IN THE CAYMAN ISLANDS COURT OF APPEAL

CACR015/2014 (C)
IND 105/12
#06062/2012

BETWEEN:

ELVIS KELSY EBANKS

APPELLANT

AND

HER MAJESTY THE QUEEN

RESPONDENT

BEFORE:

The Rt Hon Sir Bernard Rix, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal
The Rt Hon Sir Alan Moses, Justice of Appeal

Appearances: Laurence Aiolfi of Samson & McGrath for the Appellant and Patrick Moran Deputy Director of Public Prosecutions for the Crown.

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JUDGMENT

Revised from transcript of oral judgment 16 November 2015 and Approved
Released 13 May 2016

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MOSES, JA (Orally)

1. This is an appeal against a conviction following a jury trial of Elvis Ebanks who, on the 15th of May 2014, was convicted on two counts of bribery and two counts of breach of trust.
2. On the 24th of July 2014, the trial judge, Quin J, sentenced him to three years' imprisonment on each of the bribery counts and 18 months' imprisonment on the breach of trust counts, all to run concurrently. The total sentence was therefore one of three years.
3. The appellant was a serving police officer, who, the prosecution say, took advantage of a Filipino national who had just come to this island in October 2012. The Filipino national, Elmer Ferreras, had a poor grasp of English and limited money. Of that there can be no dispute.
4. But he was tempted, whilst working at Auto Spa, to steal a cell phone that he had found in a car that had been brought for servicing. He was caught with the phone because he was using it, and the owner, of course most concerned that any employee, let alone a new employee, at his business, should steal a customer's phone, reported him to the police.
5. The police did attend on the 10th of November 2012, and the policeman who attended was this defendant. He spoke to him, and it was then confirmed by the person who had lost the phone

that the phone was his. So delighted was that person at the recovery of the phone that he did not want to press charges.

6. The owner was anxious that the employee who had been tempted into theft should leave the premises, and as a matter of courtesy and kindness, so this defendant says, he gave him a lift home, a journey of some 10 to 15 minutes. During the course of that journey, it was alleged by the prosecution that the first occasion of bribery and breach of trust took place.

7. According to Mr. Ferreras, and the prosecution, the police officer, Mr. Elvis Ebanks, had underlined the gravity of the offence he committed and said that "that kind of offence could get you ten years. Do you have any money?". Mr. Ferreras said, "yes" and told him he had $115 CI, which he produced. The defendant took it and asked him whether he wanted to go to the police station. Understandably Mr. Ferreras didn't want to, and he was, so he says, threatened by the defendant with going to the police station to the extent that he produced and handed over some more money, some United States notes, eleven single dollar bills and one $20 bill (and some Filipino notes, which the defendant threw away). Mr. Ferreras was pleading with him as the journey continued and as the threats to go to the police station continued, and was prepared to offer money on an instalment basis. According to Mr. Ferreras, the defendant asked him for $200 a month, and despite the fact that Mr. Ferreras was saying that he really didn't have enough money and would have to borrow it, the defendant suggested that he should borrow a hundred dollars from five of his friends to make up the $500 he would owe as a first instalment that month.

8. Fortunately, Mr. Ferreras, although warned by this defendant not to discuss the matter with anyone, did tell a friend, and the police were informed by Mr. Ferreras and the friend two days later. It was arranged that they should go to the police station by the 14th of November, which was the date set by the defendant, so Mr. Ferreras said, for the deadline of payment.

9. In fact, the defendant called at short notice asking Mr. Ferreras to meet him ten minutes later in a Subway at a shopping plaza. By that time, Mr. Ferreras had in his possession a recording device (given to him by the police) and that recording was made and was played to the jury. The police managed to gather $500 in marked bills, and then Mr. Ferreras, escorted by police officers, went, after midday, carrying a white plastic bag with $500 in marked bills. The police were observing.

10. Mr. Ferreras approached the defendant and said, "Sir, you won't arrest me if I give you this money". The officer replied, "Okay. All right". Mr. Ferreras said "If I give it to you, that's it?" The officer replied, "all right". Mr. Ferreras then handed over the bag with the money, which was placed in the console between the driver and the front passenger seats.

