Neutral Citation Number: [2021] CA (Bda) 5 Crim

Case No: Crim/2020/6

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
THE HON. MR. JUSTICE GREAVES
CASE NUMBER 2018: No. 27

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 29 April 2021

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
JUSTICE OF APPEAL ANTHONY SMELLIE

- -

Between:

OMAR DAVY

Appellant

- v -

THE QUEEN

Respondent

Ms Elizabeth Christopher of the Legal Aid Office for the Applicant

Mr. Alan Richards and Mr Jevon Rogers of the Office of the Director of Public Prosecutions for the Respondents

Hearing date : 4 March 2021

- -

APPROVED JUDGMENT

Appeal against sentence - Appellant's plea of Not Guilty alleged to have been based on bad advice from counsel - no entitlement to discount based on guilty plea where no such plea entered.

BELL JA:

Introduction

1. On 10 July 2018, Omar Davy, a 38 year old native of Jamaica, (hereafter "the Appellant") arrived at the Bermuda airport on board a commercial flight from Toronto, Canada, where he had been visiting family. His evidence was that he had purchased a ticket to travel to Bermuda only the previous day, and that he was travelling to Bermuda, which he had previously visited some six or seven times, for the purpose of attending traffic court. On returning to his brother's house in Scarborough, on the east side of Toronto, following the purchase of the ticket, he said that he had been approached by two men who had come from an SUV parked nearby. The men had shown him a phone on which were three videos of family members, his mother, his sister and his daughter, taken in Jamaica. He was then shown a video call on the phone, where he recognised the man on the call as someone to whom he owed $24,000 which had been advanced to him for architectural drawing and construction work, which he said he had been unable to carry out because his laptop had been taken from him by the Bermuda police during a previous visit. He described the man on the call as a don named Mr Courtney. One of the men had a gun, and told the Appellant to open his brother's car, which the Appellant did, and from which one of the men removed a laptop bag and an orange suitcase belonging to the Appellant, as well as his passport and ticket, which had been on the seat. These items were then transferred to the SUV, which the Appellant was told to get into. He said that when he entered the vehicle a dark cloth was placed over his head. He was then choked and hit, and at some stage told his attackers that he was going to Bermuda the next day, and that when he got back he would have the money to repay what he owed. When the SUV came to a stop the Appellant was taken to a garage where he was again attacked and beaten. The beating was said to have been severe, including further choking, kicks to his body and head, such that he passed out, and was awakened by heavy slaps to his face and jaw. During the course of this beating the Appellant was told that he had to take a package to Bermuda. The Appellant's evidence was that he felt he had no alternative but to agree. He was told that if he tried anything funny, the men would kill his family. He said that he told them that he had an 8.30 flight, and that it was by then 4.30 in the morning. He was given a package, which was placed in a book inside his laptop bag together with a roll of tape, which he said he was told should be used to tape the package to his leg after he had gone through Customs.

2. He was then taken to the airport, where he cleared security and boarded the flight to Bermuda. He said that he did not alert the police or dispose of the package during the flight because he believed the men's threats that they would kill his family. During the flight the Appellant took all the items out of the laptop bag, including the package. He said that he used a razor blade to cut the bag to make sure there were no more drugs in the bag (he later said that he did not know the package contained drugs), and placed the package in the waist of his pants. He said that he had thought about leaving the package in the pocket behind the plane seat, but had dismissed the idea because of his fear of harm being inflicted upon his family.

3. On landing in Bermuda the Appellant went through Customs, when he was subject to a secondary search. Before that could be undertaken the Appellant fled, but was eventually caught on the Causeway, and taken back to the Customs area. While there the Appellant removed the package from the back of his trousers and placed it in his luggage. The package was recovered and on analysis was found to contain some 220.88 grams of heroin with an estimated street value of $765,700.

4. The above is a brief summary of the circumstances under which the Appellant claimed to have brought the drugs in question into Bermuda, and the basis on which he maintained in his defence that he had acted under duress. He was charged with offences of importation and possession with intent to supply diamorphine, and obstruction of a Customs officer. It is submitted on his behalf by Ms Christopher that it was on the basis of the Appellant's belief that he had a defence to the charges, based on the duress to which he said he had been subjected, that he pleaded not guilty to the charges of importation and possession with intent to supply. I say no more at this stage about the version of events given by the Appellant in his evidence, save that Mr Richards aptly described the Appellant's account as "fantastical", and submitted that the relatively short time it took the jury to convict the Appellant would suggest that they took a similar view.

