



# The Court of Appeal for Bermuda

## CRIMINAL APPEALS Nos. 26 & 27 of 2013

Between:

**ANDRE BLACKSTOCK  
KENTON BUTTERFIELD-SMITH**

Appellants

-v-

**THE QUEEN**

Respondent

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**Before: Baker, P  
Kay, JA  
Bernard, JA**

**Appearances:** Mr. Larry Mussenden, for the 1<sup>st</sup> Appellant  
Mr. Mark Pettingill, for the 2<sup>nd</sup> Appellant  
Mr. Rory Field, Mr. Carrington Mahoney and Ms. Kenlyn Swan  
for the Respondent

**Date of Hearing**  
**Date of Decision:**  
**Date of Reasons:**

**11 & 12 June 2015**  
**12 June 2015**  
**7 July 2015**

### REASONS

**Baker, P**

#### Introduction

1. These two appellants, Andre Blackstock and Kenton Butterfield-Smith, were convicted before Greaves J and a jury of conspiracy to import cannabis contrary to section 4(1)(a) of the Misuse of Drugs Act 1972 as read with section 230(1) of the Criminal Code. They were sentenced to eight and a half and eight years respectively. The period of the conspiracy was between a date unknown and 19 April 2011.

## **The Facts**

2. On 17 April 2011, Bermuda Forwarders received documents from overseas shippers relating to a shipment of cabinets. The consignee was a Neil Medeiros and the contact number on the documents was (441) 516-0854. Ms. Rosario of Bermuda Forwarders telephoned the number and asked to speak to Mr. Medeiros. A young man answered saying he owned the package and wanted it cleared and delivered by the company. Ms. Rosario became suspicious because the man appeared nervous and seemed to be uncertain of his own name and address, albeit claiming to be Mr. Medeiros. The Crown's case was that the person she was speaking to was Butterfield-Smith. Ms. Rosario had worked next to Blackstock at Bermuda Forwarders for two years and knew the man's voice was not his. Mr. Medeiros did not exist, at any rate as the true intended recipient of the cabinets. The address was also fictitious. Ms Rosario told the male he would be contacted by a customs clearance agent. The cabinets arrived in Bermuda at about 2:14 pm on 19 April 2011. The following day customs officers picked up the container with the cabinets. There was a strong smell of cannabis. When examined, the cabinets were found to contain cannabis with a street value of between \$192,000 and \$558,400 depending on how it was packaged and sold. The cabinets had been purchased from Lowe's in Florida on 30 March 2011.
  
3. DC Hewitt, the officer in charge of the case, obtained the telephone records for the 0854 number which showed messages and calls between that number and (441) 537-0424, the cell phone of Anthony Smith. On 15 June 2011 DC Hewitt and other officers, armed with a warrant, found Anthony Smith and seized his phone. It contained two numbers as contact for Butterfield-Smith, the 0854 number as Butterfield 1 and 505-8719 as Butterfield 2. Later that same day Butterfield-Smith was arrested at 1 Harmony Close, Paget. Asked if he knew Anthony Smith, he said they had been friends for years. DC Hewitt then told him of the shipment and the consignee number of 0854 to which Butterfield-Smith replied: "Yes it's my number, I will admit, but I am not involved with no shipment."

4. The following day Butterfield-Smith was interviewed. At first he denied the 0854 number was his, but the police had numerous phone contacts and text message details showing among other things regular contact between the 0854 number and Anthony Smith's number 0424 plus, significantly, a call from 0854 to Bermuda Forwarders on 19 April 2011 to find out if the cabinet pieces had arrived on the island and a series of calls to a Florida number 1 (954) 394-6826 before the package was sent off. Nevertheless he maintained that he was not involved in any conspiracy. He was interviewed again the following day and was pressed in particular about a call on 15 April 2011 from 0854 to 0826 which he maintained he did not make and did not know who had. Eventually, however, he did say that he had lent his phone to a friend at the end of March beginning of April – about 25 March to 1 April. Asked for the name of the friend he said Blackstock and gave the number 333-8136. Asked how long Blackstock had had the phone he said from 25 March - 1 April to two weeks before 6 June and that after its return he had misplaced it.
5. On 9 August 2011 officers arrested Blackstock at the offices of Bermuda Forwarders. When questioned under caution he said he knew Butterfield-Smith but that he had never given him any money, phone or anything. Informed that Butterfield-Smith had implicated him in the conspiracy as he had used the number 0854 he replied: "How could he say those things about me. I know nothing about this. I never received any phone from Kenton with that number. That is not true." He said he had never seen the 0854 number.
6. Blackstock declined to answer questions in interview and did not give evidence at his trial. This was, of course, his right but it left the jury without his explanation for the various phone calls, texts and other evidence that on their face implicated him in the conspiracy.
7. The police conducted detailed investigations with regard to various phones. These included:
  - 0854 and 8719 linked to Butterfield-Smith