11. Shortly after he drove off, this defendant was pursued by officers. There was some dispute as to his behaviour following his being stopped by the other police officers. He and some of the officers said he hadn't moved his vehicle. Others said he had reversed, trying to get away. But what was not in dispute was that the money was recovered underneath the vehicle, and the defendant, though cautioned, made no reply. He did offer a remark, unsolicited on his way to being taken back to the station, saying that he'd done nothing wrong and had borrowed money from Ferreras as a favour.

12. He then produced, with the aid of his then solicitors who were advising him, a statement in which he denied demanding money and repeated the claim that he had been offered a $500 loan.

13. There was thus a considerable dispute at trial as to who was telling the truth. On the one hand, the prosecution had available the recordings. On the other, the defendant, with the support of substantial witnesses to his credit, said that it was all a misunderstanding, that he had been offered a loan and had foolishly accepted it (but not with any corrupt motive) and certainly hadn't threatened Mr. Ferreras in the way Mr. Ferreras described. At best it was a misunderstanding with this young Filipino, possibly because of the difficulties Mr. Ferreras had with his language. At worst it was more sinister than that and there was this young man who, caught effectively red-handed with a stolen phone, had done his best to inveigle himself into the good wishes of the police, both for the purposes of evading a criminal charge and because his own right to remain on the island and work permit were by no means safe to keep him there. Therefore he had a powerful motive to cooperate with the police even to the extent of giving false evidence. The jury did not believe the defendant's story and, as we have said, convicted.

14. In powerful submissions -- for which we are indebted for their clarity and their brevity -- Mr. Aiolfi submits first that the judge wrongly admitted evidence from two police officers which related to this defendant when he was stopped by the police on the second occasion of his meeting with Mr. Ferreras. There was, as we have described, a dispute as to his behaviour - some officers saying he reversed and others not. These two witnesses both had some evidence to give in relation to this evidence.

15. In particular, one of the officers had said that the defendant when stopped had said, “I have no money”, when on the contrary he was in possession of $500, and had reversed away. Neither of the two witnesses, Bluck or Ramsay, supported that. They were silent about that. And, indeed, one of them, whose statement was read, was the only police officer who agreed with the arresting officer that this defendant had reversed away. Neither of the witnesses were called, but the prosecution sought to read their statements on the basis that it was not reasonably practical to call them and that they had taken reasonable steps to obtain their presence even though they were abroad, so as to satisfy the conditions of section 33(2) of the Evidence Law (2011 Revision).

16. The judge had allowed that evidence to be read and the submission was made to us that there was wholly inadequate evidence that proper steps had been made to bring them to the court. Had they been brought, they could have been cross-examined, might well have confirmed the defendant's account, and certainly the defence would have been able to challenge the assertion that the defendant had reversed away, and would have been able to point out that it was wrong to suggest the defendant had said he had no money.

17. The judge, having allowed the evidence to be read, pointed out to the jury that, since the defence had had no opportunity to cross-examine them, and since the jury have been deprived of the opportunity of seeing the witnesses in the witness box, they should give considerably less weight to their evidence, and pointed out that the fact that the statements were read didn't mean they had to be accepted, and then said that the statements were of minimal value.

18. In our judgment, the reading of those statements and the fact that they were not called, irrespective of whether in fact sufficient steps to bring them had been made, was totally by the way of the impact of the main body of the evidence and couldn't possibly, in the light of the judge's summing up, have had any impact upon the jury at all.

19. Moreover, whilst we do not know whether all the steps that might possibly have been taken to have their evidence before the jury, possibly by video link, in our view the question of the adequacy of the steps taken under section 113(2) must always be looked at in the context of the importance of the evidence. (See R v Castillo [1996] 1 Cr. App. R. 438.) It would clearly have been inconvenient and expensive to get those witnesses back from abroad to give evidence which would have had so trivial an impact on the trial, and in those circumstances we dismiss the first ground of the appeal.

20. The second ground of the appeal is that the judge failed fairly or adequately to sum the case up in relation to the appellant's case. Firstly, it is suggested that no warning was given to treat the evidence of Ferreras with caution and that warning should have been given. It is said that the witness could have had an improper motive for lying, and in those circumstances it was incumbent upon the judge to direct the jury that he should be treated with particular caution, tainted as his evidence might have been by an improper motive in the circumstances - see R. v. Makanjuola [1995]□ 2 Cr. App. R. 469.

21. The witness Ferreras, as we have already said, clearly was vulnerable, indeed that was the basis of the prosecution case, tempting this police officer to behave in the way he did. He had newly come to this country with a small grasp of language and was impoverished in his first job. In order to regularise his position and to avoid a conviction, he had a powerful motive to cooperate with the police. But on the other hand, his circumstances were such that it was not surprising that he should cooperate and at the same time volunteer the fact that he had been approached with the threats that we have identified.

22. The judge summarised all those defence points towards the end of his directions to the jury and summarised the case of the defence that he had "lied to the police, lied to you, and they say he's manipulated the process to get the job. He's manipulated the process to get a phone and the prospect of a trip home."

23. This was a fair and forceful way to remind the jury what they would have already heard from counsel acting for the defendant. There is no basis for saying any special warning should have been given. Indeed that would have been a very difficult warning to have given in the circumstances. The judge could not possibly have directed the jury that the witness Ferreras was cooperating in some crime and therefore should be treated like an accomplice because to do so would have been to condemn the very thing that the defendant denied. There was no basis for saying that he was in a very particular position other than one whose evidence conflicted, as so often happens, with the evidence of the defendant.

24. In our view, it would have been wrong and unjust to the prosecution to single him out for some specific warning. And in any event, we remind ourselves that the trial judge is by far better placed to decide whether any such warning should be given, and this court would only interfere if the conclusion that no such warning should be given was out with the range of reasonable conclusion.

25. The further ground of appeal relating to this witness relates to a ground that the judge failed adequately to direct the jury in relation to the burden and standard of proof. It is said that during the course of the summing up, he undermined his earlier correct directions as to the burden of proof by reminding the jury that the question was: "Who is telling the truth? If you believe the defendant, you must find him not guilty. If you believe the complainant, you would find him guilty. You have to look for support or contradiction…" and then he detailed where that

might found. And he continued, "What is crucial really is what took place in the car and at the old Prospect Road. It's a matter for you."

26. It is commonplace and perfectly correct for a judge to remind the jury where there is a conflict or clash of evidence where inevitably the jury are going to have to make up their mind as to who is telling the truth and who is not. In presenting that factual issue of credibility to the jury in that way, the judge was not in any way undermining the principle, of which he had reminded the jury, that they had to be sure that the witness was telling the truth before they could convict. We reject that ground of appeal.

27. That leaves one other ground which relates to a failure to give the jury a direction as to misunderstanding. Whilst of course it is true that the defendant denied much of what Mr. Ferreras said, there was, so Mr. Aiolfi contends, room for misunderstanding which lay in Mr. Ferreras inadequate grasp of language. In the circumstances in which he found himself, he might well have misunderstood what the defendant was doing, which was merely agreeing to a loan which this impoverished Filipino immigrant was offering him and believed that he was being made to hand it over as the price for not being prosecuted for theft. That, so the defendant says, the judge should have left to the jury as an issue.

28. The proposition that this witness would have offered this police officer a loan in the region of $500 needs only to be stated to appreciate how fanciful it is. There was no obligation on the judge to raise such a curious line of argument, and we dismiss that ground of appeal.

29. In those circumstances, none of the grounds advanced, in our view, are substantiated. We cannot leave this case without saying that it seems to us a most curious defence indeed and we are not one bit surprised that the jury rejected it. For those reasons this appeal is dismissed.

30. The appeal against conviction is dismissed. The application for permission to appeal against sentence, having been withdrawn, is also dismissed. Conviction and sentences affirmed.

Rix JA

Field JA

Moses JA