THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal 12 of 2017
IND 59/2016

BETWEEN

ANDY ERROL BARNES

Appellant

AND

HER MAJESTY THE QUEEN

Respondent

Before: **The Rt. Hon. John Martin, Justice of Appeal**
The Hon. Sir Richard Field, Justice of Appeal
The Hon. C Dennis Morrison, Justice of Appeal

Appearances: **Mr. Laurence Aiolfi of Priestleys Attorneys on behalf of the Appellant**
Mr. Scott Wainwright of DPP on behalf of the Crown

Heard: **2 April 2019**

Judgment Delivered: 17 April 2019

COURT OF APPEAL · CAYMAN ISLANDS · 11/17

JUDGMENT

MORRISON JA

Introduction

1. On 6 June 2017, after a trial in the Grand Court before the Honourable Mr Justice Wood QC ('the judge') and a jury, the appellant was convicted of possession of an unlicensed .38 calibre revolver ('the firearm'), contrary to section 15(1) of the ***Firearms Law (2008 Revision).***

2. The appellant was tried jointly with two other persons, Yannick McLaughlin ('Mr McLaughlin') and Amber Yates ('Ms Yates'), both of whom were acquitted by the jury.

3. On 23 June 2017, the judge sentenced the appellant to 13 years' imprisonment.

4. The appellant now appeals against his conviction and sentence. As regards the conviction, he relies on two grounds of appeal, in both of which complaint is made about the judge's treatment of the evidence of Mr McLaughlin. The appellant contends, firstly, that the judge failed to direct the jury to treat Mr McLaughlin's evidence with caution in so far as it implicated the appellant. And secondly, that the judge was wrong to permit the cross-examination of Mr McLaughlin to be conducted in such a way as to imply that the police had information that the appellant was in possession of a firearm for which a firearms search warrant had been issued. We will refer to the issues raised by these grounds as 'The caution issue' and 'The cross-examination issue' respectively.

5. On the question of sentence, the appellant contends that the term of 13 years' imprisonment imposed by the judge was manifestly excessive in the circumstances of the case.

6. Having heard submissions from Mr Aiolfi for the appellant and Mr Wainwright for the Crown on 2 April 2019, we reserved our decision. For the reasons which follow, we have come to the conclusion that the appeal succeeds on both grounds relating to conviction. However, we have decided that, in the interests of justice, the appellant should stand trial again in the Grand Court at the earliest convenient date.

7. In the light of this decision, we will give no more than a brief outline of the facts of the case. For this purpose, we have relied heavily on the admirable summaries of the evidence provided by Mr Aiolfi and Mr Wainwright in their written submissions. We are grateful to them.

The facts in outline

8. At approximately 6:30 am on 18 March 2016, the police executed a firearms search warrant at an apartment at Old Crewe Road in George Town. The persons present in the apartment at the time were Derry Ebanks, whose residence it was, Ms Dawn Faud, Ms Yates (who was the appellant's girlfriend), Mr Mclaughlin and the appellant. During the course of the search, the firearm was found hidden behind a grille on a microwave oven in the kitchen of the apartment.

9. Subsequent forensic analysis revealed a thumb-print matching the appellant's on the inside of the grille of the microwave; and DNA matching the appellant's at various points on the firearm. The expert witness's estimate was that it was 470 quintillion times more likely to observe this DNA profile if the appellant was the contributor than if an unknown, unrelated individual was the contributor.

10. A mixed DNA sample matching that of Ms Yates and others unknown was also found on the grip of the firearm, while Mr McLaughlin was excluded as a possible contributor to the multiple source DNA profiles found on the firearm.

11. Ms Yates, Mr McLaughlin and the appellant all gave interviews under caution to the police. The details of the interview given by Ms Yates are not relevant for present purposes. But, in their interviews, the appellant and Mr McLaughlin each implicated the other as the person who was in possession of the firearm on the morning in question.

12. The appellant said that, after the police search had commenced, and while he was in the bedroom which he occupied with Ms Yates, Mr McLaughlin ran into the room and threw the firearm down on the bed. According to the appellant, the firearm "*fall apart and I take it and put it back together and give it to him and say come out of my room ...*" The appellant denied owning the firearm or putting it inside the microwave oven. He said that

he had been staying at the apartment for some time, that he used the microwave oven every day, and that his DNA and his fingerprints would have been all over the apartment.

