The Court of Appeal for Bermuda

CRIMINAL APPEAL Nos. 2A, 9 and 9A of 2017

B E T W E E N:

THE QUEEN

Appellant/Respondent

-v-

DAMON MCROY EUGENE WELLMAN MORRIS

1st Respondent

-and-

DENISE ALBERTA MORRIS

2nd Respondent/Appellant

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

Appearances: Larry Mussenden and Larissa Burgess, Office of the Director for Public Prosecutions, for the Appellant/Respondent
Susan Mulligan, Christopher's, for the 1st Respondent/Appellant
Richard Horseman, Wakefield Quin Ltd, for the 2nd Respondent

Date of Decision: **14 November 2017**
Date of Reasons: **17 November 2017**

REASONS

Crown's appeal against no case ruling – whether point of law – need for judge to give reasons at time of ruling – money laundering – effect of no case ruling against one Defendant on case against Co-Defendant – sentence for conspiracy to import heroin – unacceptable delay between conviction and sentence

BAKER P:

Background

1. On 13 January 2017 Damon Morris and his mother Denise Morris were convicted after a trial before Simmons J and a jury of a number of drug offences. Damon Morris was charged and convicted as follows: count 1 conspiracy to import diamorphine, contrary to section 4(3) of the Misuse of Drugs Act 1972 as read with section 230(1) of the Criminal Code; counts 3 and 4 possession with intent to supply a controlled drug, namely cocaine, contrary to section 6(3) of the Misuse of Drugs Act 1972; and count 6 possession of drug equipment, namely digital scales, contrary section 9 of the Misuse of Drugs Act 1972. Denise Morris was charged and convicted of count 7, namely money laundering, contrary to section 45(1) of the Proceeds of Crime Act 1997.

2. Earlier, on 3 January 2017 Simmons J had ruled that there was no case to answer by Damon Morris on two counts of money laundering – counts 2 and 7. On the latter, he was jointly indicted with Denise Morris. Both Damon, Denise, and the Crown, have raised various issues before the Court on appeal. I take them in logical sequence.

The Crown's Appeal against the No-case Ruling on Counts 2 and 7

3. By section 17 of the Court of Appeal Act 1964, as amended, the DPP has a right of appeal against a ruling of the court on a point of law alone. By the relatively recently introduced subsection 5, an appeal against a no-case ruling is deemed to be a point of law alone. There is no right of appeal on a ground of mixed law and fact or of fact alone.

4. In consequence of the deeming provision in subsection 5, this Court does therefore have jurisdiction to hear Mr. Mussenden's appeal against the no-case ruling. Mr. Mussenden's first ground of complaint, however, relates to something that occurred before the no-case ruling, namely, the judge's ruling that covert recordings of conversations in the cells at the Hamilton Police Station, to which Damon Morris was a party, should not be admitted in evidence. Mr. Mussenden says that the judge's refusal to admit the recordings is a point of law. Essentially the judge, he argues, confused the transcripts with the recordings. The judge said there were three primary reasons for ruling as she did: (1) the poor quality of the recordings; (2) no reliable evidence of the attribution of the voices on the recordings; and (3) late disclosure.

5. The Crown made persistent efforts to persuade the judge to reconsider her ruling, but in the end, to no avail. Section 17 of the Criminal Appeal Act 1964 makes it clear, that only grounds of appeal involving a question of law alone, may be considered by this Court. Whilst it may be said that the decision itself, whether or not to admit the recordings in evidence is a question of law alone, that decision is inextricably linked with questions of fact; the most significant for present purposes being the degree of inaudibility of some of the recordings and the disclosure history. This Court could not evaluate the former without listening to the recordings, or the latter without consideration of the facts of the disclosure history.

6. There is a good reason why Parliament has limited the Crown's right of appeal to issues of law, save in certain exceptional cases. There needs to be finality in litigation, and there is no procedure in Bermuda for suspending a criminal trial, while a judge's decision is reviewed by a higher Court.

7. Mr. Mussenden's next submission was that the judge was wrong to rule that there was no case to answer by Damon Morris on counts 2 and 7 – the Money Laundering counts. Had the covert recordings been admitted, it would have been

a different story; but they were not. The judge ruled on such evidence as there was. The procedure that was followed was unsatisfactory. What happened was this. The judge gave her ruling on 3 January 2017. That was apparently arraignment day and the defence counsel were not present, but other counsel stood in for them. The judge announced, without given reasons, which counts were, and which counts were not, to be withdrawn from the jury. The following day when counsel were present, she repeated her ruling, but again without giving reasons. Her reasons were eventually given in writing some seven and a half weeks later on 24 February 2017.

