BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeals Nos. 2, 4, & 3 of 2008

BETWEEN:

ANTHONY GILBERT BIDDY **Appellants**

ELROY OREN KELLY

EMERY YOULAN RICHARDSON

AND

THE QUEEN **Respondent**

BEFORE: The Hon. Sherman R. Moore, CHB, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal.

2013: July 4

2014: March 20

Mr. Arthur Holder for Appellant Biddy.

Mrs. Angella Mitchell-Gittens for Appellants Kelly and Richardson.

Mr. Alliston Seale for the Respondent.

DECISION

Introduction

[1] **MOORE JA:** The appellants were jointly charged in an indictment containing six counts that on 3 July 2003, they imported, were in possession of and trafficked in a controlled drug, namely, 209.8 kilogrammes of cannabis, contrary to **section 18(4)** of the **Drug Abuse (Prevention and Control) Act, Cap. 131 (Cap.131);** and imported, were in

possession of and trafficked in a controlled drug, namely, 40 grammes of cocaine, contrary to **section 4(3)** of the said **Act.** They were tried by **Worrell J** and a jury. On 24 July 2007 they were each convicted on all counts and sentenced on 4 February 2008: Biddy to imprisonment for 5 years on the first count, 5 years on the second count, 6 years on the third count, 12 years on the fourth count, 10 years on the fifth count, and 10 years on the sixth count, all sentences to run concurrently; Kelly to imprisonment for 4 years on the first count, 4 years on the second count, 4 years on the third count, 5 years on the fourth count, 12 years on the fifth count and 10 years on the sixth count, all sentences to run concurrently; and Richardson to imprisonment for 12 years on the first count, 10 years on the second count, 10 years on the third count, 5 years on the fourth count, 4 years on the fifth count and 4 years on the sixth count, all sentences to run concurrently.

Facts

[2] On 2 July 2003 about 3.10 a.m., the appellants were on board a pirogue about 25 yards off Batts Rock Beach in St. Michael. Coast Guard and police personnel who were on patrol in the area saw the pirogue. The appellants made a run for it but the Coast Guard and police personnel fired warning shots and the pirogue with the appellants on board was apprehended.

[3] Personnel from the Coast Guard vessel boarded the pirogue. Constable McDonald Forte asked the appellants their business in the area and appellant Kelly replied, "I bring up some herb." He pointed to an area about 25 yards from the shoreline where the pirogue was first seen and said, "The herb dey. A Bajan man jumped off this boat to swim it ashore." The appellants, the pirogue and 16 bales which were recovered from the sea were taken to Willoughby Fort. The bales were found to contain 209.8 kilogrammes of marijuana and 40 grammes of cocaine.

[4] The appellants Biddy and Kelly made oral and written confession statements and appellant Richardson made a number of oral statements, including, "Me, the two Vincy men and a Bajan man bring up them drugs but the Bajan man jumped off the boat."... "I don't know he name or where he lives"; and in respect of the pirogue he said, "That is the boat that I come up 'pon'." At the trial each appellant denied making the oral statements attributed to him, and the appellants Biddy and Kelly said that the written statements were not theirs.

[5] The three appellants have variously appealed against conviction and sentence on five grounds. Grounds 1, 2, 4 and 5 are considered together because they are common to the three appellants.

Ground 2: Biddy; Ground 1: Kelly and Richardson

[6] The grounds, in substance, allege that the trial judge erred when he failed to direct the jury that the presumption established by **section 42** of **Cap. 131** is rebuttable by proof on the balance of probabilities as provided by **section 134 (2)** of **the Evidence Act, Cap. 121 (Cap. 121)** and not by proof beyond reasonable doubt. Both counsel for the appellants submit that the appellants were denied a fair trial because the trial judge had directed the jury only in relation to the standard of proof required by the prosecution as proof beyond reasonable doubt. Both counsel relied on **Hooper v The Queen Criminal Appeal No. 18 of 2008 (unreported) (Hooper).**

[7] Counsel for the respondent conceded that the trial judge did indeed fail to give the appropriate direction on the standard of proof applicable to the accused but submitted that in the circumstances the appellants suffered no prejudice.

