The Court of Appeal for Bermuda

CRIMINAL APPEALS Nos 12 of 2012 & 1 of 2013

Between:

LORENZO WAYNE LOTTIMORE

CRAIG DAMIAN HATHERLEY

Appellants

-v-

THE QUEEN

Respondent

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

Appearances: Mr. Lottimore in Person
Mr. Larry Mussenden, Mussenden Subair, for Hatherley
Mr. Garrett Byrne, Department of Public Prosecutions, for the Respondent

Date of Hearing: **17 & 18 November 2014**

Date of Decision: **21 November 2014**

Date of Reasons: **8 January 2015**

REASONS FOR DECISION

Baker, JA

1. These two appellants were convicted on 25 September 2012 before Simmons J and a jury of conspiracy to import heroin contrary to section 4(3) of the Misuse of Drugs Act 1972 as read with section 230(1) of the Criminal Code. Hatherley was sentenced to 12 years imprisonment and Lottimore to 15 years imprisonment. We

dismissed their appeals against conviction on 21 November 2014 and we now give our reasons.

2. The appeals were initially listed for hearing on 29 May 2014 but adjourned until the November Sitting as Lottimore had only recently obtained legal aid to cover his appeal and his counsel required more time. The court decided in June that the appeals should be heard together and granted Hatherley bail.

3. In explaining how Lottimore came to represent himself during the course of the appeal it is necessary to set out briefly the history of his representation. At the trial he was represented by Ms Pearman. On 4 January 2014 he wrote to the Legal Aid Office to request a change of counsel to Mr Attridge. He says he was unable to contact Mr Attridge and requested a change to Ms Harvey on 4 March 2014. Lottimore's next change was to Mr Richardson who says he received the documents from former counsel on 22 September 2014. Although he was covered by the legal aid certificate, Mr Richardson did not come on the court record as, he said, "he had not been afforded the opportunity to take any instructions from Mr Lottimore". On 7 November 2014 he swore an affidavit saying he would be out of the jurisdiction on the date that had been fixed for the hearing of the appeal, 10 November 2014 and asked for the appeal to be adjourned until the next session of the court in March 2015. On 10 November 2014 Mr Richardson did not appear and no one was in a position to argue Lottimore's appeal. This is an entirely unacceptable situation; either Mr Richardson should have been present to argue the appeal or he should have returned the brief in sufficient time for other counsel to prepare and present Lottimore's appeal. At some inconvenience the court was able to re-fix the appeal to begin on 17 November 2014 telling Lottimore that he had the alternatives of:

    (1) acting in person;
    (2) instructing Mr Richardson, if available, or

(3) instructing Mr Mussenden who was familiar with the case as he was representing Hatherley and confirmed to us that no conflict of interest arose.

He chose the latter course.

4. Mr Mussenden put in a great deal of work over a short period of time and helpfully produced a document consolidating the grounds of appeal of the two appellants and thus, where appropriate, dealing with the relevant grounds of the two of them together. When, however, he came to argue Lottimore's appeal, Lottimore withdrew his instructions, sought an adjournment until the March sitting of the court and said he was not ready to proceed with his appeal. The court refused his application on the ground that he had already been provided with an opportunity to obtain representation and had indeed instructed Mr Mussenden. Furthermore the interests of justice required the present panel of the court to conclude the hearing of the appeal.

5. After a short adjournment Mr Mussenden provided us with a list of documents that Lottimore wished us to read when considering his appeal. This included an amended skeleton argument that had not been filed, a skeleton argument prepared by Mr Mussenden, a letter from Lottimore and a report of the case of *R v Courtie* [1984] AC 463. The Court carefully considered the contents of all these documents.

The Facts

6. On 7 October 2010 a US Air Ramp employee called Wade was arrested at Philadelphia International Airport after being found in the cargo hold of an aircraft the previous day without authority. He admitted having put marijuana on a plane bound for Bermuda and later agreed to assist the US authorities in relation to a drug ring importing drugs into Bermuda. Thereafter telephone calls were recorded between him and a man called "Afro" in Bermuda making

arrangements to send drugs from the US to Bermuda. The Crown alleged that "Afro" was Lottimore.