13. For his part, Mr McLaughlin said that, earlier that same morning, he got a lift to the apartment in a car driven by the appellant. Ms Yates was in the front passenger seat. During the journey to the apartment, the appellant gave the firearm to Ms Yates, who in turn passed it to him (Mr McLaughlin) in the back seat. He in turn covered up the firearm in his shirt, because he was concerned about the police stopping them. He had "*heard people saying* [the appellant*] was running around with a gun and people was saying police was looking for him because of a gun*". Mr McLaughlin also told the police that "*right prior to me leaving my house* [the appellant] *had a gun and I said to him why don't you leave this here by my house, what you carrying this for, you don't hear police is looking for you with this gun why keep putting yourself in a position*". Upon their arrival at the apartment, Mr McLaughlin said, he gave the firearm back to the appellant.

14. At the trial, both the appellant and Mr McLaughlin gave evidence generally consistent with the accounts which they had given in their respective interviews. Ms Yates did not give evidence.

15. Counsel for the prosecution cross-examined Mr McLaughlin on what he had told the police during his interview under caution, in particular the matters referred to at paragraph 13 above. We will come back to this in greater detail when we come to deal with the cross-examination issue.

16. At the end of the day, as we have indicated, Mr McLaughlin and Ms Yates were acquitted on the verdict of the jury, while the appellant was convicted with the result already stated.

The caution issue

17. It may be helpful to begin our discussion of this issue by mentioning briefly the two authorities upon which Mr Aiolfi principally relied. The first is **R v Cheema**[1], which confirmed that there is no rule of law or practice requiring a trial judge to give a full corroboration warning in relation to evidence given by a co-defendant in his own defence. However, the decision also confirmed that where one co-defendant implicates another in evidence, the judge is required to warn the jury that the co-defendant "*may have a purpose of his own to serve*"[2].

18. The second authority is **R v Jones, R v Jenkins**[3]. Delivering the judgment of the court in that case, Auld LJ considered that, in determining what might be an appropriate warning in such circumstances, a trial judge might want to keep in mind four points to put to the jury:

> "*First, the jury should consider the case for and against each defendant separately. Second, the jury should decide the case on all the evidence, including the evidence of each defendant's co-defendant. Third, when considering the evidence of co-defendants, the jury should bear in mind that he or she may have an interest to serve or, as it is often put, an axe to grind. Fourth, the jury should assess the evidence of co-defendants in the same way as that of the evidence of any other witness in the case.*"

19. In this case, Mr Aiolfi pointed out that the judge did tell the jury that they should "*consider the evidence against each defendant separately and, in due course, return separate verdicts in respect of each defendant*"[4]; and that they should "*apply the same fair and impartial standards*" to the defendants' evidence as they did to the evidence for the prosecution[5]. However, Mr Aiolfi submitted that the judge did not tell the jury to decide the case on all the evidence, including that of each defendant's co-defendant; nor, critically, did he warn them to approach the evidence of each co-defendant with caution, bearing in mind that he or she might have an interest to serve.

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[1] (1994) 98 Cr App R 195
[2] Per Lord Taylor CJ at page 204
[3] [2002] EWCA 1956; [2004] 1 Cr App R 5
[4] Summing-up, page 7, lines 22-25
[5] Summing-up, page 13, lines 11-13

20. Mr Aiolfi submitted further that the judge's failure to provide the required directions was exacerbated by the following direction which he gave in relation to Mr McLaughlin's evidence:

> "*McLaughlin gave evidence. It's obvious, isn't it, if McLaughlin had said nothing in interview at all he wouldn't be here. There would be no evidence against him at all. So it really comes down to this: unless the prosecution make you sure that what Mr. McLaughlin told you when giving evidence, you have to ask yourself whether he ever had control of that gun. That's a matter for you.*"

21. Mr Aiolfi's complaint was that this direction, while emphasising the burden on the prosecution in relation to Mr McLaughlin, failed entirely to mention the appellant's evidence, thus giving the impression that that evidence was not to be factored into the case against Mr McLaughlin. To that extent, Mr Aiolfi submitted, the direction may have appeared to favour the evidence of Mr McLaughlin.

22. Mr Wainwright conceded that the judge's directions "*did not go far enough*". In our view, the concession was well made. The appellant and Mr McLaughlin were jointly charged with possession of the firearm. They both ran cut-throat defences implicating each other. There can be no question that in these circumstances the judge was under a duty to warn the jury in appropriate terms to approach Mr McLaughlin's evidence against the appellant with caution, bearing in mind that he might have an interest of his own to serve.