[8] In **Hooper,** the appellant was charged with possession of a controlled drug and drug trafficking. He was driving his motor car along the Tom Adams Highway when he was stopped by the police who searched the motor car and found a bag containing cocaine. The appellant denied knowledge of the bag and said that the first time he had seen it was when the police brought it to him at the back of the vehicle. The judge directed the jury that if they were satisfied that Hooper had the bag in his car and that the bag was in his possession, custody and control, then there was the presumption that he was in possession of the cocaine found in it and if they were so satisfied, then the burden of proof shifted to the appellant. However, the judge failed to direct the jury that in those circumstances proof was on the balance of probabilities.

[9] In the instant case the three appellants were caught on board a boat. The appellants Biddy and Kelly made oral and written statements confessing their knowledge of the drugs and the part they played in its transportation from St. Vincent to Barbados. The appellant Richardson made oral statements to like effect. At the trial, Biddy and Kelly were represented by Mr. Arthur Holder now counsel for Biddy only. During the trial,

Mr. Holder on behalf of those two appellants objected to the oral statements attributed to them on the ground that they did not make the statements and he objected to the written statements on the ground that they were not the statements of the appellants. He agreed that it was a question of fact for the jury to decide.

[10] The appellant Richardson denied making the oral statements attributed to him by the police. That also became a question of fact for the jury to decide.

[11] The law relevant to this issue is contained in **section 42** of **Cap. 131** which must be read in conjunction with **section 6(3)** and **section 39** of that **Act. Section 6(3)** provides as follows:

> "(3) Subject to **section 39,** it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, which is intended, whether by him or some other person, for supply in contravention of section 5(1)."

[12] Subject to regulations made under **section 12, section 5(1)** prohibits the production of a controlled drug and the supply of the controlled drug by one person to another.

[13] The relevant parts of **sections 39** and **42** are:

> "39. (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 sub- stance 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."

"42. (1) Without prejudice to any other provision of this Act

(a) where it is proved that a person imported anything containing a controlled drug it shall be presumed, until the contrary is proved, that such person knew that such drug was contained in such thing;

(b) where it is proved that a person had in his possession or custody or under his control anything containing a controlled drug, it shall be presumed until the contrary is proved, that such person was in possession of such drug;

(c) where it is proved that a person supplied to any other person anything containing a controlled drug, it shall be presumed, until the contrary is proved, that such first-mentioned person knew that such drug was contained in such thing;

(9) where it is proved that a person handled, within the meaning of section 7, anything containing a controlled drug, it shall be presumed, until the contrary is proved, that such person knew that such drug was contained in such thing;"

[14] At paragraph 51 of **R v Lambert (2001) UKHL 37 (Lambert),** Lord Hope of Craighead cited with approval the following direction of the trial judge which was based on UK statute which was the source of **Cap. 131:**

> "Now, members of the jury the law is this. A person who is in possession of a controlled drug shall be acquitted if he proves that he neither believed nor suspected nor had reason to suspect that the substance in question was a controlled drug. He doesn't have to know the type of drug but he must prove that he neither believed nor suspected nor had reason to suspect that the substance or product was a controlled drug. Now whenever the criminal law requires a defendant to prove a defence of this type, then he does not have to prove it to the same high standard that the prosecution have to prove their burden. The prosecution have to make you sure of anything that they have to prove. A defendant has a lower standard of proof. Is it more probable than not, on the balance of probability."

[15] Earlier, in **Lambert,** Lord Slynn of Hadley, without citing the trial judge, had in essence approved that direction when at **paragraph 16** he said:

> "16. The first question asks whether it is an essential element of the offence of possession of a controlled drug under section 5 of the [Misuse of Drugs Act] 1971 Act that the accused knows that he has a controlled drug in his possession. Bearing fully in mind the importance of the

> principle that the onus is on the prosecution to prove the elements of an offence and that the provisions of an Act which transfer or limit that burden of proof should be carefully scrutinised, it seems to me that the Court of Appeal in **R v McNamara [1988] 87 Cr App R 246** rightly identified the elements of the offence which the prosecution must prove. I refer in particular to the judgment of Lord Lane CJ (at 252). This means in a case like the present that the prosecution must prove that the accused had a bag with something in it in his custody or control; and that the something in the bag was a controlled drug. It is not necessary for the prosecution to prove that the accused knew that the thing was a controlled drug let alone a particular controlled drug. The defendant may then seek to establish one of the defences provided in ss. 5(4) or 28 of the 1971 Act".