7. Next there were telephone calls recorded between Wade and "Afro" arranging for Wade, via an associate, to collect a package from an associate of "Afro" who would be standing outside the Hotel Pennsylvania in Manhattan. Hatherley travelled from Bermuda to New York on 18 April 2011 and stayed at the Hotel Pennsylvania where he shared a room with a man called Tucker, also from Bermuda.

8. On 21 April 2011 "Afro" called Wade to tell him to expect contact with "his boy". Wade received a call from another man to arrange the meeting to pass over the drugs and that person, Hatherley said that it would have to be soon "because we are leaving tomorrow". (Hatherley left New York the next day).

9. On that day, 22 April 2011, there were telephone calls between Wade and an unidentified caller in which it was arranged that the person to receive the package would be driving a black Lexus. Shortly afterwards, Hatherley stood outside the hotel and a black Lexus pulled up. Hatherley got into the front passenger seat. He was then seen on video handing over a white towel from within a small rucksack. He said: "the money and everything is in there". The recipient was an undercover agent. After the Lexus had travelled a few blocks Hatherley got out. The package was subsequently examined and found to contain US$2,000 and 388 grams of heroin of 30% purity with a street value of BD$775,000. It was not disputed that Hatherley handed over the package. He declined to answer questions in interview and did not give evidence.

10. Following 22 April 2011 there were further telephone calls between "Afro" and Wade to discuss when the package would be brought into Bermuda. A dummy package was placed on a plane and arrived in Bermuda on 11 May 2011. But the conspirators could not find it and it was returned to Philadelphia where, Wade told "Afro", he would retrieve it. At the time of the anticipated removal of the

dummy package from the aircraft in Bermuda a man called Carroll (of whom more later) met a man on a bike in the trees nearby. The bike's licence tag matched that on one subsequently seen parked outside Lottimore's house.

11. A further attempt to deliver the dummy package to Bermuda was made in late May 2011 and on 1 June 2011 it was received in Bermuda by Carroll who conveyed it, via a man called Marshall, to Lottimore. It was recovered from Lottimore and various individuals were arrested in relation to the conspiracy later that day.

12. The case against Hatherley was based upon his travelling to New York and handing the package containing heroin and money to the undercover agent in the black Lexus. The jury was invited to infer that he must have known what he was handing over.

13. The case against Lottimore had a number of strands. When arrested the police found in his possession a cell phone number 441-518-6446. This was the number of the phone that called Wade and that Wade called back. He also had a second phone in his possession, number 441-732-9156. This phone had had contact with Carroll.

14. The second strand was a Western Union form found in Lottimore's bedroom. This showed the transfer of US$1,500 to the United States from Shawn Hatherley (not the appellant) to Kathleen Delaney. The document is dated 17 May 2011. On 10 May 2011 there had been a conversation between "Afro" and Wade on phone 441-518-6446 in which there was talk of Wade receiving extra money. US$1,500 was to be sent to Kathleen Delaney.

15. The third strand of evidence was the discovery of two pieces of paper in Lottimore's bedroom. Each piece of paper contained several numbers. One of the numbers on each piece of paper ended in 1794. This matched the phone used by Wade.

16. The fourth strand of evidence was that Lottimore's bike was at Burchell's Cove on 12 May 2011, the day of the abortive delivery, and that, by inference Lottimore was the person riding it. This was shortly after several telephone calls between "Afro" and Wade. The fifth and final strand was that Lottimore was present at the time of the arrival of the dummy package on 1 June 2011. He met Carroll and when the police appeared tried to make his escape.

17. The jury was invited to infer that "Afro" was indeed Lottimore. Like Hatherley, he neither answered questions in interview nor gave evidence. This was, therefore, a case in which the prosecution was simply put to proof of the case against each appellant.

