BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No. 8 of 2009

BETWEEN:

HANDELL MARSHALL DACOSTA **Appellant**

AND

THE QUEEN **Respondent**

BEFORE: The Hon. Sherman R. Moore, CHB, The Hon. Sandra P. Mason and The Hon. Andrew D. Burgess, Justices of Appeal.

2013:
14 February

Mr.
Marlon Gordon for the Appellant

Mrs.
Donna Babb-Agard, Q.C., Deputy Director of Public Prosecutions for the Respondent

DECISION

MOORE JA: The appellant was charged jointly with Davidson Klem Jones (Jones) on an indictment containing three counts, contrary to the **Drug Abuse (Prevention and Control) Act, Cap. 131**. The first count charged importation of a controlled drug, contrary to **section 4(3);** the second count charged possession of a controlled drug, contrary to **section 6(2);** and the third count charged drug trafficking, contrary to **section 18(4).** The offences were committed on 16 February 2003 and involved 346.6 kilograms of cannabis. Jones pleaded guilty to all charges. A new indictment was preferred naming the appellant only and he was tried before a judge sitting with a jury. He was found guilty on all charges and sentenced to three concurrent terms of 11 years and 4 months imprisonment. The appellant has now appealed to this court from those convictions and sentences.

The Facts

[2] About 12.30 p.m. on 16 February 2003 the fishing boat X151 was adrift in the territorial waters of Barbados and it was intercepted by a Coast Guard vessel. There were 19 bales of cannabis on board X151 and the appellant was sitting on some of them. The boat with its cargo and the two men on board was taken to Fort Willoughby. The police gave evidence that the appellant made the following oral statement to them:

> "Last Wednesday I did 'pon de block in Sargeants Village and 'Soffee' came and tell me how he want me to go down St. Vincent wid he and bring up some weed and he gine pay me. I did want some money to finish my house plus I did plan to t'ief some of de weed and mek some extra money fuh muh self. So I tell he alright. I meet he 'pon de block de next day and we went to a beach in Prospect going out to de boat and 'Soffee' drive down to St. Vincent. Early Saturday morning me, 'Soffee' and some Vincey men load up de boat wid weed and 'Soffee' started to drive back up. The boat start to give trouble 'pon

de way up and we end up breking down out dey if not we woulda gone clear."

[3] The appellant admitted that he was on board X151 but denied that he made the oral statement attributed to him by the police. In his defence the appellant said that he had gone fishing on a boat with Davidson Jones and another boat came alongside X151 and he saw bales being loaded onto X151 and he couldn't do anything about it because he couldn't swim from there to Barbados. He denied that he was party to the transaction and that he knew the contents of the bales that were thrown onto X151.

The Appeal

The appellant has raised three grounds of appeal which we will now deal with.

Ground 1

[4] On this ground Mr. Marlon Gordon, counsel for the appellant, contended that:

> "The fairness of Appellant trial was prejudiced by the prosecution's opening statement in the presence of the jury "**that this accused man was caught red-handed on that boat".** The comment was highly prejudicial based on the defence put forward by the Appellant. In all the circumstances of the case the comment undermined the defence of the Appellant and may very well have influenced the jury's mind in a negative way towards the Appellant and may have caused the jury to return a guilty verdict. Counsel for the Appellant objections to the comments was treated by the court as been without merit. The verdict of the jury in this regard is unsafe and unsatisfactory."

[5] Counsel for the appellant also argued that the appellant was "jointly and severally charged at the early stages. One person pleaded guilty. That man is out of the equation. The Crown in opening make the statement, he is caught red-handed on a boat with another, then obviously it raises some question in as much as he is by himself now, that was this a joint enterprise? We can't really speculate on it before a jury, but as the case developed the Defence put it in issue that if he is on a boat with another, is he then possessing it by himself as a principal ..." Counsel further argued that:

> "When you look at how the defence was and how it came out that the same person who you are not to concern yourself with, became a witness for the Defence, admitting that he misled the Appellant about what was the reason for going out at sea, when the Appellant's case against him is largely built by the police around oral statements, then putting that issue, he was caught redhanded would deny him the opportunity if we examine the authorities of Searle and Patel and Bland."