8. The delay was unexplained and one would ordinary expect a judge, unless there were unusual complexities, to give reasons why there is or is not a case to answer at the time of the ruling or very soon thereafter. Memory does not improve with time, and the judge omitted to deal at all with count 7 in her written ruling. So it remains unclear why she held in respect of this count, that Denise Morris had a case to answer, but that Damon Morris did not. Although she did refer to Damon Morris' position on count 7 when dealing with count 2.

9. With respect to count 2, the allegation was that Damon Morris sent a total of around $2,000 overseas in November and December 2015. Whilst there was clear evidence of the removal of the funds, there was no direct evidence that it was the proceeds of crime. The Prosecution relied on inference. However, there was no evidence of his disposable income; he had no convictions for any offences, and it was simply money sent overseas on his behalf. He could have been using non-criminal money in criminal activity. The judge's decision is unassailable.

10. Count 7 involved $15,000 found concealed in Denise Morris' house. The judge dealt with this in paragraphs 9 and 10 of her ruling under the heading "Count 2", but appears to have overlooked that there was a separate count 7. She explained why there was no case in respect of the $15,000 against Damon Morris, but failed to give any explanation why she had rejected Denise Morris'

submission. The judge said there was no evidence that Damon Morris was the source of, benefited from or accessed the $15,000. In other words, this money could not be linked to him. Accordingly, there was no evidence that it was the proceeds of any criminal activity on his part. She reviewed the DNA evidence on the rubber bands securing the money, and whilst Damon Morris could not be excluded as a possible contributor, neither could others. She said it was tenuous evidence at best, and not such as to support an inference of guilt. That is a conclusion with which this Court would not be justified in interfering.

11. Mr. Mussenden argued vigorously that there was other evidence, which the judge did not mention, which along with the DNA evidence, justified leaving this count to the jury. There was the family connection that Damon Morris was Denise Morris' son; that he had regular access to her house; that the cash was concealed outside a safe; and most particularly, the evidence of a police expert that the cash was packaged in the manner drug dealers package their cash.

12. In our judgment, none of these points, either individually or collectively, add up to enough to justify leaving the case to the jury. Whilst it may be true that drug dealers package their cash in the manner found in this case, that is not to say that others do not do likewise. In the absence of evidence from the covert recordings, there was insufficient evidence to leave to the jury on counts 2 and 7 against Damon Morris. The judge heard the evidence and there is no basis for interfering with her conclusion.

Denise Morris' appeal against conviction.

13. The single Count for which Denise Morris was convicted was count 7, relating to the $15,000 found concealed in her bathroom. In order to succeed on this count, the prosecution had to prove that she had possession of it, and that she knew or suspected it constituted or represented a person's benefit from criminal conduct.

14. Ms. Mulligan's primary submission is that the judge, having concluded there was no case again Damon Morris, should have found that there was no case against Denise Morris either. The position has to be considered at the end of the prosecution case, and not in the light of any evidence subsequently given. Denise Morris and Damon Morris were jointly charged, and the Crown's case was that they jointly possessed the $15,000 and that they both knew it was his proceeds of drug trafficking.

15. The Crown's problem is the Judge's finding that "there is no evidence that Damon Morris was the source of, benefitted from or accessed these funds". It does not necessarily follow that where one of two defendant jointly charged is acquitted by the judge on the basis that there is no evidence against him, the other must be discharged too. It depends on the evidence against that other. An obvious example is where he or she has made a confession to the police.

16. The critical question, so it seems to us, is what evidence was there that the $15,000 was criminal property, given the judge's finding that Damon Morris had nothing to do it with it. The judge never tackled this question. Indeed, she gave no explanation as to how she concluded that Denise Morris had a case to answer, having concluded that Damon Morris did not.