The Appeals

18. When Mr Mussenden was acting for both Hatherley and Lottimore he helpfully provided a table of consolidated grounds of appeal, showing those that had been abandoned and those that remained to be argued. Some of the grounds overlap and in some instances they cover both appellants.

19. In order to set some of the grounds in context it is necessary to look at the indictment and see how matters developed. The indictment originally contained two counts. The first charged conspiracy to import a controlled drug. The particulars of offence alleged that Carroll, Lottimore, Hatherley and Marshall:

> "between a date unknown and 2 June 2011 conspired together and with other persons not before the court to import into these islands a controlled drug, namely Diamorphine (Heroin)."

There was a second count against Carroll alone to which he pleaded guilty alleging conspiracy with others not before the court to import cannabis. The end date for this offence was 9 January 2011 and this offence is of no relevance to the issues in this appeal.

20. All four defendants pleaded not guilty to this first count. Shortly before the trial commenced, a new count was added as count 3 charging that between the same dates and with the same co-conspirators he conspired to import "a controlled drug" into Bermuda. The controlled drug was not specified. Carroll pleaded guilty to this count and it was ordered that count 1 lie on the file as regards to Carroll. The Crown did not proceed against Marshall and count 1 was amended again with Hatherley and Lottimore with the particulars of offence alleging that they:

> "between a date unknown and the 2nd June 2011 in the islands of Bermuda and elsewhere did conspire together and with David Carroll and other persons not before the court to import into these islands a controlled drug, namely Diamorphine (Heroin)".

21. The basis of Carroll's plea, as it emerged when he was sentenced, and accepted by the prosecution, was that he believed the drug was cannabis. Hatherley and Lottimore sought disclosure of the basis of his plea but this was refused by the prosecution. But for cross examination on behalf of the appellants, the trial would have proceeded without the jury knowing Carroll had pleaded guilty to conspiracy to import a controlled drug. Once introduced, however, the judge had to direct the jury about its relevance. She said this:

> "Now, we heard that Mr David Carroll has already pleaded to two counts of the offence of conspiracy to import drugs into Bermuda. We don't know precisely what was the basis of the plea, but it would appear that he pleaded to an offence arising out of a matter concerning cannabis on a past date and an offence related to the conspiracy herein charged. The fact that he has pleaded guilty to an indictment alleging that he conspired with others cannot be used by you for the wider purpose of proof that Mr Lottimore or Mr Hatherley is guilty to this charge that you are considering. All right? Now that is not to say that you cannot consider evidence of his playing some part in the events that we have heard about, you just cannot automatically jump to a conclusion of the guilt of the Defendants charged in this case."

The judge returned to this subject later in her summing up saying:

> "Please do not be side-tracked by the evidence of Mr Carroll pleading guilty. All right? We cannot speculate about that. He's not charged in this count on the indictment. However, in any event to the extent that we have heard of his involvement, I would just remind you of the definition that I have given you of a conspiracy, it is an agreement between two or more people to do an illegal act, intending that it should be carried out. So even if the evidence indicates to you that Mr Carroll was involved and has pleaded guilty to something, you cannot jump from that to an automatic conclusion about these Defendants being involved in a conspiracy. Right? And also, it would be impermissible to think that because Mr Carroll has pleaded guilty to something that in some way relieves you from considering the evidence in this case as respects these two Defendants."

22. The thrust of the appellants' complaint about the inclusion of Carroll as a named conspirator can be summarised as follows. The case against the appellants was that they had conspired to import a named drug, heroin. It was nothing to the point that Carroll had pleaded guilty to conspiracy to import an unnamed drug which, although the jury was not told, was cannabis. Once the plea was admitted in evidence the jury should have been told it was cannabis. The effect of Carroll's plea to conspiring with the appellants to import a controlled drug was to imply to the jury that the appellants had been party to the conspiracy. But that was a conspiracy to import cannabis, whereas the offence charged against the appellants was a conspiracy to import heroin. That difference, it was submitted, was vitally important and critically relevant to the outcome of the proceedings.