[16] Where in a criminal trial the burden of proof shifts to an accused it may be discharged on a balance of probabilities: **section 134(2)** of **Cap. 121.** The accused, in order to discharge the burden, is required to give such explanation as is peculiarly within his own knowledge as would enable a jury to conclude that it is more probable than not that the accused did not do the act complained of. This proposition finds support in the following extract from **paragraph 17** of **Lambert:**

> "It is not enough that the defendants in seeking to establish the evidential burden should merely mouth the words of the section. The defendant must still establish that the evidential burden has been satisfied."

[17] At pages 442 lines 7 to 32 and 443 lines 1 to 4 of the trial record, the judge directed the jury that the burden of proof rested on the prosecution and that the prosecution had to prove the guilt of the appellants beyond reasonable doubt. He stressed that the appellants had nothing to prove. Even though the judge spoke of the presumption established by **section 42(1)** of **Cap. 131,** he did not explain to the jury that the burden of proof had shifted to the appellants. It was therefore of no consequence that he omitted the direction contended for by counsel for the appellants. For in the absence of such a direction, and in the face of the judge's repeated admonition that the prosecution had to prove the guilt of

the appellants and that the appellants had nothing to prove, the jury would have been totally unaware of the legal significance of the presumption. We are of the view that the omission by the judge in all the circumstances is a mere blemish and that the appellants suffered no prejudice.

[18] In the instant case there was evidence before the court on which the jury could have found, even if the appropriate direction had been given, that the appellants knew that they had brought a controlled drug into Barbados.

Ground 1: Biddy

[19] This ground is as follows:

> "That the learned trial judge erred in law when he failed to properly direct the jury with respect to the Appellant's rights to an Attorney-at-Law as mandated by **Section 13(2)** of the **Constitution of Barbados** in that:
>
> (a) He failed to direct the Jury on the specificity of the section;
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> (b) He failed to direct the Jury that the burden of proof was on the Crown to show that that provision was complied with;
>
> (c) He failed to direct the Jury that the proof required was proof beyond reasonable doubt."

[20] Counsel submitted that:

> "The constitutional rights of an accused must be accorded highest priority in the summing up and the Appellant contends that the Learned Trial Judge failed to so do, especially given the fact that this factual issue was in dispute, and that it was imperative of him to do more than direct the jury as he did, and that it demanded an extensive direction explaining the specificity of the section as he so aptly did in respect of the offences for which the Appellant was charged."

[21] It was also submitted that:

> "Nowhere has the Learned Trial Judge directed the jury that the Appellant does not have to prove that he was accorded his rights or if they are left in any doubt as to whether he was accorded these rights that they must reject the written statement, and that the Prosecution has to prove beyond reasonable doubt that he was accorded those rights. The Appellant contends that the Learned Trial Judge fell short in his directions and that these were inadequate and incomplete, and he had to do more."

[22] **Section 13(2)** of the **Constitution** provides, inter alia:

> "Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention and shall be permitted, at his own expense, to retain and instruct without delay a legal adviser of his own choice, being a person entitled to practise in Barbados as an attorney-at-law, and to hold private communication with him ..."

