



In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2022: 03

SHAE BUTTERFIELD

Appellant

-v-

FIONA MILLER
(Police Sergeant)

Respondent

JUDGMENT

Appeal against Conviction in the Magistrates' Court – Possession of Cannabis and Delta-9 Tetrahydrocannabinol with intent to supply – section 6(3) of the Misuse of Drugs Act 1972

Date of Hearing: 09 November 2022

Date of Judgment: 16 December 2022

Appellant: Ms. Shaunte Simons-Fox, (On behalf of the DPP)

Respondent: Ms. Sara-Ann F. Tucker (Trott & Duncan Limited)

JUDGMENT delivered by Shade Subair Williams J

Introduction

1. The Appellant, Mr. Butterfield, was tried and convicted by Magistrate Khamisi Tokunbo on Information 19CR00343 on two counts of possession of a controlled drug which was intended for supply, contrary to section 6(3) of the Misuse of Drugs Act 1972. The first count referred to Cannabis and the second count was in respect of Delta-9 Tetrahydrocannabinol.
2. At the trial in the Magistrates' Court, Mr. Butterfield appeared as a litigant in person. Now represented by Counsel, he has sought for his conviction to be quashed on any one or all of the following three grounds of appeal:
 - (i) *The Wor. Magistrate misdirected himself and or failed to direct himself as to the credibility of the Crown's witnesses as they gave inconsistent accounts of their interactions with the Appellant during examination.*
 - (ii) *The Wor. Magistrate erred in law by failing to admit, consider or otherwise direct on the firsthand hearsay evidence of defence witness Jarico Gardener contrary to s.75(1) of the Police and Criminal Evidence Act 2006. [This ground of appeal was abandoned during the hearing of the appeal].*
 - (iii) *The Wor. Magistrate failed to direct himself on any points in favour of the Appellant or assist with any point of law arising from the evidence produced by the Crown for the purpose of the unrepresented Defendant.*
3. These grounds were argued before me by Crown Counsel and the Appellant's Counsel at the hearing of 9 November 2022. The Appellant was present at that hearing of the appeal. This is my judgment in respect of the appeal.

The Evidence at Trial

The Crown's Case

4. At trial, the Crown called six witnesses. It was the Crown's case that on the night of 16 February 2019, PC 2515 Regan, PC 2433 McHugh and PC 2446 Brooks all attended a football game being held on Goose Goslings field at BAA on Woodlands Road in Pembroke Parish. The three officers had been on mobile patrol and were responding to a report of a firearm in attending the football game that night. The officers were dressed in police uniform.
5. The officers alerted to the area where it was believed that the firearm suspect was present amongst or in proximity to approximately 20 seated people. At some stage those 20 odd persons left the area, leaving only the Appellant behind. On PC Regan's

evidence, the Appellant was facing the pitch with his back faced towards the officers. PC Regan stated at trial that he found it strange that the Appellant remained behind on his lonesome without turning around and acknowledging the officers' presence.

6. Both PC Regan and PC McHugh told the trial magistrate that they observed the Appellant standing on what appeared to be a plastic ziplock bag. PC Regan then approached Mr. Butterfield and asked if he could have a word with him. This prompted the Appellant to turn and look over his shoulder, but he did not move his feet, which further struck the officer as odd. PC Regan said that he took Mr. Butterfield by the arm to lead him away from the item he was standing on and saw that the Appellant had been standing on a ziplock bag containing smaller red bags. PC McHugh described that same item as a clear plastic bag containing green and brown plant-like material.
7. Suspecting the bags to contain a controlled substance, he informed the Appellant that he would be detained under the Misuse of Drugs Act. However, before PC Regan was able to secure him, the Appellant ran across one end of the football pitch and out onto Woodlands Road, thereby causing the officers to give chase. PC Regan stated in his evidence on the stand that as he and his fellow officers chased the Appellant, the Appellant was seen to be discarding items from his person.
8. The officers caught Mr. Butterfield as he stumbled in the area of the Butterfield & Vallis compound. Consequently, the Appellant was handcuffed and searched. From the waistband of the Appellant's trousers, police seized a lock knife. Also from his trousers, the PC Regan seized a cash sum of \$2,668.00 in small denominations. PC Regan's evidence was that he pried open the Appellant's fingers causing him to drop two small red ziplock bags. Those two bags were later sealed in evidence bags H1473484 and H1473485. Police evidence bag H1473484 was examined by the Government Analyst, Ms. Rentha Liz Francis, and found to contain 0.47 grams of cannabis. Ms. Francis also reported that police evidence bag H1473485 contained 0.38 grams of delta -9- tetrahydrocannabinol.
9. Further, PC McHugh seized the clear plastic bag which Mr. Butterfield earlier sought to conceal with his foot. That clear plastic bag was subsequently secured as an exhibit in police evidence bag H1473483. PC Regan seized a mobile phone, which was one of the objects the Appellant was seen to toss away.
10. The Government Analyst, whose report of 13 June 2019 was read into evidence. Ms. Francis confirmed the seized contents to contain 10.41 grams of cannabis and 1.34 grams of delta -9- tetrahydrocannabinol, a cannabinoid colloquially referred to as "shatter" on account of its glass-like quality which will shatter if dropped. Police Narcotics Expert, Acting Detective Sergeant 899 Warren Bundy explained in his 15 March 2019 witness statement, which was also read into evidence, that "shatter" is consumed through a method known as "dabbing" which is a heating process to