(R. v. Searle and Others [1971] Crim. L.R. 592; R. v. Patel [1970] Crim. L.R. 274; R. v. Bland [1988] Crim. L.R. 41)

[6] Mrs. Donna Babb-Agard, Q.C., Deputy Director of Public Prosecutions, submitted that the opening address is the prosecution's

opportunity to outline the case it intends to prove to the jury. It helps the jury understand the evidence when it is actually presented. In support she relied on the text **Fundamentals of Trial Techniques – Mauet, Caswell & Macdonald, 2nd Canadian Edition, pages 5-6 and page 23.**

[7] Counsel for the respondent also submitted that the circumstances of this particular case required the Crown to make reference to the other man without naming him, since the facts to be proved to the jury were inextricably linked, and could not be separated in the presentation of the Crown's case. In support counsel relied on **Moore [1956] 40 Cr. App.R. 50 (Moore)** and **Blackstone's Criminal Practice, 2011 (Blackstone) – paragraph D15.15, page 1705 – Opening Speech – References to Plea of Guilty by co-accused.**

[8] Counsel for the respondent further submitted that in order to avoid any possible prejudice to the appellant, the Crown withdrew the indictment in which he was jointly charged with Davidson Klem Jones and preferred a new indictment charging the appellant only.

[9] With regard to the opening speech of Mrs. Babb-Agard, Q.C. for the prosecution, "prosecuting counsel is likened to a minister of justice and is warned to avoid emotive language when addressing the jury". At paragraph 15.10 and 15.11 respectively of **Blackstone** the learned authors wrote:

> "There is little direct authority on what should or should not be said by prosecuting counsel in his opening address to the jury. By convention, it involves an outline of the evidence which the prosecution proposes to call ...
>
> In making his speeches to the jury, prosecuting counsel must remember his role as a minister of justice who ought not to strive over-zealously for a conviction ... He should therefore avoid using emotive language liable to prejudice the jury against the accused ..."

[10] In that vein, when dismissing an appeal against conviction of the appellant on a charge of carnal knowledge of a girl fourteen years of age in which the appellant complained of an irregularity in the proceedings because prosecuting counsel had exhorted the jury "to protect young girls from men like the prisoner", **Avory J** said:

> "That criticism of the manner in which the prosecution was conducted is one rather addressed to a matter of taste than to an actual irregularity in the proceedings. ... it is impossible to hold that the jury were misled by it into finding the appellant guilty. In our judgment the jury would not have found the appellant guilty unless they had been satisfied of his guilt by the evidence." **(R. v. Banks [1916] 2KB 621)**.

[11] In the instant case the words complained of would seem to have been more descriptive of the circumstances of the appellant at the time he was seen than calculated to excite emotion among the jury.

[12] With regard to Mr. Gordon's submission on reference by the prosecution to the co-accused who pleaded guilty, in **Moore, Lord Goddard C.J.** said (at pp. 53-4):

> “When two people are indicted together for a criminal offence and one pleads guilty and the other does not, it is the commonest thing in the world to tell the jury, as was done in this case, “you must not pay any attention to the fact that the other man has pleaded guilty.” Even if the plea has not been taken in the presence of the jury, it is very difficult to avoid telling the jury in some way that the other person has pleaded guilty, but the fact that he has pleaded guilty is no evidence against his co-prisoner.”

[13] The making of reference to the guilty plea of a co-accused finds support at paragraph D15.15 of **Blackstone** where the following appears:

> “Where the allegation against the accused on trial relates to his actions in concert with another who has pleaded guilty, presentation of the evidence against the accused on trial will involve reference to the actions of that other. To prevent speculation by the jury and provided the defence consent, the jury may be told in opening of the co-accused’s plea. It has been implied that they may be told of it even if the defence do not consent...
>
> Unless and until the judge rules the evidence of the co-accused’s guilty plea to be admissible his absence from the dock should be dealt with by a formula such as: ‘X, of whom you may hear mention in the course of this case, is not before you and is none of your concern.”

[14] The appellant was found with another man sitting on bales of marijuana on a fishing boat at sea. He made an oral statement to the police which showed knowledge of the contents of the bales and from which, when taken in conjunction with his presence on the boat, guilt on his part could be inferred.

[15] The trial judge gave adequate directions on possession and joint enterprise. She also told the jury that they should not find the appellant guilty by association merely because he was found on board a boat with someone who had pleaded guilty to the offences.

Prosecuting counsel and the judge took every precaution to protect the appellant.

[16] In order not to prejudice the appellant, a new indictment, naming him only, was preferred against him. In that regard counsel for the prosecution in her opening address said:

> “On 16th February, 2003 this accused man along with another man, and let me just say to you now, Mr. Foreman and your members, you may hear a lot about another person in this case. You are to have no regard to the evidence against that other person for that other person is not before you; there is only one man before you. You will therefore, Mr. Foreman and your members, not speculate about any reason why the second man is not before you. You are to deal with the evidence in relation to Dacosta Handell Marshall. Let me just say that before I continue”.

However the identity of the co-accused was clearly
revealed when he was called as a witness for the defence.

[17] Mr. Gordon submitted that as the co-accused had pleaded guilty and had given evidence for the defence in which he claimed ownership of the bales of marijuana and said that he had misled the appellant, the appellant ought not to have been treated as a principal when he was not the owner.

[18] This was a case of joint possession in which the appellant and another were found on board a boat, the appellant sitting on some of the 19 bales of marijuana. He made an oral statement to the police confessing that he and the other man went to St. Vincent where the marijuana was loaded onto the boat and then set sail for Barbados. The boat broke down off Barbados and they were caught.

[19] The judge was at pains to explain the concept of possession to the jury. It is difficult to see what more she could have done. Every owner is in possession of that which he owns but not every person who is in possession of a thing is the owner of that thing.

[20] There were two stories before the jury. The prosecution adduced evidence of the appellant's presence on the boat sitting on some of the bales of marijuana and an elaborate oral statement of his knowledge of the adventure and his plan to steal some of the marijuana to earn some money to fix his house. The defence called the co-accused who testified that the appellant knew nothing about the adventure and that the co-accused owned the marijuana and had misled the appellant. The jury had to weigh the two stories and make a decision. They found the appellant guilty, which on the evidence they were entitled to do. There is no merit in this ground.

Ground 2

[21] On this ground counsel for the appellant submitted that:

> "Given the Appellant's contention the he was never given any assess to have any attorney-at-law when he was in the custody of the police.
> When the learned trial judge gave the warning to the jury under **s. 137** of the **Evidence Act** regarding unreliable evidence the learned trial judge had a duty to further assist the jury in understanding the reason for the warning and to link the discussion of the oral statement to the broader issue of the constitutional guarantee of the right against self-incrimination. To only indicate to the jury that the oral statements attributed to the Appellant "is therefore an issue which you will have to consider very carefully and determine as a matter of fact" was inadequate in the context of the evidence.
> This was detrimental to the Appellant's defence."

[22] Counsel also submitted, "It is about time that this thing where policemen are allowed to say men give statements and they write it in their notebooks and there is no recourse beyond the police say so. The thing has to be standardised. They have to put in proper structures and systems in place so that that it is noted, not just for the police be able to say I write it in my notebook (what) the man said. Gill looked at the dangers because of what came out of Australia, how easy it is as they call it in Australia to put a verbal on a man. Now, when it is said it is hard to disprove". Mr. Gordon cited the Canadian case of **R v. Sinclair 2010**

[23] Mrs. Babb-Agard, Q.C., for the respondent agreed with Mr. Gordon’s submission but added that an accused may also exercise the option to waive his right to silence even after having been cautioned under the Judges’ Rules and may confess his part in a crime. Where he exercises the option to talk to the police, they will make a written record of what he had said.

[24] A suspect may make a confession statement, oral or written, to the police and that statement may be given in evidence at his trial. In the instant case, that is exactly what happened.

[25] The judge gave appropriate directions to the jury on how they should approach the oral statements attributed to the appellant. From line 23 at page 748 to line 25 at page 749 of the trial record she also gave them a warning in accordance with **section 137** of the **Evidence Act Cap. 121** (unreliable evidence). From line 1 at page 750 to line 18 at page 753 of the trial record the judge directed the jury on the significance of **section 13(2)** of the **Constitution** and told them that if the evidence for the prosecution did not make them feel sure that the appellant had been informed of his constitutional right they should reject the oral statements attributed to him. At various places throughout her summation the judge gave appropriate warnings on the evidence and reminded the jury of the rights of the appellant. The judge was thorough in her direction on the point complained of. We see no merit in this ground.

Ground 3

[26] Mr. Gordon contended that:

> ”Given the nature of the case for the defence the trial judge showed open partiality towards the case for the prosecution. This was especially shown on numerous occasions. This partiality in favour of the prosecution became more noticeable on the basis that the defence witness Clem Jones appeared before the said judge and pleaded guilty to all the charges for which the Appellant was on trial. The learned trial judge should have recused herself from the proceedings. By virtue of this, a material irregularity developed in the trial process based on presumption of innocence of the accused in criminal trial.

[27] Counsel for the respondent submitted as follows:

> “It is unfortunate that the appellant has couched his last Ground of Appeal in this manner. It is an understatement to say that this is a serious accusation against the Criminal Trial Court. Although every appellant has a right to have his appeal heard, even if those submissions are drafted and argued in a robust manner, these types of accusations are not to be done lightly.
>
> The Learned Trial Judge made rulings throughout the trial after legal arguments were submitted in support of various objections by both counsel for the Crown and counsel for the defence. The Court addressed and admonished both counsel when the need arose.

As was already mentioned in the Respondent's Submissions on Ground 1, the adversarial nature of a criminal trial will give life to a myriad of view points, and passions and, as a result, a Trial judge is expected to take charge of the Court. The Court has an added duty to ensure that an accused has a fair trial, assist the jury with their understanding of the law and how to apply that law to the facts which they find as the sole arbiters in the case; and ensure that both counsel appearing before the Court display self-control and respect as officers of the Court. Neither counsel should be so thin-skinned that they exhibit total lack of respect for the Court before which he/she appears when the rulings are not given in his/her favour.

The Respondent contends that the circumstances of this case did not require the Learned Trial Judge to recuse herself from hearing the Appellant's trial. Davidson Klem Jones had pleaded guilty to the Indictment on **Monday, June 16, 2008**, and the facts relating to the case were outlined sometime later before he was sentenced".

[28] We have reproduced the full text of counsel's submissions because we agree with them and to have edited them would have blunted their impact.

[29] Mr. Gordon did not raise the question of recusal at the trial and before this Court he said that it was raised "on reflection". He could, however, advance no reason why the judge should have recused herself. He also failed to point to any 'material irregularity'.

[30] The judge's summation was fair and balanced. The law does not require perfection. We can find no irregularity in the trial, let alone a material one. Accordingly there is no merit in this ground.

Conclusion

[31] The judge, in a well-balanced summation, fully reviewed the evidence as it unfolded at the trial, putting the case fairly before the jury, and leaving the issues of fact, arising on the evidence, to be determined by them.

[32] The jury was duty-bound to resolve matters affecting the credibility of all the witnesses who testified, including that of the appellant. In the end it boiled down to a question of fact for the jury and they decided that the appellant was guilty. No reasonable jury, properly directed, could have failed to convict the appellant on the evidence adduced by the prosecution.

[33] There was ample evidence on which the jury could have found as they did. For instance the circumstances under which the appellant was apprehended, his oral statement to the police and his pointing out, to the police, certain areas relevant to the commission of the offence.

Postscript

[34] At the close of argument of counsel for the appellant and

counsel for the respondent we dismissed this appeal and affirmed the convictions and sentences without giving detailed reasons for so doing. We have since learned that Mr. Gordon has appealed to the Caribbean Court of Justice and to assist that Court we have set out our reasons above.

[35] In dismissing the appeal we said:

"Before we adjourned, the learned Deputy Director of Public Prosecutions, reminded us of the facts of this case and we need not repeat them.

The learned trial judge in our opinion summed up this case admirably. She put all the relevant points to the jury and she dealt fairly and thoroughly with the issues raised by the Prosecution and by the Defence.

There was ample evidence before the jury upon which they could have come to the verdicts that were found by them and in the circumstances we find no merit in the grounds of appeal.

This appeal is therefore dismissed; the convictions and sentences are affirmed.

The trial judge also in her sentencing remarks did everything that was required of her, so that it was quite clear to the appellant why she was imposing the sentences that she imposed.

And I repeat, the appeal is dismissed and the convictions and sentences are affirmed."

Justice of Appeal

Justice
of Appeal
of Appeal

Justice