In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2019: No. 42

BETWEEN:

LENCIA BERKELEY

Appellant

-and-

THE QUEEN

Respondent

Before: **The Hon. Mr. Justice Juan P. Wolffe, Puisne Judge**

Appearances: Ms. Victoria Greening for the Appellant
Mr. Alan Richards for the Respondent

Dates of Hearing: 6th May 2022
Date of Judgment: 1st July 2022

JUDGMENT

Appeal against Conviction – Conspiracy to Import a Controlled Drug – Whether defence of lack of knowledge is applicable to the offence of conspiracy to import a controlled drug

WOLFFE J:

1. On the 5th November 2019 the Appellant was found guilty by the trial Magistrate for the offence of Conspiracy to Import a Controlled Drug, namely Delta-9 Tetrahydrocannabinol,

contrary to section 4(3) of the Misuse of Drug's Act 1972 (the "MDA") as read with Section 230(1) of the Criminal Code Act 1907 (the "Criminal Code").

2. By way of an amended Notice of Appeal filed on or about the 15th March 2022 the Appellant now appeals that conviction on the following grounds:

> *"1. That the Learned Magistrate misdirected himself on the necessary ingredients of conspiracy to import;*
>
> *2. That the conviction is not supported by the evidence;*
>
> *3. Any other grounds which appear upon receipt of the record.*
>
> *4. The Learned Trial Magistrate failed to consider at all the Appellant's defence as laid out in her defence statement, namely lack of knowledge, pursuant to section 29 of the Misuse of Drugs Act 1972, and which arose during the trial;*
>
> *5. The Learned Trial Magistrate failed to direct himself on the applicable burden and standard of proof when section 29 is engaged.*
>
> *6. The Learned Trial Magistrate erred in finding that a logical or reasonable inference could not be drawn from the What's App exchange that the Appellant was unaware of the hidden contents, and failed to draw the inference in favour of the Appellant, as required by law."*

3. At the hearing of the appeal Ms. Victoria Greening, Counsel for the Appellant, abandoned Grounds 1, 2 and 3 and accordingly focused most of her attention on Grounds 4, 5 and 6 above.

<u>The Evidence at trial</u>

4. Reflected in the Magistrate's Judgment dated 5th November 2019 is the evidence that on the 4th July 2017 Customs Officer Sinclair Richards conducted an inspection of a parcel which was addressed to the Appellant at #11 Blue Hole Hill in Hamilton Parish. The address was that of the Appellant's employer Grotto Bay Hotel and is also where she

resided in staff dormitory/accommodation. The sender of the parcel was listed as a Mr. Russell Murray who was the Appellant's co-defendant.

5. In that parcel were two "Tresemme" shampoo bottles as well as some shea butter and coco butter. The shampoo bottles were x-rayed and found to contain objects wrapped in plastic. The parcel and its contents were seized by the Bermuda Police Service (the "BPS") and placed into secure storage, and on the 5th July 2017 and the 10th July 2017 photographs were taken of them (the photographs were adduced into evidence at trial). It was then discovered by police that both of the shampoo bottles were found to each contain a plastic bag with eighteen (18) small vials of brown liquid i.e. a total of thirty-six (36) vials. The brown liquid was later analyzed by the Government Analyst and found to be the controlled drug Delta-9 Tetrahydrocannabinol with the weight of 6.85 grams in one bottle and 4.82 grams in the other bottle. A drug expert estimated the street value of all of the 36 vials to be between $900 and $5,400.

