shown to appellant who said "The guy you looking for gave me that piece of paper."

10. On the same date, January 8, 2011, DC Shannon Swan who was also in the area of IBC at about 9:07 am observed a red motorcycle, licence BD472, travelling along Park Road and onto Washington Street at a very slow speed. The rider of the cycle looked towards him and he recognised the rider as appellant Bean who appeared to be texting on a cell phone held in his left hand. He had known the appellant Bean since 2003 and had seen him on several occasions in the course of his career as a police officer and knew his name to be Everett Jahni Bean who was also referred to as "Ni". He had previously seen him riding the red bike and that it belonged to his child's mother.

11. Later that same day, January 8, 2011, the police went to the home of the appellant Bean at 4 Jones Village Lane in Warwick Parish and seized from his bedroom several documents including a Western Union receipt to Trinidad and Tobago and several TBI phone records in the name of Everett Bean.

12. Police Officer Orren Merber's evidence was that in December 15, 2010, he had arrested the appellant Bean on a warrant and he had recorded his details on his detainee form. The details included his address and phone number which were given by him as 4 Jones Village, Warwick, and telephone number (441) 518-1105.

13. Evidence given by Linda O'brien of 6 Jones Village, Warwick, the address on the package, was to the effect that she knew nothing about a consignment and never ordered anything from overseas. Dennis O'Brien of Foothill Road, Devonshire only owned one cell phone (441) 705-8146 and did not order or know of any consignment from Trinidad.

14. The TBI records taken from the appellant Bean's house showed that the number (441) 518-1105 contacted a number in Trinidad (868) 365-0949 about 87 times. There were 54 calls to another Trinidad number (868) 772-1181. Two of the Trinidad numbers also contacted a second phone number (441) 599-3582 which was said to be the appellant Bean's number.

15. It was the case for the Crown that the telephone number (441) 518-1105 belonged to the appellant Bean and that he arranged with appellant Simons to collect the consignment and that he was the rider of the red bike seen in the area of IBC and that he was texting Simons alerting him not to collect it. There was evidence also that when it is alleged Bean was seen texting, a message was sent from cell phone (441) 518-1105 to (441) 518-0319. Appellant Simons said that cell (441) 518-0319 was given to him by appellant Bean.

16. The case for the prosecution is that the appellant Bean conspired with the appellant Simons and others prior to January 3, 2011 to import the cocaine. It was conceded that the agreement ended on January 3, 2011. Although it was alleged that several calls were made between the appellant Bean and Appellant Simons after January 3, 2011, there were alleged calls made on the 10th, 13th, and 14th December 2010 between the appellants. Cell phone (441) 518-0319 showed some 25 contacts with (441) 518-1105.

17. On December 13, 2010 a call was made at 10:43 from cell phone number (441) 518-1105 to (441) 518-0319. At 10:44 another call made from cell (441) 518-1105 to cell (441) 516-4943 (belonging to appellant Simons). At 12:12 a call from (441) 518-0319 to (441) 518-1105. At 12:16 a call from (441) 518-1105 to a Trinidad number (868) 365-0949. On December 14, 2010, a text message, "Call me back its Niy", was sent from (441) 518-1105 to (441) 516-4943 (Simons) at 3:22:47. At 9:42:20 a text message "Call me" was sent from (441) 518-1105 to the Trinidad number (868) 365-0949.

18. It was the case for the prosecution that the above calls supported the evidence of conspiracy.

Defence Case

19. The appellant Bean did not give evidence or call any witnesses. The case for Appellant Bean is that he never entered into an agreement with Simons or with anyone to import drugs into Bermuda. He was not the person who used the cell phone (441) 518-1105 or any cell phone.

20. Appellant Bean admitted in an interview that he had been riding a bike around town, but he was not the person the police said they saw. He never arranged for or expected any package from Trinidad.

21. The appellant Simons gave sworn evidence. His case was that he never entered into any agreement with appellant Jahni Bean or anyone else to import any drugs into Bermuda. Before the 6 January 2011 he never knew of any package to be imported into Bermuda.

22. Prior to January 3, 2011, he visited the home of appellant Bean regularly but his communication with him and one Mr. Kahni Bean was strictly on a business basis. The cell calls between his phone and cell phone (441) 518-1105 in December 2010 were between Kahni and not the appellant Jahni Bean. Kahni always called him from (441) 518-1105. They were never about drugs or any package.