Duress

5. There are two sections of the Criminal Code 1907 ("the Code") which are relevant to a defence that the person charged is not criminally responsible for the act or omission in question, and these are as follows:

> *"**Acts done in resistance to violence***
> *47 Without prejudice to any other provision of this Act, a person is not criminally responsible for an act or omission where the act or omission is reasonably necessary for the purpose of resisting actual violence threatened to him or to another person in his presence:*
>
> *Provided that the foregoing provisions of this section shall not have effect so as to justify or excuse—*
>
> *(a) [Deleted by 1999:51]*
> *(b) an act or omission which constitutes an offence of which causing grievous bodily harm to the person of another, or an intention to cause such grievous bodily harm, is an element.*
> *[Section 47 amended by 1999:51 s.4 & Sch effective 23 December 1999]*
>
> ***Acts done for purpose of self-preservation***
> *48 Without prejudice to any other provision of this Act, a person is not criminally responsible for an act or omission where he does the act or makes the omission for the purpose of saving himself from immediate death or grievous bodily harm threatened to be inflicted upon him by some person actually present and in a position to execute the threats, and believing himself to be unable otherwise to escape the carrying of the threats into execution:*

Provided that the foregoing provisions of this section shall not have effect so as to justify or excuse—

(a) [Deleted by 1999:51]
(b) in the case of a person threatened with grievous bodily harm, an act or omission which constitutes an offence of which causing grievous bodily harm to the person of another, or an intention to cause such grievous bodily harm, is an element; or
(c) an act done, or an omission made, by a person who has by entering into an unlawful association or conspiracy rendered himself liable to have such threats made to him."

6. Before the judge gave his summation to the jury he had a detailed discussion with counsel on the applicable law, which included reference to the case of *Zegelis v R* [2014] Bda LR 28. Suffice to say that the Appellant's counsel, Archibald Warner, did not agree with the judge's view as to the need for physical presence to be established for the statutory defence to be available in regard to section 47. In the event, in his summation, after the judge had detailed the Appellant's evidence, he dealt with the Appellant's defence under section 47 in this way, having first read the section to them:

> *"A person is not criminally responsible for an act, that is, the bringing the drugs into Bermuda, if the person does the act or omission, when the act is reasonably necessary in order to resist actual violence threatened to the person or to another person who is in the person's presence. There is no onus on the defendant to prove that he did the act in those circumstances. The Prosecution bears the onus of satisfying you, beyond reasonable doubt that he did not do so. The Prosecution can do so if it relies – if it satisfies, sorry, you, beyond reasonable doubt, of any one of the following things:*
>
> *a. That violence was not threatened to the defendant.*
>
> *I stop there. And that's the Prosecution's case. Nobody threatened him. Nobody beat him up. That is a creation; that's what they say. Or, no violence was threatened to another person in the defendant's presence. The Prosecution's case is, in this case, neither Mummy, nor daughter, were in his presence at the time of this alleged threat."*

7. In relation to section 48 of the Code, the judge read the section, (as set out in paragraph 5 above) to the jury, and then summarised the case on both sides, leaving the matter to the jury.

8. At the conclusion of the summation the jury withdrew to deliberate, and returned within half an hour to deliver unanimous verdicts of guilty on all three charges. On 20 February, 2019, the judge sentenced the Appellant to 18 years on each of the first two counts, to run concurrently. There was a sentence of 6 months on the third charge, again to run concurrently.

This Appeal

9. This appeal is against the sentences imposed in February 2019, in respect of which an extension of time within which to appeal and leave to appeal were granted in October 2020. It appeared that a Legal Aid certificate had been granted to the Appellant but that he was unsuccessful in finding a lawyer, and there was a substantial delay after that certificate had been transferred to counsel in-house. His affidavit averred that "After I told my lawyer my circumstances, he advised me that I had a defence of duress". Thus the first of the Appellant's grounds of appeal is that the fact that he chose a trial instead of pleading guilty should not have been held against him (as it was when he was sentenced) to deny him the credit he would have been afforded had he pleaded guilty. Since the grounds of appeal essentially constituted a complaint against the Appellant's former counsel, it was ordered that his affidavit should be served on Mr Warner, together with a waiver of privilege, and that Mr Warner should have liberty to serve a response within 7 days following receipt of the complaint. In the event, Mr Warner chose not to respond.

10. The Appellant also said in paragraph 7 of his affidavit that he had pleaded not guilty "when if I had been advised that the duress inflicted upon me was no defence, I would have pleaded guilty". And that, in a nutshell, is the Appellant's case. There was no criticism of the judge's summation; the criticism was made of counsel, of whom it was said by Ms Christopher that he should have looked at the judgment of this Court in the case of *Zegelis*, and should have appreciated that the Appellant had no defence based on the provisions of the Code regarding duress, and should have so advised him. In those circumstances, submitted Ms Christopher, the Appellant had only pleaded not guilty on the basis of bad advice from his counsel, and should now be treated in the same manner as someone who had pleaded guilty, the course that the Appellant said he would have followed if he had been properly advised as to the law on duress.

11. I pause to note at this point that there has been no formal notice of appeal filed in this case. When leave to appeal against sentence was granted on 7 October 2020, there was a provision in the order that counsel should liaise with the Clerk to the Court in relation to directions, but this seems to have been overlooked on both sides, and the appeal was argued on the basis of the Appellant's affidavit sworn in support of his application for leave to appeal, and counsel's submissions.

12. The second general ground of complaint was in relation to the appropriate sentence following conviction after trial, it being said that the Appellant had not been sentenced, as he should have been, as a mere courier. The Court was referred to cases where sentences comparable to that given to the Appellant had been imposed on importers of equivalent quantities of the type of drug specified in the fifth schedule to the Misuse of Drugs Act 1972 ("the Act"), but where the offender in question had been higher up the chain of responsibility in regard to the importation. I will return to this ground below.

Defence under Section 29 of the Act

13. One of the issues between counsel related to whether the Appellant had a potential defence under section 29(2) of the Act going to the issue of knowledge of the drugs. This subsection is in the following terms:

> *"Subject to subsection (3), in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged."*

14. This potential defence was based on the Appellant's answer to Mr Richards in cross-examination at trial, that he did not know what was in the package he brought to Bermuda. This in turn had led the judge to give the appropriate warning to the jury as to the burden of proof on the prosecution in regard to his knowledge of the contents of the package. Ms Christopher maintained that Mr Warner was not running a section 29 defence on behalf of the Appellant, to which Mr Richards responded that the defence had been raised when the Appellant answered the question in cross-examination as he did. The point has relevance because of its existence as a possible defence, and the basis upon which the Appellant had pleaded not guilty. In the event the defence was left to the jury, and it is unsurprising that they should have rejected it, given that in his evidence in chief the Appellant had stated that during the flight he had cut into the laptop bag to make sure there were no other drugs secreted in it (paragraph 2 above and page 142 of the Record). The Appellant referred to the package having contained drugs, and his efforts to ensure that there were no other drugs in the bag, some four times during this part of his evidence in chief.

Discussion regarding the Discount for a Guilty Plea

15. The first point that has to be made is that whether or not the Appellant did or did not have a possible defence based on duress is academic in relation to the separate question which arises on this appeal, namely whether, assuming that he was badly advised by Mr Warner on the law and its consequences, the Appellant is entitled to the discount on sentence which he would have received if he had in fact pleaded guilty. I would say straight away that in this regard my view is that the Appellant would not be so entitled. The discount reflects sentencing policy and is made primarily for two reasons. First, it denotes acceptance of guilt and potentially the remorse which may go with that acceptance of guilt. Secondly, a guilty plea involves a saving, sometimes substantial, of time spent by any number of participants in the judicial process, including the judge, the jury, counsel, police officers and other witnesses. If a defendant has pleaded not guilty and a trial has been undertaken, there is no basis upon which he can properly claim entitlement to a discount based on a saving of time and effort which did not, in the event, occur. The fact remains that by reason of the not guilty plea and the consequent trial, the expenditure of time and effort did occur. So there was no saving for which the Appellant could properly claim credit.

16. Next to be considered is the issue of acknowledgement of guilt and the remorse associated with it. In this case, the Appellant did not at any time acknowledge his guilt. While the Appellant did not dispute that he had brought a substantial quantity of heroin into Bermuda, that was something he could hardly deny. Instead, he sought to justify his criminal conduct by what can only be described as a most unlikely set of circumstances designed, no doubt, to give rise to a defence of duress. And it is noteworthy that when the Appellant had the opportunity to explain the alleged circumstances to the authorities in Bermuda, he did not take advantage of that opportunity, but instead fled the scene. Suffice to say that for my part, I am highly sceptical that the Appellant has either truly acknowledged his guilt, or demonstrated any remorse.