support its consummation via inhalation. ADS Bundy also stated in his written evidence that delta -9- tetrahydrocannabinol has a high tetrahydrocannabinol (THC) content and that most users would only require an 0.1gram quantity to feel its high.

11. As to the street value of the controlled substances seized, ADS Bundy opined that the delta -9- tetrahydrocannabinol / "shatter" was worth up to \$1,000.00 while the total amount of cannabis seized would yield a street price of \$550.00.

The Defence Case

12. The Appellant gave evidence in his own defence. He described himself as a self-employed Cable Technician. In an attempt to explain his possession of the cash seized from him. He said he had been doing a job for TCD (as a sub-contractor) and that the contractor paid him a down-payment sum of \$3000.00 on the night immediately prior to his arrest of 16 February 2019. To corroborate Mr. Butterfield's evidence, the Defence called Mr. Tyrone Butterfield ("Mr. T Butterfield"), the contractor. Mr. T Butterfield's sworn evidence was that on 16 February 2019, the same day of the arrest, he made a partial-payment to the Appellant in the approximate sum of \$2,700.00. Also on the subject of cash, the Appellant called a Ms. Phyllis Edith Butterfield who stated that she saw the Appellant on 19 February 2012. She said the Appellant gave her \$50.00 on that occasion. (It is unclear from the record of appeal whether it was ever stated in evidence if either or both of the Defence witnesses are relatives of the Appellant.)
13. The Appellant denied that any ziplock bags fell from his grasp or that his fingers were pried open. He accepted that he was instructed to open his hands but denied that he had been holding on to anything when so told. In answer to this part of the Crown's case, the Appellant conceded that he had controlled substances on his person but contended that they were instead removed from the jacket he was wearing. As noted in the learned magistrate's judgment, Mr. Butterfield claimed that he had purchased this jacket from his uncle earlier that same evening of his arrest and that he had no knowledge of what type of controlled drugs were in his jacket.

The Magistrate's Judgment

14. The Magistrate in his judgment stated his findings as follows:

"I am satisfied that each of the prosecution witnesses were credible and truthful witnesses. The Defendant has given me no reason to doubt their credibility either during his cross-examination or when he himself gave evidence.

In short I find no reason to believe that the officers in this case have misled the Court or falsely implicated the defendant. The defendant, on the other hand was not, in my view, a credible witness. He was not a witness of truth. In many respects, his version of what occurred on 16 February 2019 at the football field and after agrees with the police account.

...

I reject the Defendant's version as to the incident and purchase of a jacket, that the drugs were found in the jacket, that he ran from police because he just saw (a person) black, didn't know it was police and that he ran for his safety and because he had cash on his person.

In my opinion that (his version) all amounts to a concocted story designed to evade responsibility and accountability for his illegal activity on that night. It was a big lie.

In the circumstances I am satisfied so that I feel sure that the Defendant is guilty as charged in both counts of possessing the controlled drug cannabis and Delta-9 Tetra hydro cannabinol, both with intent to supply on the 16/2/19 in Pembroke Parish..."

Decision and Reasons

Decision and Reasons [Ground 1]

15. In arguing that the learned magistrate overlooked the evidential inconsistencies on the Crown's case, Ms. Tucker pointed to the evidence of PC Regan and PC McHugh. Ms. Tucker suggested that it was significant that PC Regan described the item which Mr. Butterfield was standing on before the chase as a ziplock bag containing smaller red bags. This, she said, was because PC McHugh described the same item as being a clear plastic bag containing green and brown plant like material. Ms. Tucker submitted that this discrepancy was a basis for finding that the witnesses lacked in credibility. In answer to this appeal complaint, Ms. Simons-Fox argued this variation between the officers was nothing more than a difference of perception in respect of the same item of evidence.
16. While the Appellant stated under cross-examination that he was never standing on any plastic bag, he never put it to any of those police witnesses that they were either mistaken or being untruthful about the fact that he was standing on the item seized. Further, no challenge was made to the Crown's case that the plastic bag submitted to PC Keisha Brooks, was anything other than the plastic bag PC Hugh seized from the area where the police first encountered the Appellant. More so, the Crown's case that seized plastic bag was sealed by PC McHugh into police evidence bag H1473483 was

unchallenged. The magistrate, therefore, had no reason to reject any of these factual components of the Crown's case which did not impugn the individual credibility of any witness. For these reasons, I agree with the prosecutor that the discrepancy complained of should be treated as nothing more than a difference of visual perspective of the item in question.