23. The point was illustrated by Mr Mussenden who invited the court to compare two passages of the summing up. As to Lottimore the judge said at page 81 line 5 the prosecution had to prove that there was an agreement between two or more persons to commit the crime of importing *drugs* into Bermuda. As to Hatherley, she said at page 95 line 7 the prosecution had to prove that there was an agreement to commit the crime of importing *heroin* into Bermuda. However, the case had always been advanced by the prosecution on the basis that both appellants were party to the same conspiracy of conspiracy to import heroin and

indeed immediately before the reference to Hatherley she said: "I told you earlier what the prosecution must prove and I said that in respect of Mr Lottimore, in order to find him guilty of conspiracy to import the diamorphine (heroin)……." Further, following the earlier reference to Lottimore the judge went on to say:

> "So bearing in mind the background fact of Mr Wade's involvement the prosecution case is that you can infer Mr Lottimore's part in the agreement to import heroin from the several pieces of evidence including the items found in the Rockham residence".

24. We do not, therefore, read the above reference to *drugs* rather than *heroin* as having the significance submitted by Lottimore i.e. that it mattered not whether he believed the drugs were cannabis or heroin.

25. The Court was referred to *R v Courtie* [1984] AC 463. This was a case in which the appellant pleaded guilty to buggery with a person under the age of 21 contrary to section 12(1) of the Sexual Offences Act 1956. He was sentenced on the basis that the offence was committed without consent. Lord Diplock, with whom the other members of the House agreed, said in allowing the appeal that there were two relevant principles of English law. First, a person cannot be convicted of any offence with which he is charged unless it has been established by the prosecution that each one of the factual ingredients which are included in that specific offence was present in the case that had been brought against him. The second, procedural, principle was that if there has not been an informed and unequivocal plea of guilty, the question whether any particular factual ingredient of the specific offence charged (or of any lesser offence of which he might be convicted on that indictment) was present falls to be determined by those persons in whom there is vested the function of finding whether or not the factual ingredients of the offence have been established.

26. Conspiracy to import heroin attracts a higher penalty than conspiracy to import cannabis, although both fall within the offence of conspiracy to import a prohibited drug (see section 27B and schedule 5 of the Misuse of Drugs Act 1972,

as amended). This distinction is comparable, for present purposes with that between Class A and Class B drugs in the United Kingdom.

27. In the present case the appellants were charged with conspiracy to import heroin and the jury had to be satisfied it was heroin that they were conspiring to import. Beyond that, we cannot see that the principles referred to by Lord Diplock assist them.

28. The appellants complain that the introduction of Carroll as a named co-conspirator in the indictment was prejudicial to them, particularly as he had pleaded guilty to conspiracy to import a controlled drug, later revealed to be cannabis i.e. a different drug from that with which the appellants were charged. The jury may have believed he conspired to import heroin and weighed this in the scales against the appellants.

29. In our view the relevant law can be shortly stated. An agreement to import heroin cannot be proved by an agreement to import cannabis, see O'Connor LJ in *R v Siracusa* [1990] 90 Cr App R 340 and Rougier J in *R v Taylor and Ors* [2001] EWCA Crim 1044 paras 28-30. What the prosecution set out to prove and had to be proved in the present case was that each of the appellants was a party to an agreement to import heroin. It is true that a person may be guilty of conspiracy to import drugs where he does not care whether the drugs are heroin or cannabis but that is not how this case was put. The allegation was that they conspired to import heroin full stop.

30. It was conceded by the Crown that it might have been better if Carroll had not been named in the indictment as a co-conspirator. We agree. However, the introduction in evidence of his plea of guilty was, as we have said, by the defence through cross-examination of the officer in the case and the judge directed the jury appropriately. Once introduced, the jury should have been told that the plea was on the basis that Carroll believed the drug was cannabis but that this was a

different state of mind to that of the other conspirators and the fact that Carroll alone thought it was cannabis was irrelevant if the others thought it was heroin.