17. And the discount afforded by the sentencing policy extends far beyond the trial of the particular defendant. It is something that is made known to any defendant being advised in regard to his plea. So the notion that the process can be undone in some way, based on a premise that did not occur, is not, in my view, an available option. The trial did take place. The participants did all play their parts and spend time which they otherwise would not have done. And the consequence of ignoring that reality seems to me to be a very dangerous one in relation to the last point made above. If a defendant were to be given the discount based not on whether a trial was in fact avoided because that defendant pleaded guilty, but based on the nature of the advice said to have been given to him by his counsel, the sentencing policy insofar as it affords discounts for early guilty pleas by others would no doubt be thrown into uncertainty and confusion. So the position in my view is that the discount for a guilty plea must remain based on an actual guilty plea, and not one based on what might have happened.

Duress

18. I will nevertheless deal briefly with the possible defences which were open to the Appellant under sections 47 and 48 of the Code. It is to be noted that the heading in the Code for section 47 is "Acts done in resistance to violence" and that for section 48 is "Acts done for purposes of self-preservation".

19. In relation to section 47, the threats said by the Appellant to have been made by the two men in Toronto in regard to members of his family were clearly not threats made to those persons in the Appellant's presence, as the judge pointed out in his summation. The potential application of section 47 would therefore arise only in the event that the acts or omissions of the Appellant were reasonably necessary for the purpose of resisting actual violence threatened to him. While the judge left the determination of the section's application to the jury, it is not hard to see why the jury should have rejected the defence so quickly when, even on his own account, there had been no actual violence to the Appellant for some time before he had been delivered to the airport in Toronto and before his arrival in Bermuda. Even had there been violence inflicted on him as he alleged (and there was no sign of this upon his person when he was apprehended in Bermuda), he was no longer the subject of "*actual violence threatened to him*" as section 47 requires, once cleared through security in Toronto to board the flight to Bermuda.

20. Ms Christopher emphasised that if Mr Warner had considered the case of *Zegelis* he would have appreciated that the Appellant had no defence based on section 47. But the Court of Appeal in *Zegelis* did not indicate that the trial judge had been in error in leaving that defence to the jury. And however unlikely the prospect of the jury believing the section's application to the Appellant on the facts of this case, the judge's direction, in leaving the consideration of the defence to the jury, cannot be criticised on the basis of *Zegelis*.

21. The position is different in regard to section 48. In *Zegelis*, this Court indicated that the judge should not have left the section 48 defence to the jury, since he had directed them that the section could not provide a defence in law, no doubt based on the absence of there being any person present and in a position to execute the threats at the time that the Appellant had imported the drugs into Bermuda. It seems to me that the judge should have given the same direction in the instant case,

and not left that issue to the jury. But, as in *Zegelis*, the reality is that the Appellant was not prejudiced by the error, but rather the reverse. In the event, as already noted, the defence was properly rejected.

The Appropriate Sentence

22. Before dealing with the comparable Bermuda sentencing authorities, Ms Christopher dealt with the argument that even if the jury had rejected a duress defence based on either section 47 or 48, it was still open to the judge to find that there had been duress, even though such duress had not fitted within the constraints imposed by sections 47 and 48, such distress being referred to during the course of argument as "small d duress"; ie assuming that the jury had accepted that the Appellant had in fact been threatened with violence of some kind to himself or his family. The problem for the judge was of course that he had no way of knowing whether the jury had taken any view on "small d duress". Ms Christopher relied upon the case of *R v Downer* [2014] EWCA 2998, a case where the sentencing judge acknowledged that there had been a degree of duress, while noting that the defendant could still have avoided committing the offence had he wished to do so. Because the defendant in that case had been shot, there was no issue in regard to the fact of harm to the defendant, unlike the circumstances here. And as an aside, I note again that despite the Appellant's harrowing account of his beating, which included being choked on a number of occasions, the Appellant showed no sign of injury. Neither did he seem to be affected by the kicking to his legs which he described as making it difficult to stand, when the following day he was able to outrun his pursuers as he fled from the airport.

23. Ms Christopher suggested that in sentencing, the judge should have reached a decision on the issue of "small d duress", and because he had not done so, this court should. Mr Richards submitted that where it was not possible to determine whether the jury had taken a view on a particular matter, it was open to the judge to do so. And in this case, the judge had remarked when sentencing that he could simply adopt all the Crown's submissions as his own, indicating full agreement with them. And those submissions included the statement that the speed with which the jury had returned their verdict was a good indication that they had roundly rejected the Appellant's evidence, and the court should, the Crown submitted, easily and safely conclude that the Appellant's evidence was wholly concocted in a desperate attempt to elude justice. I agree that the judge did clearly take that view, and that consequently there was no "small d duress" to be taken into account.