23. On January 6, 2011 he met Kahni Bean who asked him to collect the package from IBC.

24. In an interview with the police on January 11, 2011 when asked if knew the appellant Jahni Bean he replied that he did not know him. He accepted that he had lied.

25. There was no evidence other than the assertion of appellant Simons that a person named Kahni Bean existed. The prosecution asserted that no such person existed.

Appellant Bean

26. The appeal of Bean was presented on three grounds of appeal:

> 1) That the learned trial judge erred in law by failing to withdraw the case from the jury upon hearing submissions of no case to answer by Defence Counsel as the identification evidence was tenuous at least.
>
> 2) That the learned trial judge erred in law by failing to adequately direct the jury with regard to the issue of

identification evidence, having dismissed the no case submissions delivered by Defence Counsel.

3) That the learned trial judge erred in law by failing to adequately direct the jury as to the law concerning conspiracies.

27. The first ground of appeal was abandoned by counsel. Mr. Horseman for the appellant Bean informed the Court that he was not pursuing this ground of appeal.

28. In relation to the second ground of appeal, Mr. Horseman relied on the cases of *Turnbull* [1977] Q. B224 and *Reid v The Queen* [1990] 1 AC. 363. It was submitted that the evidence of DC Shannon Swan and Roderick Masters was such that their evidence of identifying the appellant as the rider of the red bike was made in difficult circumstances and was a fleeting glance identification.

29. The Court was referred to parts of the transcript of these two witnesses. Swan accepted that his recognition was done in a split second.

30. The evidence of Masters was to the effect that the rider looked back in his direction several times but he could not see the face of the rider because he had on a helmet with a visor.

31. The evidence of DC Swan to which the Court was referred, does not suggest that the visor was down when Swan recognized the appellant Bean as the rider of the red bike. The appellant was known to Swan since 2003. He had seen the appellant riding the red bike on previous occasions. He saw the rider texting and this could suggest that the visor was not down at that time. Roderick Masters' evidence was at a later time when they were chasing after the rider. It is likely that the visor was down when the rider was speeding away.

32. There was a case to go to the jury and it was a matter for the jury to decide whether DC Swan was able to recognize the rider of the bike as appellant Bean.

33. Mr. Horseman submitted that there were errors in the directions of the learned trial judge as to the identification evidence.

34. Having looked at the entire directions of the trial judge as to identification, we are unable to say that the jury was not aware of the weakness of any of the identification as pointed out by Mr. Horseman.

35. In relation to the third ground of appeal, Mr. Horseman submitted that the trial judge erred in law in giving his directions on the law of conspiracy when he imported the law of joint enterprise into the law of conspiracy. This he did by referring to section 27 of the Criminal Code Act 1907 and telling the jury that his section was applicable. Neither counsel objected to this direction.

36. Section 27 of the Criminal Code Act 1907 provides:

> "(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence, and to be guilty of the offence, and may be charged with actually committing it."

They are:

> "(a) every person who actually does the act or makes the omission which constitutes the offence;
>
> (b) every person who does any act or makes any omission for the purpose of enabling or aiding another person to commit the offence;
>
> (c) every person who aids another person in committing the offence;...."

37. Mr. Horseman also submits that the learned trial judge confused the law of joint enterprise with the law of conspiracy. This direction would have confused the jury and in fact when the jury retired, they sent a question to the judge asking the judge to explain section 27 of the Criminal Code Act 1907. The trial judge then repeated the provisions of the section and his directions he had already given to the jury.

38. It was further submitted by Mr. Horseman, that having left section 27 to the jury, the jury may have believed that they could find the appellants guilty of adding and abetting even if they had no knowledge of the conspiracy prior to the drugs being imported.

39. Mr. Mahoney for the Crown submitted that even if the trial judge had been in error in leaving section 27 to the jury, there was no miscarriage of justice as the jury was on more than one occasion, directed that to convict they must be satisfied that the appellants was a party to an agreement to import the drugs into Bermuda.

40. At page 109 of the summation of the learned trial judge, he directed the jury as follows:

> "I directed you about what is meant by parties to a criminal offence, under section 27 of our Criminal Code. I told you – I gave you about three different examples, on with the principal who actually committed a crime; one with he or she who has assisted, aided, et cetera, in the commission of that crime and I gave you some examples of that, and in particular I applied that second limb to Mr. Simons, saying that if he, at the time, entered the agreement with the intent to assist the other conspirators to cause those drugs to come into Bermuda, that you can find him guilty."

Mr. Mahoney submitted that what the judge was telling the jury was that if a person entered into an agreement to import drugs into Bermuda, and his part of the agreement was to assist the other conspirators, then he would be guilty of conspiring.

41. The learned trial judge in his summing up at page 135 said:

> "You may consider whether he is a vital witness in this matter at all when you ask yourself the central question in this case, which is, did the Defendant whose case you are considering know that he entered as agreement to import drugs into Bermuda?...or to cause drugs to be imported into Bermuda....
>
> In the end, before you can convict either Defendant, it is for you to be satisfied so that you feel sure, upon the evidence as a whole, that a particular Defendant knew at the material time that he entered into an agreement to import these drugs."

42. Having explained to the jury about section 27 in answer to their question, the learned trial judge directed them at page 254:

"So in the case of Mr. Bean, if he made an arrangement, an agreement with some other people to import drugs into Bermuda, knowingly entered an agreement with them to import drugs into Bermuda, all right, whoever those persons may be, and you are satisfied on the evidence that that is provided, when you look at what he said to the Police, when you look at the documentary evidence and so on, you may find him guilty. If you are not sure that it is proved, then you should find him not guilty.

In the case of Mr. Simons, if you are satisfied that at some point he joined this agreement, right, prior to January 3rd, or up to there, right, by way of agreeing to be either a principal as well, right, bringing in the drugs for his purpose, or their purpose, or by agreeing, for whatever reason, to collect the drugs when they come in, for the others, or other, then that is capable of amounting to being an aider and assister in the agreement.

The law says that he would be as guilty as the others, in that situation.

It has to be delivered somehow. So if it is going to be delivered by way of his agreement that he's going to collect, then it would be – the offence would be proved, so long as you are satisfied that he knew that that is what he was agreeing to.

Now, let me give you the direction, therefore, on conspiracy itself....So 'conspiracy' would mean agreeing to cause to be brought in, by land, air or sea.

And how a conspiracy works? Just as it is, in a criminal offence, to import a controlled drug into Bermuda, so too is it an offence to agree to import a controlled drug into Bermuda, or to assist in the causing of that controlled drug or controlled drugs to come into Bermuda.

The agreement has to be between two or more persons.

So an agreement to commit an offence is called a conspiracy, and that is the offence which is charged here.

Before you can convict any of these two Defendants of this offence, you must be sure, one, that there was in fact an agreement between two or more persons to commit the crime in question; and, two, that the Defendant whose case you are considering was a party to that agreement at the material

time. And the material time is any time up to the 3rd of January.

In the sense that, one, he knowingly agreed with one or more of the other persons referred to in the indictment that the crime should be committed.

One or more persons referred to in the indictment include the Defendant Bean, if you're looking at Mr. Simons' case, for example, or Kahni, if you accept what the Defendant was saying about Kahni, because Kahni would fall under the category of 'Other persons", or whomever.

If you're looking at the case of Bean, other person would include Mr. Simons, or Jahnita [sic], because she would fall under the category of other persons who are not specifically named in the indictment, or the people in Trinidad, or whomever not actually named, they would fall under that category. Even Kahni.

So, as I was saying, the Defendant whose case you are considering, you must be satisfied he was party to that agreement at the material time, one; if he knowingly agreed with one or more of the other persons referred to in the indictment that the crime should be committed; and, two, that at the time of agreeing to this, he intended that the agreement should be carried out, that is the object should be carried out.

You may think that it is only in a rare case that a jury would receive direct evidence of a criminal conspiracy. Example, eye witnesses and documentary evidence and CCTV and all of that.

When people make agreements to commit crimes you would expect them to do so in private. You would not expect them to agree to commit crimes in front of others and broadcast it and so on, across the airways or to put their agreement in writing.

