BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 18 of 2008

BETWEEN:

DAVID THEOPHILUS HOOPER **Appellant**

AND

THE QUEEN **Respondent**

Before: The Hon. Frederick L.A. Waterman, CHB, The Hon. Peter D.H. Williams and The Hon. Sandra P. Mason, Justices of Appeal

2009: 25 November

2010: 29 November

Mr. Andrew Pilgrim and Ms. Nargis Hardyal for the Appellant

Ms. Manila Renée for the Respondent

DECISION

INTRODUCTION

WATERMAN JA: On 30 May 2008, David Theophilus Hooper was convicted of (i) possession of a controlled drug contrary to ***section 6 (2)*** of the ***Drug Abuse (Prevention and Control) Act, Cap. 131*** (***the Act***) and (ii) drug trafficking contrary to ***section 18 (4)*** of ***the Act***. On 17 September 2008 he was sentenced to five and eight years imprisonment respectively, these sentences to run concurrently. The appellant now appeals against his conviction and sentence.

THE PROSECUTION'S CASE

The case for the prosecution was that on 27 May 2004, Sergeant Lovell and Police Constable Mayers were on duty in an area near the Grantley Adams International Airport when they observed the appellant driving a motor vehicle. The officers had a conversation and decided to follow the appellant's vehicle. Later while driving on the Tom Adams Highway they signalled the appellant to stop. After the car stopped, the police evidence was that the appellant got out of the car, ran about 20 metres to the front of the car, where he was caught by Constable Mayers.

The officers then identified themselves to the appellant, told him that they were in receipt of information that he was in possession of controlled drugs and asked permission to search his car. The appellant responded "Officer you could search the motor car and see I just got a parcel of fish".

During the search of the car, the officers found a brown box on the back seat which was marked 'Century Elson Limited' with a Trinidad address. Inside the box the officers discovered what they described as a black pilot's bag. The pilot's bag contained a wrapped jeans pants.

When they unwrapped the pants they found a transparent black taped package. Upon closer examination of the package they found that the package contained a white powdery substance which they suspected to be cocaine. Following this, they discovered five transparent taped packages which all contained a white substance which they suspected was cocaine.

When asked to account for each of the packages, the appellant replied, "Officer wunnah good. How wunnah get onto me?" The appellant was then arrested and, under caution, he said "This bigger than I expect". When informed of his right to communicate with an attorney of his choice, he said, "I will talk to my daughter when I ready. I don't want my wife to know yet."

The officers then transported the appellant to the Oistins Police Station for further questioning. On arrival at the station the appellant was again told of his right to communicate with an attorney of his choice and he said:

> "Officer, do what you have to do, I don't want any. I will talk with my daughter."

Later, when told that he was found with a quantity of cocaine, a controlled drug, along the Tom Adams Highway the appellant said, "I will hold the rap this is too big". When asked whether he wished to make a written statement, the appellant replied "Officer, all I studying is the shame I bring on my family".

The following day he said in answer to the police, "Officer, I just want to get to court and get over this".

The appellant was later formally charged for the offences before the court and shown a notice to prisoners which was displayed in a conspicuous position in the station office, and he said, "Officer I just want to get to court". The appellant when invited to sign all the oral statements he had allegedly made during the course of police investigations, refused to sign and said, "I just want bail sign that is all".

At the station, in the presence of both police officers, the appellant placed his initials on eight pieces of masking tape which were then stuck to the six packages containing the white substance, the black pilot's bag and the brown box. The appellant was then told that the quantity of cocaine found constituted an offence of trafficking with intent to supply and he did not respond.

On 10 June 2004 Sergeant Lovell gave the six taped packages which were in a pink plastic bag to forensic scientist Marsha Skeete at the Government Forensic Sciences Centre of the Attorney-General's Chambers. On 30 August, 2004 Skeete returned the packages to the Sergeant together with a certificate of analysis and two copies. On 16 September 2004, the appellant was served with a copy of the certificate of analysis.