24. In regard to the Bermuda sentencing authorities, relevant to the second ground of appeal as to the proper tariff, Ms Christopher began with the case of *Lottimore and Hatherley v The Queen*, Criminal Appeals #12 of 2012 and #1 of 2013. The defendants were convicted of conspiracy to import an amount of 388 grams of heroin, and the two defendants had clearly been solely responsible for the planning and execution of the importation. Hatherley was sentenced to 12 years imprisonment and Lottimore to 15, and there was no appeal against sentence. The next case was *Richards v The Queen*, Criminal Appeal #1 of 1991, an older case involving the importation of 126 grams of cocaine. Sir Denys Roberts P noted that it was not in dispute that Richards had recruited drug couriers, had sent the drugs and generally had taken an active and essential part in the importation of the drugs. He commented that because of his role, he should, as a general rule, be more severely punished than an importer who merely carried the drugs ashore. He was sentenced to 12 years, but regard must be had to the age of the case, since the statutory uplift now in place for the importation of Schedule 5 drugs, introduced in 2005, did not then apply. Ms

Christopher suggested that there had at that time been an uplift applied in respect of the importation of heroin, but this submission is unsupported by authority. Clearly the statutory uplift provisions introduced in 2005 were intended to increase the then current sentencing levels by 50% in the case of the importation of Schedule 5 drugs.

25. Ms Christopher next referred to the case of *The Queen v Morris and Morris* [2017] Bda LR 128, a case involving the importation of 86 grams of heroin with a street value of $253,000, and quantities of cocaine found at the defendant's premises. The defendant was sentenced to 12 years imprisonment, following trial and on an appeal by the Crown on the basis that the sentence was manifestly inadequate, this Court raised the sentence to 18 years. Ms Christopher described the defendant in that case as having been at the top of the chain, and argued that a courier, as she submitted the Appellant was, should be treated on a lesser basis. Next was the case of *The Queen v Alomar* [2003] Bda LR 38. This case involved the importation of 148.3 grams of heroin with a street value of $158,180. The defendant pleaded guilty, and was sentenced to four and a half years, which on appeal by the Crown was raised to 8 years. But as was pointed out by the President in argument, that period of 8 years would equate to 12 years without the plea of guilty, and the 50% uplift would take the sentence to 18 years.

26. More generally, Ms Christopher criticised the judge for not having found a starting point. In fact, while the judge did say that he did not feel the Crown's suggested sentence of 18 to 21 years could be challenged, he said in terms that he would take the starting point as 12 years, and that with the 50% uplift, that would make 18 years.

27. Mr Richards submitted that the Court should have regard to the more recent cases of *Tyrone Brown v The Queen*, Criminal Appeal # 9 of 2016, and *Curtis Swan v The Queen*, Criminal Appeal # 10 of 2017. In the former case, the defendant imported almost 900 grams of cocaine and was convicted following trial, and sentenced to 15 years. His appeal against that sentence was dismissed, and Baker P referred in the course of his judgment to the words of Mantell JA in *R v Cox* [2005] Bda LR 47, where he said that it was well recognised that in cases of commercial importation of crack cocaine the starting point following trial was unlikely to be less than 12 years. In the case of *Swan*, the importation was of cocaine hydrochloride, which could be converted to crack cocaine relatively easily. This Court rejected an argument that it had been wrong to sentence the defendant on the basis that the substance imported was crack cocaine, and the appeal against a sentence of 21 years was dismissed.

28. I would agree with Mr Richards that more assistance is gained from reviewing the more recent cases. The case before us was one of commercial importation of a significant quantity of heroin, and the sentence was proportionate to other sentences for similar offences. But it is also to be noted that because of the Appellant's implausible defence, this Court cannot assume that the Appellant was indeed a courier somewhat lower down the chain of responsibility than an importer who had planned and organised the drug importation. The judge in sentencing made it very clear that he understood that the jury had rejected the Appellant's defence, and that in sentencing he could not go behind that. The judge also said in terms that he could simply adopt the Crown's sentencing submissions as his own, and those submissions were as I have set them out in paragraph 22 above, namely that the Appellant's evidence was wholly concocted. In those circumstances there is no basis for the argument that the Appellant was at the bottom of the chain of responsibility, as

submitted by Ms Christopher, and I would reject that approach. Accordingly, I would dismiss the appeal against sentence in this case.

SMELLIE JA:

29. I have read My Lord's speech in draft and I agree.

CLARKE P:

30. I also agree. The appeal is therefore dismissed.