23. The judge was also under a duty to tell the jury that, in considering the case against Mr McLaughlin, they were obliged to take into account all the evidence in the case, including that given by the appellant against him. By failing to do this, in our respectful view, the judge's generous direction as to how the jury should approach Mr McLaughlin's evidence may at the same time have deprived the appellant of a fair consideration of his defence, which was that Mr McLaughlin was the one who was in possession of the firearm on the morning in question.

24. We will come back in due course to the question of what should be the outcome of the appeal in the light of the prosecution's concession on this issue.

The cross-examination issue

25. This issue arises from the manner in which counsel for the prosecution cross-examined Mr McLaughlin on his statement to the police during his interview under caution as to what he had been told about the appellant "*running around with a gun*"[6]. Mr Aiolfi was careful to explain that he made no complaint about the admission of evidence of Mr McLaughlin's interview. He accepted that, on the joint trial of the appellant and Mr McLaughlin, what the latter said in his interview would have been admissible either as against him or as part of his defence.

26. But, on the other hand, whatever was said by Mr McLaughlin in his interview was not admissible as against the appellant, a point which, as the judge would later remind the jury, he made clear to them at the time when the interviews came to be read out in court[7]:

> "*You may remember that before the interviews were read out I warned you that what one defendant said in interview about another was not evidence against that defendant because he wasn't there to say you're talking rubbish, that didn't happen, and so on and so forth ...*"

27. So Mr Aiolfi's real complaint had to do with the way in which, that evidence having been admitted, counsel for the prosecution proceeded to cross-examine Mr McLaughlin. Our attention was directed to three passages of cross-examination in particular:

> (i) "Q: *You see, because if you read on, you had heard that [the appellant] had a firearm and that the police were looking for him, correct?*
>
> A: *I overheard people saying something about that, yes, sir.*

[6] See para 14 above
[7] Summing-up, page 20, lines 14-19

Q: *Yes. Because you go on to say: what you carrying this for? You don't hear police is looking for you? You don't hear police is looking for you with this gun? Why you keep putting yourself in a position? When did you hear [the appellant] had a firearm? It was obviously before that morning, wasn't it?*

A: *Yes, sir."*

(ii) *"Q:* *You can't have been surprised when the police arrived, were you?*

A: *I was surprised sir.*

Q: *Well you knew the police had been looking for [the appellant] with a firearm?*

A: *That was something which was told to me."*

(iii) *"Q:* *When the police arrived it must have been perfectly obvious what they were there for to you?*

A: *I guess so.*

Q: *Banging on the door early that morning. Why not tell the police [the appellant] has got a firearm?"*

28. Mr Aiolfi submitted that this line of cross-examination tended to confirm to the jury that the prosecution had information that the appellant had a firearm and had been looking for him in connection with it, thus linking that knowledge to the firearms search which actually took place on the morning in question. Given that there was no contrary evidence in the case, there would no longer have been a level playing field and the appellant would have been deprived of a fair chance to put forward his defence to the jury. This was so prejudicial to the appellant that the judge ought to have either discharged the jury in relation to him; or, alternatively, given an appropriate direction as to how to approach the matter. The judge did neither, thus giving rise to a material irregularity in the conduct of the trial.

29. Mr Wainwright's response was that these submissions were based on speculation, which the judge had specifically warned the jury to avoid. And, in any event, once the police

arrived at the apartment and carried out the search, the evidence that the appellant had been in possession of the firearm was "*very strong indeed*".

30. In our view, the danger of those parts of prosecuting counsel's cross-examination of Mr McLaughlin of which Mr Aiolfi complained can hardly be described as speculative. Albeit inadvertently (as we accept that it must have been), the questioning clearly proceeded on the firm basis that the appellant had a firearm in his possession at some point before 18 March 2016; and that it was that fact which had led to the search of the apartment in which he was expected to be that morning. There was nothing in the evidence to support any of this, based solely as it was on what Mr McLaughlin "*overheard some people saying*". It was, in short, looked at from the standpoint of the appellant, inadmissible hearsay and therefore apt to achieve nothing in the case but prejudice against him.