31. We were told that there was no identification of the drug in the evidenced conversations between "Afro" (Lottimore) and Wade and further that the judge was in error in saying at page 65 of the summing up that the prosecution relied on certain pages of 11 May to show that there was an agreement between Wade and Lottimore to import marijuana. It is unfortunate that this was not corrected at the time but nothing in our view turns on this slip.

32. The indictment charged conspiracy to import heroin and the only direct evidence of the drug was the 388 grams of heroin in the package that Hatherley handed over in New York. Neither appellant answered questions in interview or gave evidence, so neither appellant was saying he thought the package contained cannabis; the prosecution was simply left to prove its case. The Crown's case throughout was that the package that contained, or was believed to contain, heroin was the subject matter of the conspiracy. The judge summed the case up on that basis. She said at page 83 line 2:

> "The fact that two or more proposals or arrangements may have been discussed with Wade does not necessarily mean that the agreement referred to in the indictment did not occur or was not intended to be carried out. You are not concerned with other agreements. What you must be satisfied of is that these two Defendants entered into an agreement with David Carroll and others to import drugs into Bermuda and when they did so they intended that at least one of them would cause those drugs to come into Bermuda. If you are satisfied that that occurred, then it would not matter if one of them was also trying to get a side deal going, for example."

And then these important words:

> "If, however, you conclude that there was no one conspiracy linking the Defendants and the others to the drug being delivered in New York to the undercover agent, and that that

> drug was intended to be delivered to Bermuda, then the prosecution will not have proved its case against the Defendants".

We are unpersuaded that any of the appellants' grounds of appeal arising out of either Carroll's guilty plea or the contention that there may have been more than one conspiracy has any merit.

33. We turn next to the judge's direction that Hatherley had a defence of lack of knowledge, under section 29 of the Misuse of Drugs Act 1972. This was misdirection in that section 29(1) specifies those offences to which the section applies and conspiracy to import a controlled drug is not among them. It is therefore necessary to look at the terms of the judge's direction and see if either of the appellants was prejudiced. The judge said at page 55:

> "The defence is provided where a defendant lacks knowledge of the existence of any fact that the prosecution has to prove; for example it could be that a defendant who passes on a package to someone else lacks knowledge that the package contains a controlled drug. Hatherley has a defence to this charge if he neither knew, nor suspected, nor had reason to suspect the existence of diamorphine or heroin in that package that was wrapped in the white towel……..In other words the prosecution must satisfy you by the evidence that Hatherley either knew or suspected or had reason to suspect that an illegal drug was in that towel wrapping that he handed to agent Patten".

34. The judge was in reality doing no more than telling the jury the element of *mens rea* that was necessary to establish the offence. Hatherley's case through cross examination was that he did not know what was in the package. In order to convict him the prosecution had to prove that he knew or suspected what it was. The judge repeated the error in answer to a question from the jury at pages 119 and 120 but again pointed out that the prosecution had to prove guilty knowledge. We can see no prejudice whatsoever to Hatherley. There was no evidence that Lottimore ever handled the package that was handed over in New York and knowledge was not an issue in his case.

35. Both appellants contend that the conspiracy ended with the abortive May importation rather than in June and that the judge wrongly directed the jury that the end date was 1 June. This argument appears to be based on the premise that there was more than one conspiracy which in turn has its genesis in the basis of Carroll's plea and the judge's error at page 65 of the summing up about "Afro" and Wade speaking of importing marijuana. We cannot accept this contention. The case throughout was advanced on the basis that Hatherley's part in the conspiracy was in April when he went to New York and that Lottimore made the arrangements from the Bermuda end. The conspirators thought the importation would take place on 11 May 2011 and the conspiracy would have ended then had they been able to locate the dummy package, but they could not and the conspiracy continued until the package was redelivered on 1 June 2011. We should add that the fact, if it be the case, that one conspirator believes the agreement is to import cannabis does not prevent there being a conspiracy where the other conspirators believe they are importing heroin. The effect is simply that the one who believes the drug is cannabis cannot be convicted of conspiracy to import heroin. Further, we cannot in any event see how this ground assists Hatherley whose part in the conspiracy was, on the evidence, limited to what occurred in New York.