[23] From page 478 line 23 to page 479 line 14 of the trial record the judge gave the following direction:

> "You would have recalled also, Mr. Foreman and your members, that it has emerged that each accused man has indicated that they were never told of their rights to attorneys-at-law. If you find, Mr. Foreman and your members, that the accused men were denied their rights, that is a constitutional right to have communication with a lawyer of their choice, then again, Mr. Foreman and your members, you will have to reject the evidence surrounding the written and oral statements, because it is not a matter of choice for the police to determine when they will inform an accused person of his right to an attorney. It is not a matter of choice. They must do so as reasonably practicable, and at any rate before a person has been questioned and taken into custody. Mr. Foreman, in this case the accused men are saying that they were not told of these rights, the police are saying, Mr. Foreman and your members, that they were told of their

> rights and that they, the police, complied with the provisions. Whose testimony do you accept, Mr. Foreman and your members? Do you accept and believe the evidence of the police officers? Do you find them to be witnesses of the truth or do you find the accused persons to be witnesses of the truth? That is, Mr. Foreman and your members, a matter entirely up to you."; and
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> from page 532 line 24 to page 533 line 6 thereof he said:
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> "You know what the Defence's case is, Mr. Foreman and your members, that those statements were never made, none of them and that there was never any informing Mr. Biddy of his rights to an attorney-at-law. And I told you, Mr. Foreman and your members, if you find that Mr. Biddy was not informed of his rights to an attorney-at-law, it is not a question of choice for the police. As soon as the police are in that position and before they commence the investigations, they should indicate, they have to, let Mr. Biddy or any other accused person know of his rights to an attorney-at-law, and the rights to hold private communication with him, and if you find that any of his rights were so breached, constitutional rights, you will dismiss those oral statements, reject them, the alleged oral statements."

[24] The judge does not have to set out **section 13(2)** as it appears in the **Constitution** and give its "specificities". What the judge is required to do is to direct the jury on the substance of the section in language that they understand. He does not have to use technical language or legalese which is more likely to confuse the jury than to assist them. Also the judge is not required to direct the jury on the burden of proof and the standard of proof in respect of every issue in a case.

[25] We are satisfied that the passages from the trial record set out above represent an adequate direction on **section 13(2).** We find that the complaint by counsel cannot be supported.

Grounds 2 and 3: Kelly and Richardson

[26] Counsel abandoned these grounds.

Ground 3: Biddy

[27] On this ground, counsel contended that "the Learned Trial Judge erred in law when he failed to give a full direction to the Jury in relation to the free and voluntary nature of the Appellant's written statement".

[28] The kernel of counsel's submission is that the admissibility of a confession as evidence is a question for the judge to decide. He stated that voluntariness is only a test of admissibility and where the judge decides to admit the confession as a voluntary statement, the only question for the jury to consider with reference to the confession so admitted is its probative value or effect. In support of his contention he referred to passages at page 478 lines 7 to 22, page 479 line 29 to page 480 line 7 and page 544 lines 21 to 26 of the trial record. He also cited **Chan Wei Keung v R [1967] 51 Cr. App. R 257 (Keung)** and **Edilberto Munoz Coronell and Jimmy Marquez Nagles v The Queen Criminal Appeals Nos. 6 & 7 of 1995 (unreported) (Coronell and Nagles)**.

[29] Counsel concluded his submission thus: "The Learned Trial Judge accordingly fell into error by directing the jury to deliberate on matters which were clearly his, and not within their province, and which could have misled the said jury."

[30] In **Keung,** which was cited in **Coronell and Nagles,** the voluntariness of the statements was challenged and the headnote to that case states:

> "Voluntariness is a test of admissibility and not an absolute test of the truth of a statement. It is a matter for the judge and not the jury. The truth of a confession is not directly relevant when the judge is ruling on admissibility though, if the judge admits the statement, the truth of it will be a crucial question for the jury. The judge should not direct the jury specifically that they must be satisfied beyond reasonable doubt of the voluntariness of the statement before giving it consideration. The only question for the jury to consider is the probative value of the statement. A confession may be voluntary and yet to act upon it may be quite unsafe, and it may have no probative value."

[31] Counsel highlighted the following passages from the trial record:

Page 478 lines 7 to 19:

"If you accept the evidence of the police officers, Mr. Foreman and your members, that there was no violence, if you accept the evidence of the police officers in relation to the circumstances in which they told you the statements were given, well, then it will be entirely up to you, Mr. Foreman and your members, you would be free to act on those statements if you accept the truth, if you accept that the police officers were speaking the truth.