31. Mr Aiolfi very helpfully referred us to the decision of the Court of Appeal of England and Wales in **R v Walter James Windass**[8], in which a similar, though not identical, situation arose. We take the facts from the headnote. Windass was apprehended while driving his car. A large quantity of stolen clothing and a 'shopping' or 'selling' list of various items of clothing, together with suggested selling prices, was found in the car. The list was addressed to 'Knocky', which was Windass' nickname. A search of Windass' girlfriend's flat revealed more stolen clothing, as also the girlfriend's diary, which contained material highly probative of her complicity in Windass' activities. Both Windass and his girlfriend were charged with, among other things, conspiracy to steal and conspiracy to handle stolen goods. At the trial, the girlfriend's diary was admitted in evidence, with a warning to the jury that it was only evidence against the girlfriend as the person who had compiled it. However, when Windass went into the witness box, counsel for the prosecution then proceeded to cross-examine him at some length on the contents of the diary, several times asking him what the girlfriend meant by various entries in it. Despite belated interventions from the judge and, finally, Windass' counsel, the cross-

[8] (1989) 89 Cr App R 258

examination continued, with matters going so far as copies of the diary being given to the jury to hold in their hands as it progressed.

32. Windass was convicted of conspiracy to steal and appealed on the grounds, among others, that the judge erred in admitting the diary in evidence and that he was wrong to allow prosecuting counsel to cross-examine Windass on its contents. The first of these two grounds failed, on the basis that the diary was plainly admissible against the girlfriend, subject to the proper warning which the judge gave to the jury that its contents were evidence against her, but not against any of her co-defendants. But the second ground succeeded on the basis that the judge was wrong to allow the cross-examination of Windass to have proceeded as it did. As the Lord Chief Justice explained[9] -

> *"It seems to us that there are two objections which should properly be made to that line of cross-examination. First of all it is quite improper to ask a witness to explain what a third party means by a document written by the third-party ...*
> *Secondly, perhaps more importantly, it is, in our judgment, quite improper for counsel to take in his hand a statement which is inadmissible vis-à-vis the witness whom he is cross-examining, let alone allowing the jury to have a copy of the statement in their hands whilst he is doing that, and then to ask the witness to explain, almost sentence by sentence, the highly damaging statements, inadmissible against him, which the maker of the document has written."*

33. The Lord Chief Justice observed[10] that the situation "*might perhaps have been rescued by the learned judge by the way in which he directed the jury as to the effect of that cross-examination*", but that, "*unhappily in the present case the judge did not carry out any such rescue operation*". The court therefore considered what had occurred to be a material irregularity and allowed the appeal on that basis. The court also concluded that it was impossible to say what effect the improper line of questioning and the answers it elicited might have had on the jury. Accordingly, the court declined to apply the proviso and quashed the conviction.

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[9] At pages 262-263
[10] At page 263

34. **Windass** is obviously distinguishable from this case in at least two significant respects. First, in **Windass**, it was the defendant himself who was subjected to the improper line of cross-examination by prosecuting counsel, thus giving rise to an additional dimension of direct unfairness to an accused person. And second, the conduct of prosecuting counsel in **Windass** was egregious in a way in which it happily cannot be said to have been in this case. It nevertheless seems to us that the decision is relevant for its emphasis on the fact that, despite the clear admissibility of the girlfriend's diary as against her, it was inadmissible and therefore valueless in relation to **Windass**.

35. In this case, it is clear that the judge had the distinction in mind when he allowed Mr McLaughlin's statement under caution into evidence; but he appears, with respect, to have lost sight of it completely during prosecuting counsel's cross-examination on the matter. We would observe in passing that some responsibility for this lapse must rest with the appellant's counsel at trial (not Mr Aiolfi), who might also have been expected to be more alert to the highly prejudicial direction which the prosecution's cross-examination of Mr McLaughlin was taking in relation to his own client.

36. So, the question is, what should have been done about it? As will be recalled, Mr Aiolfi's primary submission was that, upon the disclosure to the jury of the prejudicial material emerging from Mr McLaughlin's cross-examination, the judge should have discharged the jury from giving a verdict in relation to the appellant. Mr Aiolfi no doubt had in mind the long-established principle that –

> "*... a jury sworn and charged in respect of a defendant may be discharged by the judge at the trial, without giving a verdict, if a 'necessity', that is, a high degree of need, for such discharge is made evident to his mind*"[11].

37. And, despite the fact that, as Mr Aiolfi readily acknowledged, no such application was made to the judge, it is equally well established that the judge had a discretion to

[11] Archbold 2019, para 4-315

discharge the jury of his own motion if he considered it right to do so in all the circumstances[12].