17. Another complaint made by the Appellant as part of the first ground of appeal is stated under paragraph 5 of Counsel's written submissions:

"The evidence of officer Regan is that he spoke to the Appellant and the Appellant did not move. The evidence of officer McHugh is inconsistent in that he states that the Appellant suddenly took off as the police spoke to him and makes no mention of the Appellant being led away by arm from where he stood or that the Appellant had been detained. The evidence of the Appellant on this is at page 11 of the record is that he felt a grip on his arm and that he turned around and saw all black and ran because he did not know who it was. It was the Appellant's submission that notwithstanding the Appellant's evidence on this point the police did provide inconsistent statements. The evidence of Officer McHugh corroborates the evidence of the Defendant and the Wor. Magistrate makes no concession for that in his deliberation or ruling."

18. The fact that PC McHugh made no mention of PC Regan taking Mr. Butterfield by his arm and leading him away does not negate the evidence of PC Regan to this effect, which was unchallenged by Mr. Butterfield during cross-examination. Otherwise put, PC McHugh neither corroborated nor rejected this portion of PC Regan's evidence. He simply made no mention of it and was not questioned on it by either side. That is not, in my judgment, tantamount to an inconsistency. So, as I see it, the trial magistrate was perfectly entitled, having assessed PC Regan's demeanour as a witness, to accept PC Regan's evidence on this detail.

19. As to Mr. Butterfield's evidence of seeing "all black", it was never stated as part of the evidence for the Crown (nor put to any prosecution witness) that the police officer who initially approached Mr. Butterfield was dressed in all black clothing. (Counsel appearing before me were provided with a post-hearing opportunity to examine the audio recordings of the trial to verify this as being so.) Having heard all of the evidence, the magistrate rejected Mr. Butterfield's evidence that *"he ran from police because he just saw (a person) black."* I see no cause for fault in the magistrate's determination.

20. The final point contended by the Appellant's Counsel on the subject of evidential inconsistencies relates to the evidence of the items discarded by Mr. Butterfield during the police chase and the drug packets pried out of Mr. Butterfield's hand by police after the chase. On my assessment, this is not an example of conflicting evidence. The Crown's case, as consistently outlined by the police witnesses, is that the Defendant was discarding various items as he ran from police. Those items, which

included a cellular phone, were not fully particularised in the evidence according to the record of the magistrates' notes. However, none of those items discarded during the chase were said to be or to contain controlled drugs. The police witnesses, on my review of the evidence, were not in any conflict on the fact that Mr. Butterfield was subsequently apprehended by the police and that PC Regan pried open the Appellant's fingers causing him to drop two small red ziplock bags.

21. For those reasons, this first ground of appeal fails.

Decision and Reasons [Ground 2]

22. At the appeal hearing before me, Ms. Tucker abandoned Ground 2 under which it was pleaded that the Magistrate erred in law by failing to admit, consider or otherwise direct on the firsthand hearsay evidence of defence witness Jarico Gardener, contrary to s.75(1) of the Police and Criminal Evidence Act 2006.

23. This ground of appeal is accordingly dismissed.

Decision and Reasons [Ground 3]

24. Under this final ground of appeal, it is complained that the magistrate rejected the Appellant's defence of lack of knowledge. Ms. Tucker pointed to the absence of DNA evidence connecting the Appellant to the drugs seized, particularly in respect of the clear plastic bag he was said to have been standing on prior to the chase. Ms Tucker further submitted that the magistrate erred in failing to consider a Lucas lies direction.

25. In my judgment the learned magistrate was entitled to accept the Crown's case as proven beyond reasonable doubt, notwithstanding the absence of DNA evidence. The direct evidence of the police witnesses was sufficiently strong enough to establish the Appellant's knowledge and control of the plastic bag he sought to conceal by standing on top of it.

26. As a matter of principle, it is indeed correct that once the magistrate rejected the Defence case, he was obliged to set that aside in his mind and make an independent assessment of the Crown's case in determining whether the case was in fact proven beyond reasonable doubt. I see no reason to doubt that the magistrate employed the correct approach as is evident from his written judgment. Magistrate Tokunbo's rejection of the defence case as a concocted lie was not dispositive of his assessment of the evidence. The learned magistrate clearly considered the strength of the Crown's case independently from the rejected case for the Defence. This did not engage the need for a Lucas lies direction, which only arises when it is asserted by the prosecution and/or accepted on the evidence that the Defendant lied.

27. For these reasons, I find that this ground of appeal cannot succeed.

Conclusion

28. The appeal is dismissed on all grounds.

Dated this 16th day of December 2022

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE

