IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 16/2018
IND. 66/2016
SC#03211/16

BETWEEN:

UKEL DIXON

Appellant

- and –

Her Majesty the Queen

Respondent

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

Date of Hearing: **2 April 2019 and 17 April 2019**

Appearances: The Appellant in person
Mr. Patrick Moran of DPP for the Respondent

JUDGMENT

Oral judgment delivered: 17 April 2019

Transcript Approved for Release: 17 June 2019

MARTIN, J.A.

1. On 9 November 2017 the applicant, Ukel Dixon, was convicted after a trial by Justice Quin and a jury of conspiracy to supply controlled drugs contrary to section 321 of the Penal Code (2013 Revision).

2. On 11 May 2018 Mr. Dixon was sentenced by Justice Wood to three years' imprisonment.

3. By Notice of Appeal dated 4 February 2019, nearly nine months after sentencing, Mr. Dixon sought leave to appeal against his conviction. Section 13 of the Court of Appeal Law requires an application for leave to appeal to be made within fourteen days of the date of sentence, although the court has power to extend time. Mr. Dixon also applies for leave to adduce new evidence on the appeal if his application is granted.

4. Mr. Dixon represented himself on this application. He explained to us that he had been unable to find a lawyer to represent him. He explained that the delay in making the application was caused by the fact that it was only after he began to look into the law himself, while in prison, that he came to understand what, according to him, had gone wrong at his trial.

5. The circumstances that gave rise to Mr. Dixon's conviction were these: On 22 October 2015 a man named Alexander Ebanks was arrested on suspicion of supplying drugs. Police officers seized two mobile phones from him. A search of his apartment revealed, among other things, several thousand dollars' worth of cocaine.

6. Analysis of his mobile phone data revealed that he had been involved in the supply of controlled drugs on a significant scale for at least four months prior to his arrest.

7. On 25 August 2016 Mr. Ebanks pleaded guilty to offences including conspiracy to supply drugs, conspiracy to import cocaine, converting criminal property, possession of controlled drugs with intent to supply and possession of drugs and utensils. These matters were the subject of admissions at Mr. Dixon's trial.

8. Analysis of Mr. Ebanks' mobile phone data led to the identification of a number of individuals who appeared to be involved with Mr. Ebanks in the supply of drugs. One of

them was Mr. Dixon. He and two others were charged in one indictment in which it was alleged that each was involved in separate conspiracies with Mr. Ebanks to supply controlled drugs.

9. The case against Mr. Dixon was that he had conspired with Mr. Ebanks in the months leading up to Mr. Ebanks' arrest to supply controlled drugs. The Crown suggested that Mr. Dixon had acted as a runner for Mr. Ebanks, delivering drugs to customers and collecting cash from them.

10. The foundation of the case against him was material found on Mr. Ebanks' mobile phone. That material consisted of numerous messages between Mr. Ebanks and other persons, apparently relating to the supply of drugs, interspersed with telephone calls between Mr. Ebanks and a telephone number 321-0044, said by the Crown to have been used by Mr. Dixon. The connection between Mr. Dixon and telephone number 321-0044 was established at trial by a formal admission made by Mr. Dixon in the following terms:

> *"On 18.11.2015 Ukel Dixon went to George Town Police Station to request the return of some property on behalf of Alex Ebanks. Mr. Dixon provided to DC Alan Slater two telephone numbers on which to contact him; 321-0044 and 324-2211".*

11. Before the trial, an application was made by Mr. Dixon's then counsel to exclude the telephone evidence. It was said that DC Slater should have cautioned Mr. Dixon before the conversation in which Mr. Dixon mentioned telephone number 321-0044. A *voir dire* hearing was held at which DC Slater gave evidence. When cross-examined, he said that he had no reason to suspect Mr. Dixon of any wrongdoing at the time of the conversation and therefore had no reason to caution him. It was suggested to him that the telephone number had been given to him by a woman, not by Mr. Dixon. He denied this. The judge accepted DC Slater's evidence and ruled that the telephone evidence was admissible. The admission we have quoted was then formally made.

12. The data obtained from Mr. Ebanks' mobile phone was analysed and organised into schedules by Ms. Joanne Delaney, a police analyst. The significance of those schedules was the subject of expert evidence given by Mr. Patrick Gittelsohn, a special agent with the United States Drug Enforcement Administration. A sufficient indication of the substance of Mr. Gittelsohn's evidence and the content of the schedules is given by the following passage from the judge's summing up:

> *"Now JD/18 is another document prepared by Joanne Delaney and it relates to communications between Alex Ebanks' phone at 322-4470 and the phone attributed to the third defendant Ukel Dixon 321-0044. Now Mr. Gittelsohn says drug dealings often use couriers or delivery men and he said the reason for that is;*
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> 1. *it creates a buffer between the source of supply – Alex Ebanks – and the actual drug – cocaine – that he is selling.*
> 2. *Mr. Gittelsohn said if you use a delivery man or a courier, then should the Royal Cayman Islands Police intercept the deal before it is completed, the drug dealer Ebanks is removed from the scene; and,*
> 3. *Mr. Gittelsohn said it can also increase sales. Another example was at tab 7, item 12 where Mr. Gittelsohn highlighted on 24 September we have a WhatsApp from Ebanks to Mikey, a customer, saying call Dixon and then shortly afterwards we have calls from Mr. Dixon to Mr. Ebanks and calls from Ebanks to Mikey saying I'm outside. Mr. Gittelsohn said this looks like a drug deal and Mr. Gittelsohn said Dixon was involved in this drug deal in the same manner and the customer is told by Ebanks to call Dixon. Example 2, item 22 rows 511 to 532 is a customer, Sarah, ordering a gram from Mr. Ebanks and Mr. Ebanks is sending Dixon to make the delivery. Mr.Gittelsohn said this is...sorry Mr Dixon (sic).. said, this again, based on the totality of the evidence, this reads very much like a drug deal, and what Mr.*

Gittelsohn says he sees here is Sarah is ordering a gram of cocaine from Alex Ebanks and Ebanks is sending the third defendant, Dixon, to make that delivery.

And Item 29, this time the customer is Mikey. It's on 28 September. Mikey thought he was getting the drug from Ebanks. But at line 661, Ebanks tells him it is Dixon.

Finally, another example is item 41. The customer this time is Robert, and Mr. Dixon (sic) said this is a drug deal. Dixon is delivering the drug for Ebanks but there is some confusion and Ebanks is attempting to manage the arrangements so that Dixon can deliver a gram of cocaine to Alex's customer Robert."

13. Mr Dixon did not give evidence at his trial, a matter of which he now complains. As we have said, Mr Dixon was convicted of the one charge against him. The jury's verdict was unanimous.

14. The grounds of Mr Dixon's proposed appeal, as set out in his notice of application, are that the judge misdirected the jury; that the conviction is perverse and the result of an abuse of the court's process; that the Government has breached or threatened Mr Dixon's rights and freedoms under the Bill of Rights annexed to the Cayman Islands Constitution; and that the evidence adduced by the Crown was unfair.

15. Mr Dixon provided a 14 page skeleton argument in support of his application. This contained an introductory section on the law, running from pages 2 to 8, and making reference to statutory and case law. The remainder of the document set out Mr Dixon's complaints, which we summarise as follows:

(a) Mr Dixon was unable to question Mr Ebanks or any of his supposed customers under oath;

(b) the judge misdirected the jury by inviting them to presume that Mr Dixon was guilty; by referring to section 322 of the Penal Code rather than section 321, which Mr Dixon was charged with contravening; and by expressing his own view (which Mr Dixon said was biased) about the reason for the absence of any CCTV evidence;

(c) the evidence of DC Slater and Mr Gittelsohn was unfairly prejudicial and should not have been admitted;

(d) the telephone evidence (which showed that communications to telephone number 321-0044 lasted for one minute on average, which was about the time for an answering machine to play its recorded message) did not provide a safe basis for the conviction; and

(e) the case against Mr Dixon was based on inadmissible hearsay evidence and inferences wrongly drawn from it.

16. Mr Dixon addressed us in support of his application. He accepted that the substance of his complaints was as summarised above. However, it became clear that his overriding concerns were that he had not understood any part of the court proceedings at his trial, had had inadequate opportunity to speak to his counsel, had been pressured into agreeing not to give evidence, and had not been properly represented. He produced to us a letter dated 29 October 2018, addressed by him to the court administration and to another attorney, setting out complaints about the way in which he had been represented. These included that he was put under pressure to plead guilty, that there was no application for a split trial, that the telephone number 321-0044 did not belong to him, that Mr Ebanks used the names Ukel and Dixon, and that Ms Delaney was inadequately qualified and - because she was employed by the Cayman Islands Police Service - not impartial.

17. We deal first with the complaints set out in the application notice.

18. The first of those complaints is that Mr Dixon was unable to question Mr Ebanks or any of his supposed customers. So far as Mr Ebanks was concerned, the prosecution had taken the view that it was unnecessary to call him. It relied upon the admitted facts of his conviction and of the drugs and drug paraphernalia found at the time of his arrest to establish that Mr Ebanks was a drug dealer. That meant that, if Mr Ebanks were to be called to give evidence, he would have to be called by Mr Dixon. To do so would be highly risky. If Mr Ebanks had exonerated Mr Dixon, his evidence would have been attacked on the grounds that it was inconsistent with the telephone evidence and that he was a convicted drug dealer unworthy of belief. If, on the other hand, he had implicated Mr Dixon, Mr Dixon would have had no automatic right to cross examine him or dispute his account, since it was Mr Dixon who had called Mr Ebanks to give evidence. He would have been dependent on the judge acceding to an application to treat him as a hostile witness; and even if that application had succeeded, the damage would have been done. Similar considerations apply to the customers, although so far as we know none of them had been convicted of drug offences. We do not find it remotely surprising that Mr Dixon's counsel did not try to call Mr Ebanks or the supposed customers. We see nothing in this complaint.

19. The second complaint is that the judge misdirected the jury in three respects: by inviting the jury to presume that Mr Dixon was guilty, by referring to section 322 of the Penal Code, and by offering a prejudicial explanation for the absence of CCTV evidence.

20. In the course of his summing up, the judge dealt with what was meant by a conspiracy. He said that it was simply an agreement to commit an unlawful offence, and that if the jury was satisfied that each defendant entered into an agreement with Mr Ebanks to lead to the supply of controlled drugs there was a conspiracy. He then said this:

> *"Now, an agreement can be proved in the usual way or by proving circumstances from which you may presume it; and, indeed, proof of the existence of a conspiracy is often a matter of inference, and it is adduced*

from certain criminal acts of the parties accused done in pursuance of an apparent criminal purpose".

21. Mr Dixon fixed upon the word "*presume*" in that passage as meaning that the jury were to presume that he was guilty, or presume that there was an agreement. It is plain, however, that the passage does not mean that. The judge was doing no more than indicating that certain circumstances, if proved, could lead to the conclusion that there was an agreement. As he said, that would often be a matter of inference. Although Mr Dixon is right that the words "*presume*" and "*infer*" are not synonymous, in the context there was no difference of substance between them.

22. Slightly earlier in his summing up, the judge said this:

> "*Now, conspiracy is s. 321 of the Penal Code. It reads:*
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> > *'A person who conspires with another... to commit any offence or to do any act in any part of the world which if done in the [Cayman] Islands would be an offence...'.*
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> *And s. 322 (f) and (g) say:*
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> > *'A person who conspires with another...' – in this case it is alleged that each of the three defendants conspired with Alex Ebanks – so it reads: 'a person who conspires with another... to effect [an] unlawful purpose' commits an offence*".

23. The judge's reference to s 322 (f) and (g) was a mistake: he meant s 321 (f) and (g). The mistake is, however, of no significance whatever. The judge had made it clear at the outset that he was dealing with section 321; and it was not the section number, but the substance of what the section said, that was important for the jury's consideration.

24. Later in his summing up, when discussing Ms Delaney's evidence, the judge said this:

> "*Now, members of the jury, she mentioned that there's no photographs of the deals; there's no CCTV coverage of the deals; there's no eyewitnesses. Now, you must remember, members of the jury, drug dealing is by nature*

a very furtive and secretive activity. Neither the dealer nor the buyer want to be identified. Neither the dealer nor the buyer wish to be apprehended by the police. So frequently you don't have CCTV coverage because drug dealers do not do deals under CCTV cameras, not knowingly".

25. We do not consider that this amounts to a misdirection. It was the case that there was no CCTV footage, and no eyewitnesses, capable of implicating Mr Dixon. The judge's comments did not alter that fact. All they amounted to was an observation as to why that might have been so. They neither added to nor detracted from the evidence against Mr Dixon. Moreover, the judge had towards the beginning of his summing up, given the jury the usual warning to the effect that if he appeared to express any views concerning the facts, the jury was not to adopt them unless they agreed with them.

26. The third complaint concerns the admission of the evidence of DC Slater and Mr Gittelsohn. So far as concerns DC Slater, the matter had been conclusively dealt with at the *voir dire*. Mr Dixon had been represented at that hearing, and his counsel had been able to cross examine DC Slater on his evidence. The judge was entitled to accept DC Slater's evidence that he had no reason to suspect Mr Dixon of wrongdoing before their conversation took place, and that it was Mr Dixon who volunteered telephone number 321–0044 as a contact number. Once the judge had taken that view, the admission of which Mr Dixon now complains was inevitable.

27. By the same token, Mr Dixon's application to adduce new evidence must fail. The evidence he wishes to adduce is evidence from DC Slater and from Roseanna Myre, who he claims gave the number 321-0044 to DC Slater. These matters having been determined against Mr Dixon on the *voir dire*, there is no basis on which he can seek to cover the same ground with further evidence.

28. So far as Mr Gittelsohn is concerned, the complaint is that the evidence he gave about the significance of the telephone communications was based on part only of the totality of the data on Mr Ebanks' phones. According to Mr Dixon, a complete download of the data

would have demonstrated that the communications between Mr Ebanks and Mr Dixon were merely because they were cousins, not because Mr Dixon was acting as Mr Ebanks' runner. This complaint, too, fails. Even if there were innocent communications between the two on other occasions, that would not reduce the impact of the juxtaposition of the communications commented on by Mr Gittelsohn and relied on by the Crown.

29. We take the fourth and fifth complaints together. They are that the telephone evidence was an unsafe basis for conviction, and that his conviction was based on hearsay evidence and inferences wrongly drawn from it. These complaints also are misconceived. The evidence against Mr Dixon was properly proved or admitted, and expert evidence was given by persons properly qualified to give it. It was for the jury to determine the import of the telephone evidence and what inferences could be drawn from it. Those were matters on which they were properly directed, and there is no basis to challenge the jury's conclusions on them.

30. We turn now to consider Mr Dixon's overriding concerns, as they emerged from his submissions to us. As we have said, they were that he had not understood the trial proceedings, had had inadequate opportunity to speak to his counsel, had been pressured into agreeing not to give evidence, and had not been properly represented.

31. We have considered carefully whether we should call upon Mr Nicholas Dixey, who represented Mr Dixon at his trial, to give his version of events. In the end, we have concluded that that is not necessary. In relation to the main complaint, that Mr Dixon was pressured into agreeing not to give evidence, we think it inconceivable that an experienced criminal advocate, as Mr Dixey is, would have failed to take proper steps to ensure that Mr Dixon was aware of the advantages, disadvantages and implications of failing to give evidence. Mr Dixon told us twice that Mr Dixey had said that he would walk off the job if Mr Dixon insisted on giving evidence, and that that would have left him without a lawyer. If anything to that effect was said – and it is clear that it has stuck in Mr Dixon's mind – it is impossible to suppose that it was the totality of the conversation or a fair reflection of its substance and tenor. As for the other complaints,

we think these are matters of perception and fall very far short of indicating that there was any unfairness in the trial process.

32. We turn finally to the letter of 29 October 2018. This was produced to us very much as an afterthought and we do not regard it as properly forming part of the application. So far as concerns the main points made by it, we observe that Mr Dixon did not in fact plead guilty, whether or not he was – as the letter says – under pressure to do so; and the other complaints against Mr Dixey add nothing of substance. We have seen nothing to suggest that an application for a split trial would have succeeded, or that any unfairness to Mr Dixon resulted from his being tried jointly with two others. The judge was throughout his summing up careful to keep the allegations against each of the three defendants separate from those against the others. There is no proper basis for the complaints about Ms Delaney; and the other matters are points of fact which it is too late to raise on an application for leave to appeal.

33. For completeness, we mention that in the course of his address to us Mr Dixon suggested that there was a family connection between Mr Dixey and the trial judge, Justice Quin, that had caused him prejudice. In fact, the position was that there was such a connection between Mr Dixey and the sentencing judge, Justice Wood, which was mentioned by Mr Dixey in open court at the outset of the sentencing hearing. No possible prejudice to Mr Dixon can have resulted from this circumstance.

34. It will often be a matter of concern to an appellate court that a defendant feels that he has had an unfair trial, particularly when he claims not to have understood the proceedings; but perception and reality are not necessarily the same. We have sought to identify Mr Dixon's complaints and deal with them on their merits. Having done so, we conclude that there is no ground on which it can sensibly be argued that the trial was unfair or Mr Dixon's conviction unjustified by the evidence. There was no actual or threatened breach of the Constitution or statute, and nothing was done that went against the case law. For the reasons we have given, we conclude also that there is no ground on which we should extend time for making the application for leave to appeal, no ground on which we

should accede to the application to adduce further evidence, and no ground on which we should give leave for the appeal itself.

35. The application is accordingly dismissed.