But people may act together to bring about a particular result in such a way as to leave no doubt that they are carrying out an earlier agreement, therefore you've got to look at the evidence as a whole, before, at the time of, and after; what they did, what he said, what he didn't do, what he didn't say, how he did it, how he didn't do it; all of those things you look at."

43. We agree that section 27 of the Code was not necessary or applicable to the case, but we also are also of the view that the directions of the trial judge were such that the jury would have been left in no doubt, that the appellants could only be convicted if they were satisfied there was an agreement between the appellants and others prior to January 3, 2011 to import drugs into Bermuda and that the collection of the drugs was part of the agreement.

Appellant Simons

44. Four grounds of appeal were filed on behalf of the appellant Simons.

1) The learned judge erred in ruling that there was a case to answer.

2) The learned judge erred and misdirected the jury in the evidential scope of the conspiracy.

3) The learned judge exhibited conduct of bias towards the Crown's case throughout the trial.

4) The learned judge failed to order a mistrial after violent outbursts of rage by the co-accused targeting the judge and jury.

45. Ms. Subair informed the Court that the appellant abandons grounds 3 and 4. The submissions were made on grounds 1 and 2.

46. It was submitted that the fact that the appellant went to IBC and enquired about the package on January 7, 2011 and that he subsequently collected the package on January 8, 2011 at a time when the agreement had ended is not in itself evidence towards the conspiracy charge. It was accepted that the conspiracy ended on January 3, 2011 a date prior to the collection of the consignment.

47. Ms. Subair also submitted that the telephone calls made from cell phone (441) 518-1105 to cell phone (441) 518-0319 and from (441) 518-0319 to (441) 518-1105 is not sufficient evidence to implicate the appellant in a conspiracy. She argued that the learned trial judge was in error in not accepting the no case submission.

48. The appellant admitted that he had cell phone number (441) 518-0319 and that it was given to him by appellant Bean.

49. The appellant's case was that the phone calls were made to Kahni Bean and not the appellant Jahni Bean.

50. The Crown's case was that the phone calls in December which were prior to January 3, 2011 was evidence for the jury to consider in deciding whether the appellant was part of the agreement to import drugs into Bermuda.

51. There was evidence that the cell phone (441) 518-0319 was given to the appellant by the appellant Bean. When the appellant was detained by the police he was asked "with whom he was travelling and he replied 'Mr. Bean on a red bike." A cell phone was seized from the appellant. Recorded on the phone were two text messages from telephone number (441) 518-1105. One read "Yo don't do it." The other said "I'm going to let them deliver it." These messages came from cell phone (441) 518-1105.

52. In his interview to the police, appellant Simons said that he did not know the appellant Jahni Bean. He subsequently admitted that he had lied and that he did know the appellant Bean. There was also evidence that the appellant Simons was granted bail. He was to report to the police on June 30, 2011. In March 4, 2011 he attempted to leave Bermuda. His return ticket showed a date for January 20, 2012.

53. There was evidence for the jury to consider as to whether the two appellants were the persons using the cell phones (441) 518-0319 and (441) 518-1105. It was open to the jury to find that the two text messages were sent by the appellant Bean to the appellant Simons.

54. It was also open to the jury to find that the cell phone calls were made by the appellant to the appellant Bean.

55. We hold that the judge was not in error in not accepting the no case submission. We are satisfied that there was evidence led by the prosecution on which the jury was entitled to find the appellant guilty of conspiracy.

Section 27, The Criminal Code Act 1907

56. Ms. Subair in relation to ground of appeal #2 stated that she adopted the submissions of Mr. Horseman that the learned trial judge in directing the jury on section 27 of the Code would have confused the jury in thinking that the act of the appellant on January 7 and 8, 2011 was sufficient to find him guilty of conspiracy. For the reasons given above in the appellant Bean's appeal, we hold that the learned trial judge made it clear to the jury that it was open to them to find that the assistance given to the appellant Bean was on the basis that the appellant was a party to the agreement prior to January 3, 2011.

57. For all the above reasons we find that the grounds of appeal of each of the appellants fail.

58. We are satisfied that the verdict of the jury in respect of each of the appellants cannot be disturbed. For the above reasons we dismiss the appeal of both appellants and affirm the convictions.

59. Mr. Horseman indicated to the Court that the appeal against sentence was abandoned.

Zacca, P

Evans, JA

Baker, JA