6. It was decided by police that a controlled delivery of the parcel should be carried out i.e. for the parcel to be put back into normal postal circulation (at trial the police could not say whether on the date of the controlled delivery that the parcel contained a controlled drug). To this end, a controlled delivery was carried out by the BPS on the 18th July 2017 and on this date a man by the name of Mr. David Landy, who is a Customs Officer, attended the Crawl Post Office and presented to the clerk a parcel notice or slip for the said parcel. It appeared from the parcel notice that Mr. Landy was authorized by the addressee to collect it and he therefore signed for the parcel after being presented with it. The clerk requested Mr. Landy to open the parcel so that Customs may ascertain whether the items contained within were duty free i.e. did not exceed the value of $30.00. With no duty being payable Mr. Landy took the parcel away and the clerk called the BPS. Upon arrival at the Crawl Post Office the clerk gave the police a description of Mr. Landy and from that information the police attended Mr. Landy's place of employment at the DHL Customs Facility on Cox's Hill in Pembroke Parish. They eventually arrested Mr. Landy and the parcel was seized from the rear seat of his motorcar.

7. Mr. Landy gave police the Appellant's telephone number and later that same day the Appellant attended the Hamilton Police Station ("HPS") where she was arrested. At the time the Appellant was arrested she did not have her telephone with her but eventually the police went to the workplace of the Appellant's friend where they seized the Appellant's phone. Eventually, data was extracted from the Appellant's phone by a forensic technician and a report was produced in this regard.

8. On the 19th July 2017 a search was conducted by police at the Appellant's residence and a phone was recovered as well as travel documents and delivery information for the parcel (some of which was scrunched and some torn up). One of these documents was UPS tracking information. It was accepted at trial that some of the torn documents included a boarding pass and a luggage receipt but that some of the documents were not torn in such a way as to intentionally make them illegible.

9. On the 13th March 2018 the Appellant was seen walking in the company of Mr. Murray (her co-defendant). She was issued with a Court Summons and Mr. Murray was arrested and detained on suspicion of conspiracy to import a controlled drug. However, Mr. Murray, who is a private jet pilot, subsequently left Bermuda and has not returned. It is unclear as to whether Mr. Murray was interviewed under caution by police.

10. Mr. Landy gave evidence at trial and he said that he had known the Appellant for approximately (10) years since she started working at the Grotto Bay Hotel where he also worked on the Front Desk (presumably in addition to his work as a Customs Officer). He explained that all mail for staff residing in the dormitory came to the hotel's front desk and then the mail would be distributed to the various departments for the staff member concerned. He also said that in July 2017 the Appellant was out of the jurisdiction tending to her sick mother when he reached out to her and she asked him if there was a "postal slip" at the front desk (I presume that a "postal slip" is the same a "parcel notice"). He confirmed to the Appellant that there was and it was he, as her friend, who asked her if she wanted him to collect the package for her. The Appellant said "yes" so he filled out the form

nominating himself as the Appellant's agent to collect the parcel. He also signed the Appellant's name on the form.

11. Mr. Landy went on to say that on the 18th July 2017 he went to the Crawl Post Office to collect the parcel thinking that it contained shampoo and lotion as the Appellant had told him, and once there he opened the parcel and saw that it did contain lotion and shampoo in Ziplock bags that were cut open. The bags being cut open indicated to him that they were inspected (he would have probably known this as he is was a Customs Officer). At some point the Appellant called him and he told her that that he had the parcel in his possession and that he would take it to the hotel. He stated that he was going to take the parcel to the hotel that night for the Appellant to collect but that he did not do so because the police had attended his job at Customs, placed him under arrest, and seized the parcel from the back of his motorcar.

12. The Appellant did not give evidence in her own defence nor did she call any witnesses, as she was legally entitled not to do, but in a recorded police interview conducted on the 19th July 2017 (the transcript of which was made an exhibit at trial) she did answer various question put to her by the police. The Magistrate extracted the following from what the Appellant said in her police interview:

- She went to New York at the end of the previous month for a graduation but that she got so busy that she did not have time to do any shopping for items *"like soap and stuff"*. So she asked her male friend to send her *"some soap, cocoa butter and shea butter"*. The Appellant's friend agreed to send her "stuff" and said that he would send it via mail.

- She said that her friend sent the *"stuff"* to Bermuda as she was overseas seeing her mother who was not feeling well and that she asked one of her co-workers if there was a slip for her to pick up a package. The co-worker informed her that there was and asked her if she wanted to collect the package for her. She

said "okay" because she was not certain when she was going to return to Bermuda.