- 333-8136, 292-8136 and 1377 all linked to Blackstock
- 292-4600 Bermuda Forwarders
- (943) 394-6826 linked to Florida, and
- 777-0293 a number relayed by Blackstock to Butterfield-Smith

8. There was a helpful exhibit (No. 26) showing the frequency of contact between those phones in the period 1 February to 30 April 2011. There were also print outs of text messages and analyses of phone calls going back to the start of 2011. The jury was thus able to see how the messages and contacts developed from early in 2011 until after the cabinets containing the drugs were delivered in mid-April. The period of the conspiracy was from a date unknown until 19 April 2011 when the drugs arrived in Bermuda and the Crown's case was that the conspirators were at work with a view to importing cannabis from long before the actual importation.
9. In January 2011, Blackstock went to Jamaica and then to Miami to locate cannabis. He contacted Butterfield-Smith on 23 January when he was in Miami. He was in urgent need of money; there was a message for Butterfield-Smith wanting to know why. Thereafter on Blackstock's return to Bermuda on 27 January, there were conversations between both appellants. There were enquiries of others if they wished to make an investment as Butterfield-Smith was looking for financial opportunities. Butterfield-Smith was dealing in drugs and indeed told the police so when he was interviewed, albeit he throughout denied involvement in conspiracy to import. He was however dissatisfied with both the supplier and the quality; hence the look for an alternative. There was thus evidence of overt acts relating to the conspiracy well before the actual importation in mid-April. There was an ongoing picture of an effort to obtain cannabis.
10. On 14 March after discussing drugs, Blackstock asked Butterfield-Smith to call a number for him with his prepaid phone. Butterfield-Smith responded: "Fuck he got to find that." He said it was somewhere in his cabinet but he had about four

minutes on his American phone and he would try and see if he could get it. It was at that point that Blackstock relayed the 0293 number to him.

11. On 30 March, the day of the purchase in Florida, at about 10:40pm Blackstock responded to another call from Butterfield-Smith and went to his house. They met in a car outside and shortly after 11:00pm when they were in the car, Blackstock's phone 3177 phoned the Florida number 6826. This was compelling evidence that the appellants were in the conspiracy together.
12. The purchase of the cabinets took place at Lowe's with a customer name of the non-existent Neil Medeiros and the 6826 Florida phone contact number. Prior to this there was considerable contact between Blackstock and Butterfield-Smith by text and phone. On 30 March Blackstock's phone, 3177, called the Florida phone on three different occasions and on 1 April there were calls from both Blackstock's phone and Butterfield-Smith's 0854 phone. This was followed by three calls from Butterfield-Smith's phone to Florida on 4 April. On 10 April there was an incriminating text message exchange between Butterfield-Smith and Blackstock. The following day Butterfield-Smith's phone was again in contact with Florida. On 20 April, just after the cabinets had arrived in Bermuda the 0293 number made two calls, one of which was abortive, to Florida. The 0293 number had been relayed by Blackstock to Butterfield-Smith on 14 March although the phone itself was never located by the police.
13. In summary between 24 March and 20 April there were 26 contacts between the phone Florida and Blackstock's phone and 16 between the Florida phone and Butterfield-Smith's phone. After notification of the arrival of the shipment in Bermuda, Butterfield-Smith was quickly in touch with Blackstock considering another shipment and complaining about the price. He was again in touch with Blackstock soon after his release from custody on 18 June when there were further text messages consistent with the earlier conspiracy.