)] Marsha Skeete, a Forensic Scientist, who gave evidence for the prosecution testified that on 10 June 2004, Sergeant Lovell handed over a number of items consisting of one sealed pink plastic bag which contained five black packages labelled '1-5', these contained a white powdered substance. In addition one transparent bag with the marking 'Food Saver bags' contained a package labelled '6' which also contained a compressed powdered substance. These items were then placed in a vault. An analysis was conducted on 30 June 2004 and the witness gave evidence that, in her opinion, the white powdered substance was cocaine and weighed 5.7 kilograms.

THE DEFENCE

] The appellant elected to make an unsworn statement from the dock which was as follows:

> "On 27th May 2004, after purchasing fish in the Oistins Fish Market, I proceeded to the Grantley Adams Airport to obtain some funds that were due to me. After I left the Airport I was required by the Barbados Police Force to come to a halt on the highway, and at no time did I run, and I gave them permission to search my car. I never saw this suitcase or pilot's case until the officers brought it to me at the back of the vehicle, and that is all I want to say, that I remain innocent of these charges."

THE GROUNDS OF APPEAL

:] The appellant filed nine grounds of appeal but did not pursue all of these at the hearing. It is our judgment that we need only consider two grounds in order to dispose of the appeal.

Ground 1

;] On this ground, counsel for the appellant contended that the judge erred in law when she failed to adequately direct the jury as to the burden of proof required.

·] At pages **177** and **178** of her summation the judge directed the jury on the burden of proof as follows:

> "***Section 42*** of ***the Act*** establishes that there is a presumption of possession and knowledge of a controlled drug in certain circumstances. This is important so I will repeat it to you. **Section 42** of ***the*** **Act** establishes that there is a presumption of possession and knowledge of a controlled drug in certain circumstances. ***Subsection (b)*** of this section provides:
>
> '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.'

This means, in effect, Mr. Foreman and members of the jury, that if you are satisfied that David Hooper had the brown box in his car, that he knew it was in his car and that this brown box was in his possession, custody and control, then there is a presumption that he was in possession of the cocaine that was found in that box and bag. In other words, the prosecution need only prove possession, custody and control of the brown box. If you are satisfied that this is the case, then the burden shifts to the defence to disprove this presumption."

] Counsel for the appellant submitted that the judge failed to direct the jury in accordance with ***sub-section 134(2)*** of the ***Evidence Act, Cap. 121,*** that where the burden of proof shifts to the accused, the requisite standard of proof is not proof beyond reasonable doubt but rather on a balance of probabilities.

] That sub-section reads as follows:

"In a criminal proceeding where the burden of proof is on the accused, the court shall find the case of the accused proved if it is satisfied that the case has been proved on the balance of probabilities."

] Counsel further submitted that the judge having failed to properly direct the jury, there was a "real risk" that the jury would assume that the usual standard of proof i.e. beyond reasonable doubt would apply and consequently this failure would have prejudiced the appellant's right to a fair trial.

] In support of his submissions counsel cited the cases ***of R v Carr-Briant [1943] KB 607, R v Ashton-Rickardt [1978] 1 All ER 173*** and the Bahamian case of ***Adderley v Commissioner of Police, BS 1988 SC 116***.

] In ***Carr-Briant*** the Court of Criminal Appeal of England held that where by statute or at common law, some matter is presumed against an accused person, "unless the contrary is proved", the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish. In ***Adderley***, a case involving drugs, the Supreme Court of the Bahamas held that ***section 5(5)*** of the ***Dangerous Drugs Act*** creates the presumption or casts a burden on the appellant once material proved to be a dangerous drug was found in his suitcase and among his clothes, to show that that drug was not deposited there with his knowledge or consent. The standard of proof is of his lack of knowledge or consent on a balance of probability.

] In her submissions, counsel for the respondent countered that the appellant did not avail himself of ***section 42(b)*** of ***the Act*** because he did not disprove the presumption. Counsel submitted that the lack of an explanation by the appellant in his unsworn statement for his possession of the drug was crucial to minimizing the effect of the judge's non-direction on the law.