Mr. Foreman and your members, if you find that they were not given freely and voluntarily that they were obtained by oppression or violence, Mr. Foreman and your members, then you will reject not only the written statement of each particular man, ...;"

page 479 line 29 to page 480 line 7:

"If you do not find that they were freely and voluntarily given, as I told you, you will reject the statements because they will not be evidence upon which you can act because the prosecution would have failed to prove to you that the statements were free and voluntary and obtained without oppression or violence or promises. They would have failed thereby to prove the guilt of the accused, and as I told you, you, you will accordingly reject both the written and oral statements in respect of Biddy and Kelly if you find that the written statements were not freely and voluntarily given"; and

page 544 lines 21 to 26:

"And he also said that the statement, the written statement was recorded by the accused Biddy in accordance basically with the Judges' Rules, in that there was no beating, no violence, nothing like that, Mr. Foreman and your members, no tricks in anyway in order to get ... no inducements to get this statement."

[32] However, counsel chose to ignore the following direction where the judge directed the jury on their duty to determine the truth of the statements:

> "If you find, Mr. Foreman and your members, that the accused men made the written statements that the police ascribed to them in the circumstances in which the police said they were made, and if you accept them, then you have to ask yourselves whether those statements contained the truth of what is inside of it. Is what is said in the statement, is that representative? Does that represent the truth of what transpired, Mr. Foreman and your members? And you would have to look at that to decide what weight you will have to give to those statements, if you accept them to be freely and voluntarily given. You will give them, Mr. Foreman and your members, if you find that the written statements were freely and voluntarily given, you will give them as much weight as you deem fit."

[33] The points raised by counsel on this ground are not relevant to the determination of the issue of admissibility because admissibility was not in issue at the trial. At the trial counsel himself did not object to the admissibility of the statements, oral or written. He simply said that the oral and written statements attributed to Biddy and Kelly (for whom counsel appeared) were not their statements. Appellant Richardson said that he did not utter the oral statements attributed to him.

[34] The facts and circumstances of this case are quite different from the facts and circumstances of the cases cited by counsel. The direction on voluntariness given by the judge was of no practical significance in the circumstances, as admissibility was not in issue and could not in anyway have prejudiced the appellants.

Ground 4: Biddy, Kelly and Richardson

[35] On this ground it is alleged that the verdicts are unsafe and unsatisfactory.

[36] The prosecution relied on the oral and written confession statements and the fact that the appellants were found on board a boat and there were drugs in the water nearby. At the trial the appellants denied knowledge of the drugs and said that it was a question of fact for the jury to decide whether they accepted that the appellants had made the statements attributed to them. Clearly, by their verdict, the jury accepted the circumstances in which

the appellants were apprehended at sea and the truth of those statements and returned guilty verdicts. For those reasons and having found no merit in the other grounds of appeal, this ground also fails.

Ground 5: Biddy, Kelly and Richardson

[37] On this ground it is alleged that the sentences are excessive.

[38] The only submission on this ground was that the appellants should be given full discount for the time spent on remand awaiting trial and the sentences should be adjusted accordingly. In support of their submission they cited **Romeo Hall v The Queen (2011) 77 WIR 66 CCJ (Hall)** and **Jermaine Hazell v The Queen Criminal Appeal No. 24 of 2008 (unreported) (Hazell).**

[39] This morning this Court delivered the decision in **Moore v. The Queen, Criminal Appeal No. 7 of 2008 (unreported) (Moore)** in which we extensively examined the application of **Hall** to sentences imposed by a sentencing court before **Hall.** In sum, this Court held in **Moore** that **Hall** is not retrospective and denied the appellant a reduction in his sentence. Accordingly, in this case we deny the appellants reductions in their sentences for time spent on remand.

Disposal

[40] These appeals are dismissed, the convictions and sentences are affirmed and each sentence will begin six weeks after the date on which it was imposed.

Justice of Appeal

Justice of Appeal **Justice of Appeal**