- When she returned to Bermuda she asked the co-worker if he had collected the "stuff" for her. He said "yes" and that he would deliver it to her on his way home.

- She then got a call from the police saying that they needed to see her about the package. When asked by the police who she asked to send her the items she said a "Russell Murray" who lives in the Bronx, New York. She did not know his address.

- She told the police that her mother lives in the Bronx but that she did not meet Mr. Murray when she was there. In respect of the package, she said that Mr. Murray gave her the tracking number for it but that she did not have the tracking number recorded anywhere.

The Magistrate noted in his Judgment that the evidence adduced at trial, particularly (i) a USPS receipt and (ii) a Tracking History screenshot (both found on the Appellant's phone which was seized by police) and a two (2) page USPS Tracking History which was found torn up in her residence, indicated that she did in fact have documentary details of the tracking number for the package.

- When shown photographs of the items that were in the package she said that she did not know what was in the package because she did not see what was in the package.

The Magistrate noted in his Judgment however that in a WhatsApp message to Mr. Landy on the 13th July 2019 that the Appellant referred to the contents of

the package as being *"soap and shampoo"* [the Magistrate underlined the word for emphasis].

13. At trial the Prosecution also relied on WhatsApp exchanges between the Appellant and a Neitra Dill, and separately between the Appellant and a Stacy Taylor on the 12th and 13th July 2017 regarding the package and its collection from the Post Office.

14. The Defence, seemingly, placed significant reliance on a WhatsApp message exchange between the Appellant and a "Beau Goose" (who is believed to be Mr. Murray) in which the Appellant stated *"That dam package u send me……Is going to cost me my life"*.

The Magistrate's consideration of the Law

15. In paragraphs 39 to 45 of his Judgment the Magistrate set out his analysis of the law in respect of the offence of conspiracy to import controlled drugs, and in particular the element of "conspiracy". He wrote:

> "*39. I am reminded and direct myself that the essence of a criminal conspiracy is the agreement to commit the crime – in this case to import the controlled drugs into Bermuda. Before I can convict Ms. Berkeley I must therefore be satisfied beyond reasonable doubt, so that I feel sure, that:*
>
> *(i) there was an agreement to import controlled drugs into Bermuda;*
> *(ii) that Ms. Berkeley entered into, and was party to, that agreement; and,*
> *(iii) that, when she did so, she intended that the controlled drugs would be imported into Bermuda.*
>
> *40. The prosecution does not have to prove that Ms. Berkeley had either: been in contact with all of the other people in the conspiracy; or that she played an active, or any specific, part in putting the conspiracy into effect.*
>
> *41. Further, and as is invariably the case, there is no direct evidence of an agreement in this case – it would be unusual for people who are planning a crime to explicitly put their agreement into writing or to tell other people about it. So I must consider the evidence of what happened and of what Ms. Berkeley and other people did and said and ask myself whether those circumstances make me sure that there was a conspiracy and that Ms. Berkeley was part of it and intended that it would be put in to effect.*

42. *I am also reminded that I am entitled to draw inferences from the evidence. That is, I am entitled to come to common sense conclusions based upon the evidence which I accept as true provided those inferences flow logically and reasonably from those proven facts. But, it is no part of my function to speculate. Furthermore, I am reminded that if there are two or more inferences which may logically and reasonably be drawn from the same set of proven facts then I must draw the inference most favourable to the defendant, Ms. Berkeley, simply because it is the duty of the prosecution to prove so I feel sure, beyond a reasonable doubt, of the guilt of Ms. Berkeley, and she is therefore entitled to the benefit of every reasonable doubt.*

43. *Much of the submissions of counsel in this case were taken up with consideration of the Court of Appeal for Bermuda's decision in Lottimore and Hatherly –and- The Queen Criminal Appeals Nos. 12 of 2012 and 1 of 2013. That was a conspiracy to import the particularised controlled drug, diamorphine, just as in this charge Delta-9 Tetrahydrocannabinol is particularised. Mr. Richardson submits that in the instant case not only is there no evidence of an agreement to import a controlled drug, but there is certainly no evidence of an agreement to import Delta-9 Tetrahydrocannabinol particularly, as, he submits, is required following the decision in Lottimore and Hatherly which is binding upon this Court.*

44. *I am obliged to Mr. Richards for his submission in this regard which analyse to the English cases relied upon by our Court of Appeal in Lottimore and Hatherly. In my view the Court of Appeal by referencing Section 27B and Schedule 5 of the 1972 Act and equating it to the distinction between Class A and Class B drugs in the United Kingdom under the 1971 Act – whilst I accept there may be some argument, with the greatest respect to their Lordships in the Court of Appeal, as to whether that is an appropriate comparison – sought only by their decision to import into Bermuda law the position in England and Wales, namely, per Archbold 2019 paragraph 33-19, that:*

"…where a conspiracy count identifies in the particulars of offence a particular controlled drug, it must be proved against any defendant not merely that he knew that the agreement related to the importation…of a controlled drug; he must be proved either (i) to have known that it related to the particular drug mentioned in the indictment; or (ii) to have known that it related to a drug of the same 'Class' (as specified in the Misuse of Drugs Act 1971) as the drug mentioned [or in our case another drug listed in Schedule 5], without having any knowledge or belief as to it involving any particular drug, or (iii) to have believed that it related to another particular drug of the same class [or in our case another Schedule 5 drug], or of a class attracting a greater penalty [or in our case another Schedule 5 drug when it was not in fact a Schedule 5 drug], or (iv) to have believed

that it related to a drug of class attracting a greater maximum penalty [or, arguably, again in our case a Schedule 5 drug when it was not, in fact, a Schedule 5 drug], without having any belief as to any particular drug, or (v) to have not cared at all what particular drug was involved. A defendant would escape liability only where he mistakenly believed that the conspiracy related to a controlled drug of a class attracting a lesser maximum penalty [or, arguably, in our case not a Schedule 5 drug when it was in fact a Schedule 5 drug]." [Emphasis added]

45. At the very least therefore, whilst I may be bound in certain circumstances to, and in fact (as a matter of principle) do, disagree with Mr. Richard's first contention in paragraph 8 of his written submissions. I am in agreement with his, begrudging, second contention that the exception that arises when the particularised drug is listed in Schedule 5 is irrelevant in this case (given that the particularised drug is not in Schedule 5), and need not, therefore, be decided at this time."

The Magistrate's conclusions

16. Persuaded by the Prosecution's case the Magistrate went on to find that:

- The WhatsApp messages between the Appellant and the person believed to be Mr. Murray can lead to an inference being drawn that the Appellant was not pleased with what occurred.

  The Magistrate however was not persuaded that an inference can also be drawn from the said WhatsApp messages that the Appellant did not know about the contents of the package.

- The Appellant, because of her friendship with Mr. Landy and because he was her co-worker, anticipated that he would offer to pick up the package after he was made aware of the postal slip by the Appellant.

- In the WhatsApp exchange between the Appellant and Mr. Landy prior to the discovery of the drugs the Appellant mentioned that the package contained

"shampoo" but that in her caution police interview after the discovery of the drugs the Appellant made no mention of any "shampoo" being in the package.

- The items listed as being in the package, that is soap and shampoo, (a) are "mundane items" valued at only $30.00 and which can easily be purchased in Bermuda; (b) at a cost of $68.65 to mail the package to Bermuda the total value of the items were over twice their retail value; and (c) had the Appellant brought the items with her when she returned to Bermuda they likely would have been duty free as the retail cost of the items would not have exceeded the $200 duty free allowance enjoyed by residents returning to Bermuda after a trip overseas.

- The Appellant reminded Mr. Landy of these "mundane items" on no less than three occasions, including the day of her return, whilst simultaneously contacting Neitra Dill and Stacey Taylor.

  The Magistrate found that this demonstrated a disproportionate level of interest by the Appellant in the package and its contents and that from this it can be inferred that she was well aware of the true value and nature of the concealed contents.

- By the Appellant being well aware of the true contents of the package it can be inferred that she did not act alone and that at least one other, most likely Mr. Murray, was a party to an agreement with her to import the controlled drugs into Bermuda.

17. In the closing paragraphs of his Judgment the Magistrate wrote:

> *"51. In all the circumstances, and applying the law as I find it to the evidence in this case taken as a whole, and having considered the submissions and arguments of counsel I am satisfied, beyond a reasonable doubt, so that I feel sure, that between a date unknown and 4th July 2017:*

> (i) *there was an agreement to import Delta-9 Tetrahydrocannabinol, or at the very least a controlled drug, into Bermuda;*
> (ii) *that Ms. Berkeley entered into, and was party to, that agreement; and,*
> (iii) *that, when she did so, she intended that the Delta-9 Tetrahydrocannabinol, or at the very least a controlled drug, would be imported into Bermuda.*
>
> 52. *On that basis I therefore find the Defendant guilty of the offence charged, and will hear counsel as to the appropriate sentence."*

Decision

Grounds 4 and 5

18. In her written and oral submissions Ms. Greening contended that in reaching his decision the Magistrate failed to properly or at all consider the Appellant's defence of lack of knowledge which was afforded to her under section 29 of the MDA ("Section 29 defence"). Section 29 of the MDA reads:

> *"**Defence of lack of knowledge***
>
> *29 (1) This section applies to offences under sections 4(3), 5(2) and (3), 6(2) and (3), 8(2), 9(2), 10(2) and 11(2).*
>
> *(2) 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.*
>
> *(3) Where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused—*
>
> (a) *shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had*

reason to suspect that the substance or product in question was the particular controlled drug alleged; but

(b) *shall be acquitted thereof—*

(i) *if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug; or*

(ii) *if he proves that he believed the substance or product in question to be a controlled drug, or a controlled drug of a description, such that, if it had in fact been that controlled drug or a controlled drug of that description, he would not at the material time have been committing any offence to which this section applies. Nothing in this section shall prejudice any defence which it is open to a person charged with an offence to which this section applies to raise apart from this section.*

19. Relying on section 29 of the MDA, as well as the authorities of *The Queen v. Dean Anthony Minors [2002] BDA L.R. 64*, *Luke Hill v. R. 2001 Bda L.R. 83*, and *R v. Lambert [2001] UKHL 37*, Ms. Greening argued that by virtue of the Appellant evoking the defence of lack of knowledge (presumably by reference to the transcript of the Appellant's police interview as the Appellant elected not to give evidence in her own defence) that the Magistrate should have properly considered the Appellant's section 29 defence, and that if he rejected it he then should have set out his reasons for doing so.

20. In response, Mr. Richards submitted in writing and orally that a section 29 defence was not open for the Magistrate to consider as the offence charged is one of "conspiracy to import a controlled drug" under section 4(3) of the MDA as read with section 230(1) of the Criminal Code, and not the principal offence of "importation of a controlled drug" under section 4(3) of the MDA. Had the Magistrate considered a section 29 defence, Mr. Richards argues, he would have been wrong to do so and he would have misdirected himself. Mr. Richards relied on the authorities of *Lottimore & Hatherley [2012] CA (Bda) 12 Crim & [2013] CA (Bda) 1 Crim* (which was also relied on at trial) and *McGowan [1990] Crim L.R. 399* to make his point.

21. Having heard Ms. Greening and Mr. Richards I find that the submissions of Mr. Richards resonates far more to the facts and law in this case than does Ms. Greening's. Starting with the applicability of a section 29 defence, the section itself expressly stipulates which offences it directly applies to. Namely, section 29(1) of the MDA lists the following applicable offences:

Section 4(3):	Importation or Exportation of a Controlled Drug
Section 5(2):	Production of a Controlled Drug
Section 5(3):	Concerned in the production of a Controlled Drug
Section 6(2):	Possession of a Controlled Drug
Section 6(3):	Possession of a Controlled Drug with intent to Supply
Section 8(2):	Misuse of a Controlled Drug
Section 9(2):	Possession of Drug Equipment
Section 10(2):	Doing an act preparatory to the commission of an offence under sections 4(3) or 5(3)
Section 11(2):	Cultivation of Cannabis

22. The offence of Conspiracy to Import a Controlled Drug under section 4(3) of the MDA as read with section 230(1) of the Criminal Code is a stand-alone offence and not a derivative and/or lesser offence of the principal offence of importation of a controlled drug under section 4(3) of the MDA. It is for this reason that it is not uncommon for an offender, in one Indictment or Information, to be separately charged with the trio of offences of conspiracy to import a controlled drug, importation of a controlled drug, and possession of a controlled drug (with or without an intent to supply). The tribunal of fact can therefore, depending on how the evidence unfolds at trial, reasonably find that the offender is guilty or not guilty of one, two or three of those offences charged as the elements or ingredients of each offence differ. I should make it clear though that in such instances the burden of proof for each offence would be the same and still remains throughout with the Prosecution.

23. Far be it for me to predict what was in the minds of the legislature when it enacted section 29(1) of the MDA but it would not be a mental stretch to conclude that the legislature must have appreciated that because of the specific nature of the offence of conspiracy to import a controlled drug, particularly the element of conspiracy, that a section 29 defence should not be applicable to the offence of conspiracy to import a controlled drug. My position is illuminated further when the statutory definition of the element of "conspiracy" is unpacked.

24. Section 230(1) of the Criminal Code provides:

> *"**Conspiring to commit offence***
>
> *230 (1) Subject to subsection (2), every one who conspires with any other person to commit any offence (in this section referred to as "the principal offence") is guilty of an offence which shall be triable either summarily or on indictment in the manner of the principal offence, and the person committing such offence is liable to—*
>
> *(a) imprisonment for half the term, if any, prescribed by law for the principal offence; and additionally or alternatively*
>
> *(b) imprisonment for ten years where the penalty prescribed for the principal offence is life imprisonment; and additionally or alternatively*
>
> *(c) a fine in an amount not exceeding half the amount, if any, prescribed by law for the principal offence; and additionally or alternatively*
>
> *(d) subject to paragraphs (a) and (c) to the penalty prescribed by law for the principal offence.*

25. As for the word "conspiracy", a criminal conspiracy is an agreement between two or more persons to do an unlawful act. The essence of the offence of conspiracy is the "unlawful agreement". The Prosecution must therefore prove beyond a reasonable doubt that the accused person intended, when he entered into an agreement, to play some part in an agreed course of conduct which involved the importation of controlled

drugs into Bermuda. This would be the case even if the accused person intended to participate in only part of the conduct (whether it be a major or minor part). The Prosecution do not have to prove that the accused person played an active part in putting the conspiracy into effect. It also does not matter that the accused person, at some time later, withdrew voluntarily from further participation in the agreement.[1]

26. Further[2]:

(i) It is not necessary for the Prosecution to prove performance of the agreement and it is irrelevant that the performance of the importation of controlled drugs into Bermuda may have been impossible.

(ii) The agreement need not be in writing and it is not necessary for people to formally agree for there to be an agreement.

(iii) Parties can join or leave a conspiracy at different times according to their role and level of involvement. So the Prosecution do not have to prove that the accused was in the conspiracy from the very beginning.

(iv) It is also not necessary that each participant know all of the details of how the scheme is to be or was implemented.

(v) It is not necessary that all parties be in direct communication with each other.

(vi) It is not necessary for each participant to have met. They may not even know each other or know each other's identities.

27. It is therefore the <u>agreement</u> between the parties which is the nucleus of conspiracy to import cases. The crucial element of conspiracy is satisfied upon proof beyond a

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1 Taken from standard Queensland Benchbook directions given to a jury in conspiracy cases.

2 See footnote 1.

reasonable doubt of the agreement to import a controlled drug and the Prosecution need not go on to further prove beyond a reasonable doubt that the package imported or to be imported actually contained or could contain a controlled drug. The offence of conspiracy to import a controlled drugs can still be made out even where no controlled drugs are found. Again, it is the agreement to import the controlled drug which is the focus in conspiracy cases.

28. Therefore, whether or not the accused person knew or suspected or had reason to suspect that the imported package actually contained a controlled drug is immaterial in conspiracy to import a controlled drug cases. The fact that controlled drugs are intercepted, such as in the case at bar, simply forms part of the factual matrix from which an inference could be drawn that the accused person entered into an agreement with others to import a controlled drug into Bermuda. Therefore, the offence of conspiracy to import a controlled drug can still be made out even if the controlled drugs are not intercepted. Such as, proof of an agreement by way of verbal or written communication between persons evidencing a scheme to import controlled drugs.

29. For the Appellant to have been found guilty of the offence of conspiracy to import a controlled drug into Bermuda the Prosecution must only have proven beyond a reasonable doubt, and the Magistrate would have had only to find as a fact, that:

(a) Between a date unknown and another date that the Appellant <u>entered into an agreement</u> with another to import drugs into Bermuda.

It was not a requirement for the Prosecution to prove the exact date or dates that the Appellant made the agreement with another, nor was it necessary for the Prosecution to have before the Court the other person(s) with whom the Appellant entered into such agreement. In this case, Mr. Murray was arrested but it seems as if he absconded from prosecution.

(b) When the Appellant entered into the agreement that she intended to play some part in the agreed course of conduct which involved the importation of the controlled drugs into Bermuda.

30. The Magistrate was therefore not obliged to consider whether or not the Prosecution proved beyond a reasonable doubt that the Appellant knew or suspected or had reason to suspect that the bottles of shampoo that were imported into Bermuda to her address contained the 36 vials of controlled drugs. This is whether or not the Appellant raised a section 29 defence. The police intercepting the bottles containing the controlled drugs, and which were addressed to the Appellant, was simply part of the evidence used by the Prosecution to prove beyond a reasonable doubt that the Appellant conspired or agreed with another to import controlled drugs.

31. No doubt, had the Appellant been charged solely with the principle offence of importation of controlled drug Ms. Greening's submissions and the principles set out in *Minors*, *Hill* and *Lambert* would have been more compelling. In each of those authorities the defendant was either charged with the principal offence of importation of a controlled offence (*Minors*) or possession of a controlled drug with intent to supply (*Hill* and *Lambert*) and the issues canvassed on appeal were (a) whether section 29 of the MDA imposed a legal or evidential burden on the defendant, and (b) whether the trial judge misdirected the jury in that regard. However, the Appellant in this case was charged with and found guilty of the offence of a conspiracy to import a controlled drug. Given this, I prefer to follow the guidance of the Prosecution's cited authorities of *Lottimore & Hatherly* and *McGowan* in which it was held that a section 29 defence is not open to offenders charged with conspiracy to import a controlled drug and that a section 29 defence type direction (i.e. lack of knowledge) would constitute a misdirection. Hence, there would be no need for me to further address the applicable burden and standard of proof when a section 29 defence is invoked.

32. In consideration of the above paragraphs, I find no fault in the Magistrate reaching the conclusions that he did. He properly considered (a) whether the Appellant entered into

an agreement with another to import drugs into Bermuda, and (b) that when the Appellant entered into the agreement that she intended to play some part in the agreed course of conduct which involved the importation of the controlled drugs into Bermuda. In doing so the Magistrate properly did not direct himself as to any section 29 defence of the Appellant (whether raised by her or not).

33. I therefore dismiss Grounds 4 and 5 of the Appellant's appeal.

Ground 6

34. Under this ground of appeal Ms. Greening submitted that the inferences drawn by the Magistrate were not logical or reasonable based on the evidence heard (whether separately or together). In particular, the Magistrate's finding that the WhatsApp exchanges between the Appellant and Mr. Murray, and the torn-up tracking history documentation found in the Appellant's possession, infer an agreement between the Appellant and another to import controlled drugs into Bermuda.

35. In respect of the text messages, Ms. Greening argued that because the Appellant sent them to Mr. Murray after she had been identified as a suspect and because they are indicative of her showing "exacerbation" for Mr. Murray sending the package containing the controlled drugs, that they provided a reasonable explanation for the Appellant's conduct. Therefore, Ms. Greening adds, the Magistrate should have drawn inferences which were favourable to the Appellant.

36. In respect of the torn-up tracking history documentation, Ms. Greening submitted that such evidence did not take the Prosecution's case any further as the Appellant admitted that she knew that the package came into Bermuda and that Mr. Landy had collected it for her. The Appellant, she says, simply discarded the documentation as it was no longer needed and therefore the Magistrate should have drawn this inference in favour of the Appellant.

37. Mr. Richards counter-argued that it was the totality of the evidence advanced by the Prosecution against the Appellant, not just the evidence of the text messages and the torn up tracking history, which ultimately led to the Magistrate's finding of guilt. Therefore, Mr. Richards says, Ms. Greening's submissions under this ground of appeal are unfounded.

38. In reaching his decision the trial Magistrate was called upon to examine all of the evidence and ask himself whether the Prosecution met its burden and standard of proof. In doing so, the Magistrate was entitled to use any circumstantial evidence (which he accepted) and to draw any inferences from accepted facts to conclude that there was a conspiracy between the Appellant and another to import controlled drugs into Bermuda.

39. It is obvious from the construction of the Magistrate's Judgment that the Magistrate viewed the evidence of the WhatsApp messages and the torn-up tracking history documentation against the backdrop of the other evidence in the case. Such as, that the bottles containing the controlled drugs being addressed to the Appellant and being collected by Mr. Landy who was asked by the Appellant to collect; the Appellant mentioning to Mr. Landy prior to the discovery of the drugs that the package contained shampoo but making no mention of there being any shampoo in her police interview after the discovery of the controlled drugs; the total cost of shipping the bottles exceeding the actual costs of purchasing the items by a factor of two; and, the Appellant showing too much interest in Mr. Landy collecting items which essentially were basic and could have easily been purchased in Bermuda.

40. So while the Magistrate did draw the favourable inference that the text messages showed that the Appellant was not pleased with what had transpired, it was also open for the Magistrate to decline the invitation to draw an inference from the text messages that the Appellant was not a part of an agreement to import controlled drugs into Bermuda. It would appear that the Magistrate accepted that the Appellant appeared exasperated in the text messages, but he concluded that such exasperation did not

logically mean that she was unaware of the contents of the packages. This reasoning is sound. After considering all of the evidence in this case (as summarized in the preceding paragraph), the Magistrate was entitled to reject the inference that the text messages logically and reasonably showed that the Appellant was not a party to any agreement to import controlled drugs or that she was not aware of the presence of drugs in the bottles.

41. The same can be said about the torn-up tracking information found at the Appellant's residence. There may very well have been innocuous reasons for the Appellant to tear up the tracking history information. It is not unusual for a shipper of packages to discard shipping documentation after an item has arrived. However, in her police interview the Appellant said that she did not have any of the tracking information recorded anywhere when in fact she did have such information stored on her cellphone. From this, the Magistrate was entitled to logically and reasonably draw the inference that the Appellant tore up the tracking information in order to conceal evidence pointing to her agreement with Mr. Murray and/or another to import drugs into Bermuda.

42. I therefore dismiss Ground 6 of the Appellant's appeal.

Conclusion

43. Having dismissed Grounds 4, 5 and 6 of the Appellant's appeal (Grounds 1, 2, and 3 were abandoned) I hereby remit the matter to the Magistrates' Court so that the Appellant may be sentenced by the trial Magistrate.

Dated the 1st day of July 2022

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The Hon. Mr. Justice Juan P. Wolffe
Puisne Judge