36. Both appellants submitted there was insufficient evidence to leave to the jury. Hatherley's involvement in the conspiracy was limited to events in New York. Hatherley's argument is, and was before the judge, that there was no evidence on which a jury, properly directed, could conclude that he knew of the presence of drugs in the package that he was seen on video to hand over to the undercover agent. The case against him can be summarised as follows:

    - He made a short trip to New York, the only known purpose of which was to hand over the package to Wade's representative.

- Someone, who could be inferred to be Hatherley called Wade shortly before the handover to say they would be waiting outside the hotel. Shortly afterwards Hatherley was seen standing outside the hotel.
- He was in possession of a small rucksack and inside there was heroin and cash wrapped in a towel.
- He got into the Lexus with the undercover agent.
- He handed the towel to the agent saying "the money and everything is in there".
- The package contained US$2,000 and heroin with a street value of US$775,000.

The jury was fully entitled on these facts to conclude that Hatherley was well aware the contents of the package were heroin as well as cash. The evidence was circumstantial but compelling.

37. As to Lottimore, it is unnecessary to say more than to refer to the five strands of evidence that we mentioned earlier in these reasons. Again the case was based on circumstantial evidence but in our view it too was compelling.

38. The next ground of appeal is that of Lottimore and complains that the judge did not put his case adequately before the jury. This is a difficult ground to substantiate where the appellant declines to answer questions in interview or give evidence. Of course that is his right but the court is left with the Crown's evidence alone. A careful reading of the summing up reveals that the judge was careful to emphasise points made by Ms Pearman who represented Lottimore at the trial (see pages 59, 66-67, 69, 80, 82, 93 and 95 of the summing up). We are not persuaded that there is any merit in this ground.

39. Lottimore's final ground relates to the evidence of Paul Weall. It is contended that the judge wrongly allowed his evidence to be read. His evidence was that he took the phones retrieved from Lottimore and connected them to a computer in order

to download the numbers. This was, submits Mr Byrne for the Crown, evidence of a formal technical nature. Lottimore's argument is that he should have been called and he was deprived of the right to cross examine him. In short, Mr Weall was overseas and the Crown contended it was not reasonably practical to get him to come to Bermuda and give oral evidence, the cost would have been $5,000. Mr Weall's evidence became critical because other evidence was ruled inadmissible. The defence argued that the Crown should have appreciated earlier that Mr Weall's attendance was required.

40. The judge had first to consider section 75 of the Police and Criminal Evidence Act 2006. She concluded that the witness was outside Bermuda and that it was not reasonably practical to secure his attendance. She was entitled to reach this conclusion and there are no grounds for this court to interfere. She then, correctly went on to consider section 78 of the same Act. This section prohibits the court from admitting the evidence unless it is of opinion that it ought to be admitted in the interests of justice and this requires consideration of the contents of the statement, the possibility of controverting the statement if the maker does not attend, unfairness to the accused and any other relevant circumstances. The judge correctly applied the discretion given to her by section 78 and again there is no basis for the court interfering with her decision. The judge correctly applied the two stage test.

Conclusion

41. None of the grounds of appeal is made out. There was a strong circumstantial case against both defendants, unchallenged by any evidence from either of them.

42. In our view the jury was entitled to find that:

    (1) Hatherley knew or suspected that the package contained a drug and that that drug was heroin;

    (2) he was acting pursuant to an agreement made between Wade and "Afro";

(3) that "Afro" was Lottimore; and

(4) that accordingly both Hatherley and Lottimore were party to an agreement to import those drugs into Bermuda.

43. We are satisfied that the convictions of both appellants are safe and accordingly their appeals against conviction were dismissed.

Signed

Baker, JA

Signed

Zacca, P

Signed

Evans, JA