] We find favour with the submissions of Counsel for the appellant and are of the opinion that there is substantial merit in this ground, the judge having given the jury no direction on the required burden of proof.

Ground 3

] The appellant complained that the judge erred in law when she failed to properly present the appellant's defence to the jury.

] Counsel contended that it was the judge's duty to identify and adequately remind the jury of the case for the defence. He referred the Court to pages 207 to 208 of the trial record where the judge during her summation stated:

"Now, what is the case for the accused? The accused asked you to find him innocent of the charges brought against him. He bases his defence on two limbs. One, that the evidence of the forensic analyst is not of a quality or kind to satisfy you that the substance found is in fact cocaine and that the weight of the cocaine was in fact 5.7 kilograms. And two, that the nature and quality of the evidence of the police officers is not such that it can convince you of the guilt of the accused".

] Counsel noted that the defence was a complete denial of the knowledge of the presence of drugs but that this defence was undermined by the judge's inaccurate depiction of the defence as being based on 2 limbs, viz the unsatisfactory nature of the evidence of the scientist and the general weakness of the police evidence.

] Counsel further argued that the judge having failed to adequately analyse the case for the defence deprived him of the protection which a jury trial should have afforded him.

] In support of this argument, Counsel referred to the well known case of ***Fuller v. The State (1995) 52 WIR 424*** as well as the local case of ***Dwight Ovid Alleyne v. The Queen, Criminal Appeal No. 17 of 2003 (unreported)*** where this Court addressed the role of a trial

judge:

> "In our opinion, the duty of a trial judge in summing up the evidence is not merely to remind the jury of the evidence, but to use experience and judgment to assist them generally in arranging, assessing and making sense of the evidence and applying it to the issues in the case. That duty applies in all cases."

'] In the opinion of this Court a full analysis of the defence ought to have been undertaken by the judge for the benefit of the jury. The appellant's defence was a complete denial of the offences charged; in essence he was stating that he had no knowledge of the pilot's bag prior to the police showing it to him. The appellant's unsworn statement was briefly referred to by the judge at page **205** of the record but no analysis was undertaken in order to emphasize that the case for defence was a complete rebuttal of the prosecution's case. In our view the judge did not assist the jury with their analysis of the appellant's defence but left them to consider technical points as they related to nature of the cocaine found and the quality of the evidence of the police officers. Page 208, lines 9 to 28 of the trial record states:

> "The defence argues that the tests to determine whether the substance is cocaine is too flawed to be accepted as proof by you. That the fact that the purity of the cocaine was not tested puts into doubt that there was in fact 5.7 kilograms of cocaine. That the fact that the officers did not record the weight of the cocaine; the fact that they did not record that they carried out a search at the home and the restaurant of the accused; that Officer Mayers made his notes of what was said at the station rather than at the time that the accused was stopped; that the accused was asked to sign the officer's notebook at the end of the investigation and not when he made the alleged orals; that all of these are factors which put into doubt the nature and quality of the officer's evidence. In essence, the defence argues that the prosecution had not met the standard required to prove to you beyond reasonable doubt that the accused is guilty as charged. He tells you, in other words, that the prosecution has failed to remove the cloak of innocence from the accused. The defence therefore urges you to find him innocent of these charges".

3] In the circumstances, we find that there is merit in this ground of appeal.

DISPOSAL

)] Having regard to the nature of the misdirections we are of the opinion that the verdict cannot be regarded as safe and satisfactory. In the circumstances, the appeal is allowed.

CONCLUSION

)] While this Court is mindful of the inordinate prevalence of drug offences in Barbados and of the deleterious effects of drugs on our society and more particularly the youth, we are also mindful of the appellant's constitutional right to a fair trial which includes his right to have his case adjudicated within a reasonable time.

] Taking into account the passage of time from the date of the alleged commission of the offence (May 2004) to conviction (May 2008) to hearing of this appeal (November 2010), we are of the view that the interests of justice would not be served by ordering a retrial. The appellant is now free to go.

Justice of Appeal

Justice of Appeal

Justice of Appeal