17. Mr. Mussenden sought valiantly to persuade the Court that, absent a case against Damon Morris, there was still a case against Denise Morris. The money was in her house, it was concealed, she had numerous bank accounts with money being paid in and out and there was no need to keep this substantial sum hidden elsewhere. Further there was the manner in which the notes were bundled. The overriding problem however, is that, if it was not the proceeds of Damon Morris' drug dealing, and the judge had found that there was no evidence that it was, where was the evidence that it was the proceeds of crime? In fact, there were was none. Accordingly, the case should have been stopped on 3 January 2017 and the judge fell into error in not doing so.

18. The judge having ruled against her submission; Denise gave evidence and called her father as a witness. Broadly, they sought to explain the provenance of the $15,000. It is of course impermissible to take into account their evidence when considering whether the judge's decision, at the close of the prosecution case, was justified. It may be that discrepancies in their accounts played a part in the jury's decision to convict. In her summing up, the judge, when telling the jury what had to be proved in count 7, said this at page 45:

> *…"Possession of criminal property"; I can say this much to you, that the specific criminal property need not be proved. Okay? A specific criminal property need not be proved. And "namely a quantity of cash". I won't tell you what a quantity of cash is, you heard the evidence.*
>
> *"Knowing or suspecting it to constitute or represent a person's benefit from criminal conduct." I think those are straightforward words, but I'm going to leave the law where it is now…"*

19. She returned to the subject at page 55:

> *Now, on Count Seven, Money Laundering, this relates to Denise Morris only. Yesterday I mis-spoke about this. I said one word, but it was actually another word that was printed there. So, I'm going to direct you on this. Count Seven, the Statement of Offence is Money Laundering, contrary to section 45(1) of the Proceeds of Crime Act 1997. That section provides that a person commits an offence if he or she has possession of criminal property.*
>
> *The Particulars of Offence are that Denise Morris, between a date unknown and the 22nd of January 2016, in the Islands of Bermuda, had possession of criminal property, namely a quantity of cash knowing or suspecting it to constitute or represent a person's benefit from criminal conduct.*
>
> *The elements are quite straightforward. The first element, be sure that the correct person has been*

> *charged. The second element, there's no dispute about the date or the place, Warwickshire Drive, Bermuda.*
>
> *The next element, "had possession". Well there's no dispute on the evidence that the money in the English Sports Shop bag was under her control, so possession in the sense of under her control.*
>
> *The next element is "criminal property, namely a quantity of cash". The Prosecution's case is that the cash found in her closet was criminal property. The Crown does not have to prove a specific crime as the source of the criminal property.*
>
> *The next element is "knowing or suspecting it to constitute or represent a person's benefit from criminal conduct." And this should be straightforward to you. In this case it is the Crown's case that Denise Morris knew that the cash that was found in that bag came from Damon Morris's drug dealing.*

20. So she directed the jury that the Crown's case was that the money came from Damon Morris' drug dealing. But, she did not direct them that there was no evidence that the money came from any other criminal source. The judge went on at page 166 to say that the real issue was the origin of the money, and then went on to describe Denise Morris' account and her father's account. At page 182, the judge again referred to the source of the $15,000. She said:

> *"…the Crown's case is that the money in that garment bag came from criminal activity and...Sorry. And that that money was, in fact, criminal property, and that Denise Morris at the time knew or suspected that it constituted, or represented a person's benefit from criminal conduct.*
>
> *You will have to determine whether the Crown has proven to you that the money that Denise Morris had was criminal property and that she knew or suspected that it represented a person's benefit from criminal conduct.*
>
> *The Crown's case is that it represented Damon Morris' drug dealing money -- drug dealing. The Prosecution*

must satisfy you that the money was criminal property. This would include the money that Dennis Morris said in evidence was his.

And you would have to be satisfied that Denise Morris knew or suspected that the money represented her son's benefit from criminal conduct."

21. Again, she did not limit the criminal property to the proceeds of Damon Morris' drug dealing. She returned to the subject at p 183:

"The Prosecution did not present evidence of a particular part of the cash that they say represented her benefit, or Damon's benefit, for that matter, from criminal conduct. It is, rather, their case that all the money is criminal property coming from Damon Morris' criminal conduct.

And again, in my view, you would have to reject Dennis Morris's evidence and Denise Morris's evidence about the source of the money before you can find her guilty of this offence."

22. Once again, criminal conduct generally is not ruled out, and the jury might have understood this direction that it was enough to convict her, that they rejected her and her father's evidence. The position is not helped by the judge's further direction at page 187:

I said to you that it is the Prosecution case that all of the money in the suit bag is criminal property. This is with respect to Count Seven and Denise Morris.

I went on to say to you that you would have to reject Dennis Morris's evidence and Denise Morris's evidence about the source of the money before you can find her guilty of Count Seven.

23. At the conclusion of her summing up, the judge left the jury with three possible verdicts on count 7. At page 188 she said:

> *"Firstly, you can find the Defendant, Denise Morris, not guilty of Count Seven, Money Laundering, if the Prosecution evidence leaves you in reasonable doubt as to the source of the money found in the suit bag.*
>
> *Or, if you accept Denise Morris's evidence about the source of the money, your verdict would be "Not guilty."*
>
> *Or, if you reject Denise Morris's evidence about the source of the money, and the Prosecution has satisfied you so you are sure that all of the elements in Count Seven have been prove, then the verdict of "Guilty" to Count Seven would be open to you in respect to Denise Morris."*

24. This left open to the jury the possibility that the source of the money was some unsuspected criminal conduct, other than Damon Morris' drug dealing - of which there was no evidence. This problem must be seen in the context that Denise Morris was cross-examined about her relationship with a man who had drug convictions and access to her house, but in respect of whom there was no evidence of any connection with the $15,000.

25. In our judgment, the judge should have stopped the case against Denise Morris on count 7 at the close of the prosecution's case. If however, contrary to our view, there was a case to answer, her conviction is unsafe, because there was no evidence, and the Crown did not suggest that there was, that the $15,000 came from any criminal source other than her son's drug dealing. For these reasons, we allowed her appeal against conviction.

The Crown's Appeal against Damon Morris' Sentence

26. Damon Morris fell to be sentenced for conspiracy to import heroin; two counts of possession of with intent so supply cocaine; and one count of possession of drug equipment.

27. In summary, the case against him was that he arranged for Michael Tucker to fly to England and import drugs into Bermuda. The importation was part of a joint operation between persons residing in the UK and Bermuda. It involved some planning and sophistication. Tucker was caught on his return at the airport with 86 grams of heroin with a street value of some $253,000. That was count 1. His premises was searched and two separate hidden quantities of cocaine were found totalling about 19 grams with a street value of about $18,000 – counts 2 and 3; and also a pair of scales *inter alia*, which relates to count 6.

28. Damon Morris is 28 years old and has no previous drug convictions. Importing heroin is a particularly serious offence. This was a carefully planned offence, at which Damon Morris was at its heart. He was responsible for involving Tucker; an aggravating feature of an already serious offence. Counts 2 and 3 indicate that the conspiracy in count 1 was no isolated involvement in the drug dealing world.

29. The Judge said the conspiracy charge merited a sentence of 8 to 12 years imprisonment, but that the authorities showed that cases at the lower end of the scale were where the defendant had pleaded guilty. She said that counts 3 and 4 warranted 10 years and count 6, one year. Despite the conspiracy taking place on a different date from the discovery of the cocaine, the sentences were to be concurrent.

30. Mr. Mussenden drew the attention of the judge to section 27B of the Misuse of Drugs Act 1972, as amended. It provides that the court is required to consider the street value of the drug, and the destructive affect it has on society and to apply an uplift of 50% to the basic sentence. This section applies in the present case concerning counts 1, 3 and 4, because the drugs concerned are heroin and cocaine.

31. In *The Queen v Tucker and Simons [2010] Bda LR 39* at paragraph 16, Zacca P explained the procedure to be followed when sentencing in cases to which section 27B applied. He said this:

> *"The proper procedure would be for the trial Judge to fix the basic sentence. We understand this to mean the appropriate sentence for the offence charged after considering all the circumstances of the case including discounts if any. Having fixed that sentence the section provides that fifty percent of that figure should be added to the basic sentence."*

32. We recently affirmed that as the correct approach in *Tyrone Brown v The Queen Criminal Appeal 9 of 2016* at paragraph 30. The judge in the present case did not initially follow the appropriate procedure, but when it was drawn to her attention by Mr. Mussenden she said "perhaps I should have said basic sentence of 8 years for the conspiracy," which with the uplift would have amounted to 10 years. She referred to a similar adjustment with counts 3 and 4. Again, reaching the original result, this time 10 years. After further argument, she made a further adjustment of 10 ½ years for those counts, commenting that totality was relevant to the final figure.

33. Ms. Burgess for the Crown criticizes the judge's approach arguing that it is ex post facto reasoning to get back to the original sentence she had reached. We think there is some force in this. The first step was to decide the basic sentence for each offence in the light of all the circumstances, taking into account the authorities. In *Tyrone Brown* the defendant was convicted after a trial of importing 894 grams of cocaine with a street value between $95,000 and $132,000. After taking into account a one year discount for previous good character, a basic sentence of 10 years was uplifted to 15 years imprisonment. This Court said that it was not manifestly excessive.

34. In *Rahman v The Queen [2009] Bda LR 17*, leave to appeal against the sentence of 17 years was refused. The case involved conspiracy to import heroin although the report describes neither the amount nor the street value. But, the DPP says in his submissions, they were a little less than in the present case. The sentencing Court held that the basic range was between eight and twelve years which with a 50% uplift took it to 15 years imprisonment. The additional two years is irrelevant to the circumstances of the present case.

35. *Richards et al v The Queen, Criminal Appeals Nos 1, 4 and 5 [1991] Bda LR 15*, involved conspiracy to import Cocaine. Roberts P said that the conspiracy to import generally attracted a heavier sentence for the organiser or supervisor, then for the courier. 8 to 12 years was the appropriate starting point. If a substantial amount of drugs was involved, the Court would no doubt consider a longer period.

36. Twelve years on Richards was upheld after a plea of guilty to importing 126 grams of cocaine. That case was prior to the 50% uplift provision. We have found little assistance from other cases of which are limited reports and one does not have the full facts. Limited assistance is to be gained from authorities prior to the uplift.

37. Section 27B requires the Court to take into account the street value of the drug and its destructive effect on society, before applying the mandatory uplift. But these are matters that the sentence judge will always take into account in cases of this nature. One has therefore to be careful to avoid double counting, and the totality of the sentence, after applying the uplift, is also something that must be borne in mind.

38. The serious features of the present case were that Damon Morris was an organiser in a conspiracy to import a substantial amount of drugs, that he suborned Tucker, and that there was evidence of a considerable amount of

cocaine for dealing at his home. In our judgment, the total sentence of 12 years was manifestly inadequate and did not reflect the statutory uplift required of 50%. Accordingly, we allowed the appeal and substituted sentences of 12 years plus 6 uplift equals 18 on count 1 and 10 years plus 5 years uplift on each counts 3 and 4; those sentences to be concurrent, and also concurrent with the sentence of 12 months imprisonment on count 6 which remains unchanged. Thus a total sentence of 18 years. We saw no basis for making any part of the sentences consecutive.

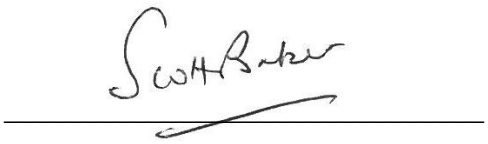
Denise Morris' Appeal against Sentence

39. We also say a word about sentence in the case of Denise Morris. As we allowed Denise Morris' appeal against conviction, her appeal against sentence became irrelevant. However, it revealed one matter of concern to which we draw attention. The jury returned its verdict on the 13 January 2017. Denise Morris was granted bail but with the condition of reporting to Hamilton Police Station, and a direction to surrender any travel documents and not to travel without the consent of the Court.

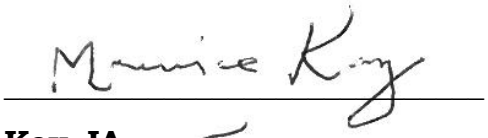
40. The Judge told her she could not say whether she was likely to receive a non-custodial sentence and ordered a Social Inquiry Report. That report is dated 27 February 2017 with a date of 1 March 2017 on the front, which may be the arraignment date on which the author had anticipated the report would be considered. Yet, the Court did not pass sentence until the 6 June 2017, when Denise Morris was sentenced to 12 months imprisonment suspended for 12 months.

41. This Court is unaware for the reason of the delay, and this is not the occasion to explore it. Suffice it to say, this is not the only occasion when considerable delay between conviction and sentence has come to our attention. The delay in this case unnecessarily caused hardship to Denise Morris and there is no reason in

our view, why delays of this nature, which would be regarded as unacceptable in other jurisdictions, should be allowed to occur in Bermuda.



Baker P



Kay JA

Bernard JA