## **The Appeal**

14. The main thrust of the appeal arises out of a ruling by the judge that interviews with Butterfield-Smith in which he referred to his drug dealing business should be admitted unedited. The answers given by Butterfield-Smith in these were, of course, only evidence against him and not against Blackstock; however Blackstock was also concerned because similar evidence emerged in text messages between the two of them. It was, they both submitted, highly prejudicial to both of them that the jury should know that they were drug dealers and such evidence was not probative of their participation in a conspiracy to import. It should be observed that if the evidence was ruled inadmissible and Butterfield-Smith gave evidence, as in the event he did, the evidence objected to was likely to emerge anyway.
15. Initially Butterfield-Smith had denied any knowledge of the 0854 phone which he said was not his. When pressed in interview, however, it became apparent that this was a lie that he could not realistically maintain and he then said it was a number he used during the course of his business which involved the sale of jewellery and drug dealing. When pressed further he said that he had lent his phone in the March/April period to Blackstock thus seeking to distance himself from his phone's involvement in the conspiracy. The Crown sought to adduce the evidence of Butterfield-Smith's answers in his interviews to rebut his lie that he knew nothing about the phone and therefore to connect him with the conspiracy.
16. The judge ruled that the evidence of what Butterfield-Smith said he was doing with the phone in relation to his drug and jewellery business was admissible to prove he was part of the conspiracy to import drugs. He said he favoured the submission of the Crown that it was admissible to disprove a relevant issue in the case, namely to rebut Butterfield-Smith's lie. He went on to consider whether the evidence was so prejudicial as to outweigh its probative value but concluded that it was not and that the prejudicial effect could be dealt with by a careful direction to the jury.

17. Mr. Pettingill for Butterfield-Smith maintained a vigorous argument that the judge was wrong. The key, he submitted, was that the appellant's drug dealing was criminal conduct not related to the charge. The text messages exacerbated the situation, it was impossible for the jury to be objectively impartial. The drug dealing was not probative of the conspiracy to import and the admission of the evidence was so prejudicial that no direction by the judge could prevent an injustice. The hearing was not fair and thus there was a breach of section 6 of the Bermuda Constitution Order 1968.
18. Mr. Pettingill argued that the judge should have edited the appellant's answers so as to delete anything that related to drug dealing. He accepted that references to the jewellery business could remain. We observe, however, that any editing must not be such as to leave a false picture.
19. Whilst the judge dealt with the submissions on the basis advanced by the prosecution i.e that the evidence was admissible to rebut a lie, in our view the prosecution could very well have submitted that the evidence was admissible as part of the *actus reus* of the conspiracy. Drug dealers have to acquire their drugs from somewhere, otherwise they have no drugs to sell. In our judgment it would have been entirely unrealistic to try and edit out references to the sale of drugs from the other matters, particularly in the text messages. This was a conspiracy to import that dated back to January 2011 and began, on the evidence, with Blackstock's visit to Jamaica and Miami looking for suppliers and discussions about how to raise the money. In our view therefore the evidence had greater probative value than simply the rebuttal of a lie. It is true that the evidence had considerable prejudicial effect, probative evidence often does, but even on the basis admitted by the judge we are not persuaded that the prejudicial effect outweighed the probative value.
20. Mr. Mahoney, for the Crown, relied on *R v Peters* [1995] 2 Cr App R 77. In that case the defendant was stopped at Dover and drugs were found in his car. He denied knowledge of them and said he had recently bought the car and had taken it to France to try it out. He said he had no connection with drugs in any form.

Evidence was admitted that a small quantity of drugs and drug related equipment was found at his home as were his answers in an interview in relation to it. The Court of Appeal held that it was rightly admitted. Evans LJ referred to the judgment of Lawton LJ in the earlier case of *Willis* (unreported 29 January 1979 Ref 2934/3178) in which a similar situation arose. There Lawton LJ said that *prima facie* possession of heroin in some other part of the United Kingdom had no relevance whatsoever to the offence charged but he added:

“The Court, however, has to look to see what the defence was the appellant disclosed in the course of her interviews with the customs officers. What she was saying was that she had no knowledge whatsoever of the fact that inside the covers of two photograph albums there was opium in one and heroin in the other. She was putting herself forward as the innocent victim of somebody else’s smuggling.”