38. However, on the facts of this case, we find it difficult to say that this is what the judge should have done as a response to the unfortunate manner in which the cross-examination of Mr McLaughlin proceeded. This was, after all, hardly the more common case of gratuitous disclosure to the jury for the first time of prejudicial material affecting a defendant (as, for instance, in **R v Azam**, where, under cross-examination, the prosecution's main witness in a case of attempted murder launched what the trial judge described[13] as "*wild, reckless and intemperate allegations and assertions about the defendants, their characters and their involvement in criminal activity*"). Rather, the questions which prosecuting counsel directed at Mr McLaughlin in cross-examination, no doubt with a view to strengthening the case against him, were explicitly based on what he had said in his interview, the full text of which had already been read to the jury, about the appellant's participation in the events of the morning in question.

39. In these circumstances, we therefore prefer Mr Aiolfi's alternative submission, which is that the judge should have directed the jury in appropriate terms how to approach the matter. In our view, what was required was a careful, but strong, direction to the jury, reiterating what the judge had already told them as to the inadmissibility of anything said by Mr McLaughlin in his interview against the appellant; and telling them further that they were to disregard all that Mr McLaughlin said in cross-examination relating to the appellant's alleged prior possession of the firearm, and the fact that the police were looking for him in connection with it, in its entirety.

[12] See **R v Azam** [2006] EWCA Crim 161, paras 48-57
[13] Quoted in the judgment of the Court of Appeal at para 43.

Disposal of the appeal

40. We therefore conclude that the appellant has made good his submissions on both issues. However, Mr Wainwright submitted that, in all the circumstances of this case, the judge's failure to give the appropriate warnings to the jury did not render the appellant's conviction unsafe or unsatisfactory. In this regard, Mr Wainwright reminded us in particular of the apparent strength of the fingerprint and DNA evidence implicating the appellant. On that basis, he submitted that, even without Mr McLaughlin's evidence, the case against the appellant was a very strong one.

41. Although Mr Wainwright did not say it in so many words, this was an obvious invitation to the court to invoke the proviso to section 9 of the *Court of Appeal Law*: in familiar terms, that section provides that the court may, "*notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if the Court considers that no substantial miscarriage of justice has actually occurred*".

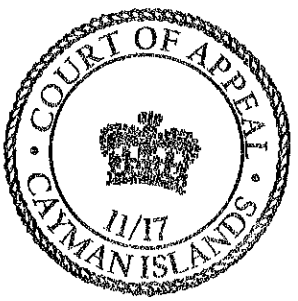
42. It seems to us that, had the appellant's defence been a complete denial of ever having handled the firearm or touched the microwave oven, it might well have been difficult to avoid the conclusion that the fingerprint and DNA evidence, assuming that it was otherwise reliable and capable of belief, was conclusive against him. However, as Mr Aiolfi pointed out, the appellant proffered an explanation for how his DNA and his thumb-print came to be on the firearm and the microwave oven respectively. In the case of the firearm, as will be recalled, his evidence was that he handled it briefly before returning it to Mr McLaughlin after the latter had entered his room and thrown it on the bed. And, as regards his thumb-print on the microwave oven, he said he used it every day and that his fingerprints would have been all over the house. It was therefore a matter for the jury to consider the appellant's explanation in the context of determining whether the prosecution had made out the case against him to the requisite standard.

43. The test which must be applied to the application of the proviso is well settled. As Viscount Sankey LC explained in **Woolmington v Director of Public Prosecutions**[14], it is whether, if the jury had been properly directed, they would inevitably have come to the same conclusion upon a review of all the evidence. Applying this test in this case, we have found it impossible to say that the jury would inevitably have come to the same conclusion had they been directed (i) to exercise caution in approaching Mr McLaughlin's evidence insofar as it implicated the appellant; (ii) to have regard to all of the evidence, including the appellant's, in assessing the appellant's guilt; and (iii) to disregard completely any hearsay evidence given by Mr McLaughlin against the appellant.

44. It therefore follows that this appeal must be allowed. However, as Mr Aiolfi quite properly accepted, there was evidence in the case for a jury, properly directed, to consider. In these circumstances, we have concluded that it would be best, in the exercise of the court's powers under section 9(2) of the *Court of Appeal Law*, to quash the appellant's conviction and order a new trial in the interests of justice.

FIELD, JA:

45. I agree.



MARTIN, JA:

46. I also agree.

[14] [1935] AC 462, at pages 482-483