These two authorities in our judgment support the judge’s conclusion.

21. The judge correctly directed the jury about the admissibility against Blackstock by out of court statements by Butterfield-Smith and also directed the jury to be careful not to use previous dealings in drugs or gold to automatically jump to a conclusion of guilt of the offence charged. The appellants’ argument is that no direction by the judge, however expressed, could overcome the prejudicial effect of the drug dealing. In our view, however, its probative value outweighed its prejudicial effect in the present case, the more so when one appreciates the admission of the evidence could have been justified on the wider basis that we have described.

### **Other Grounds**

22. Both appellants submitted that the indictment was defective and that the judge left the jury three different bases on which they could be convicted. In our judgment this ground is misconceived. The charge was one of conspiracy to import, not a specific importation. The point made by the judge was that parties to a conspiracy could be involved in different ways at different times.



23. Blackstock contends that his counsel should have submitted there was no case to answer. In our view this point too is misconceived. There was ample evidence and it would have been fruitless to have made such a submission which would inevitably have failed. Further grounds that the evidence did not support a finding of guilt and was circumstantial add nothing to the “no case” submission. The only difference between these grounds and the “no case” ground is that by the time the case concluded Butterfield-Smith had given evidence. If, as we are satisfied, there was a *prima facie* case against Blackstock, Butterfield-Smith’s evidence did not destroy it, it strengthened it.
24. Blackstock’s final ground is that the judge throughout his summation invited the jury to speculate when such speculation was not based on any fact or proper inference. In our judgment, the summing up was adequate and put the defence case. This complaint appears to relate to instances in which the judge was summarizing points made by the prosecution which the jury were invited, not directed, to consider.
25. Butterfield-Smith’s remaining ground of appeal, ground 6, relates to a direction by the judge at p. 219 of the summation. This ground alleges that the judge erred in his direction to the jury in relation to the evidential weight and significance of particular telephone numbers and directed the jury on matters that were not in evidence. After the jury had retired counsel raised a number of points with the judge which resulted in some further directions to the jury one of which was about cell phones in the following terms:
- “So merely because a number is registered to a particular jurisdiction, doesn’t mean it can’t move round. Doesn’t mean it can’t be in Bermuda, or New York, or whatever else and you’re communicating from it.
- You have 441 numbers, they’re registered to Bermuda, and they go other places, don’t they? Right.
- So, there’s no evidence saying what that other Florida number is, land or cell.
- The prosecution ask you to draw an inference on it. I told you that the prosecution ought to have put it to the

Defendant when he was there so that his counsel could have had an opportunity to respond to it. That didn't happen.

So, you may discard that inference that Mr. Butterfield was communicating with the 954 number, if you desire to do so.

And if on the evidence it appears to be relevant to you, you may consider it as well, bearing in mind the caution that I have given you about how to approach it. All right? Goodie.

Remember I told you if more than one inference could be drawn, the one favours the defence and one favours the prosecution, you should draw the one that favours the defence."

26. Mr. Pettingill pointed out that there was an underlying dispute whether the Florida number 6826 was a cell phone or a land line. He submitted that the jury should have been directed to discard the inference rather than leaving it open. He submitted that by failing to do so the judge overstepped the mark, albeit the point was not, he said, going to determine the outcome of the appeal. We are not persuaded that the judge was, as alleged, giving evidence in this passage but in any event, as Mr. Pettingill said, it was a small point in the context of the appeal.

**Conclusion**

27. The evidence of the appellants' drug dealing was not unlawfully admitted. When one considers all the evidence of the developing picture from January 2011 until the drugs were imported together with their conduct and what they said afterwards there was a strong case that they were both heavily involved in the conspiracy to import. The convictions are safe and accordingly we dismissed the appeals.

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*Signed*

Baker, P

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*Signed*

Kay, JA

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*Signed*

Bernard, JA