IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
CICA (Crim) 15/ 2012
Ind 15/10
C05183/2009

The Right Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Hon Ian Forte, Justice of Appeal

ON APPEAL FROM THE GRAND COURT

BETWEEN

HM THE QUEEN

Respondent

-and-

DAVE BRYAN

Appellant

Ms Margetta Facey-Clarke appeared for the Appellant
Mr Michael Snape instructed by the Director of Public Prosecutions appeared for the Crown

Hearing: 29 July 2013

JUDGMENT
Revised from transcript and Approved

Released: 23 January 2014

Sir John Chadwick, President:

1. On 3 April 2012, after a trial of some three weeks before Mr Justice Quin sitting as a judge alone, the appellant, Dave Bryan was found guilty on two counts. On the first count he was found guilty of obtaining money transfers by deception contrary to section 251 of the Penal Code. On the second count he was found guilty of making a document without authority contrary to section 293 of that code. We are concerned only with the first count.

2. The particulars of the offence were that between 1 January 2007 and 31 May 2008, the appellant obtained money transfers to the aggregate value of CI$309,981.37 from Foster's Food Fair by deception; namely, by falsely representing the quantity of the goods which had been supplied by Cayman Bakery to Foster's Food Fair. Put very shortly, the prosecution alleged that, in the course of delivering Easter buns and other bakery products on behalf of Cayman Bakery over a period of some months, the appellant submitted invoices for far more product than he had actually delivered and received payment on those invoices.

3. When the matter came before this Court on 16 July 2013, on an appeal from the conviction on the first count, we expressed concern in relation to two points. The first was the admission into evidence of notes made by Detective Constable Francella, the officer in charge of the case, of an interview held on 29 September 2008. The second was the reliance placed by the judge on the evidence of one of the principal prosecution witnesses, Seymour Morgan. Mr Morgan had received deliveries of the goods from the appellant; and signed the invoices submitted to him in circumstances in it could be said that he ought to have appreciated that the quantity of the goods shown on the invoices did not – and could not – correspond with the quantity actually delivered. The judge was not told – as, plainly, he should have been – that Mr Morgan had been given a promise that he would not be prosecuted as an accomplice if he gave evidence at the trial against the appellant, Mr. Bryan.

4. The Court's concern led it to adjourn the appeal hearing from 16 July 2013 to enable transcripts of the relevant portions of the evidence - and of proceedings at a *voire dire*, held during the trial, in the course of which the question whether the statements made to Detective Constable Francella should be admitted into evidence was addressed - to be obtained. Those transcripts are now before the Court.

5. The issue which the judge was asked to address on the *voire dire* – and on which he gave his ruling on 12 March 2012 - was whether the statements had been made as a result of oppression. The point which now raised is different: it is, whether or not made as a result of oppression, the statements were made in breach of the Judges' Rules. It is not in dispute that the statements were made at an interview conducted immediately after the appellant had been told by Detective Constable Francella that the evidence against him was overwhelming. In these circumstances it seems to this

Court impossible to avoid the conclusion that, by the time the statements were made, the prosecution had already decided that it would charge Mr. Bryan on the basis of the material that it already had. In those circumstances no further interview should have taken place. The Judges' Rules provide that it is only in exceptional circumstances that a person who has been charged, or is about to be charged, should be asked further questions about the offence. Further, the interview itself was plainly not conducted in accordance with the rules and the interview notes were not signed either by the police officers who conducted the interview or by the defendant. The notes should not have been admitted into evidence at the trial.

6. The second matter of concern to this Court is that, in the course of his evidence, Mr. Morgan was asked by counsel for the appellant a question in these terms:

> "Did the police or anyone ask you to give evidence on behalf of the prosecution?"

Mr. Morgan's answer was:

> "They don't have to ask me anything ma'am. I told you before, I sit down and I read my papers that I have before and I decide that I'm going to tell what is the truth".

Counsel for the appellant and counsel for the prosecution both knew that that answer was not an answer to the question put; and that it was misleading. The true position - as both counsel knew, but the judge did not know - was that Mr. Morgan had been asked to give evidence on behalf of the prosecution; and had been asked to do so in circumstances in which he was promised that, if he did so, he would not be prosecuted as an accomplice. Mr. Morgan's signature was on the two relevant invoices by way of confirmation or acknowledgment that the goods, in the quantities shown on the invoices, had been received. Mr. Morgan had changed his evidence on the question whether or not he had checked the goods against the invoices; and so it was plainly necessary for the judge to consider with care whether he believed him when he said at trial that he had not done so.

7. The judge addressed that issue in his judgment of 3 April 2012 (at paragraphs 113 and following). He said that, having reviewed all the evidence, he found that the Cayman Bakery products on invoices 826508 and 826509 were never received by Foster's Food Fair, airport branch; and that he accepted Mr. Morgan's evidence that he never checked to see if the items on those invoices matched the delivery that was made to Foster's on the day. The judge accepted Mr. Morgan's explanation that in

panic he had lied to his employers and to the police in the interest of preserving his job. He admitted that he made a previous statement to the police which was untrue and inconsistent with the evidence he gave at the trial; in the course of which he contradicted his previous statements. At paragraph 117 of his judgment, the judge said this:

> "When considering Mr. Morgan's reliability as a witness I must take into account these inconsistencies and also Mr. Morgan's explanation for them. It is for me to judge the extent and importance of the inconsistencies. If I conclude that Mr. Morgan has been inconsistent on an important matter I should treat both of his accounts with considerable care. If, however, I am sure that one of Mr. Morgan's accounts is true in whole or in part then it is evidence that I may consider when deciding on my verdict."

The conclusion which he reached after considering Mr Morgan's reliability as a witness was that Mr. Morgan was now telling him the truth.

8. The factor which the judge did not take into account when considering Mr Morgan's reliability as a witness – and could not have taken into account, because he did not know of it - was that Mr. Morgan was giving evidence for the prosecution because he had been promised that he would not, himself, be prosecuted as an accomplice. It may be that the judge would have come to the same conclusion – that, notwithstanding earlier inconsistent statements, he would treat Mr Morgan as a witness of truth – even if he had been able to take that factor into account; but it is impossible to be sure that he would have done so. He did not know a very material fact; and he could not put that fact into the balance when considering the issue which he needed to address. If he had been sitting with a jury, he would have had to direct the jury in relation to that fact (if he had known of it); and he needed to be able to direct himself in relation to that fact. He did not do so because he did not know of the promise which had been made to Mr Morgan; and he did not know of that promise because neither counsel had told him. Indeed, the point had been raised in the course of Mr. Morgan's evidence; he had given a misleading answer; and neither counsel had alerted the judge to the true position. The judge did not receive the assistance from counsel which he was entitled to expect.

9. The two factors together lead us to the conclusion that the judge's verdict in this case after a trial must be regarded as unsafe. In reaching that verdict the judge took into account material (the interview notes) which should not have been before him; and

did not take into account material (the promise made to Mr Morgan) which should have been before him.

10. We are asked by the prosecution to take the view that, given the other evidence in this case (described by the prosecution as overwhelming) - this Court should reach the conclusion that no substantial miscarriage of justice has actually occurred. We do not feel able to reach that conclusion. Whether or not Mr. Bryan would have been convicted in any event, he did not receive a fair trial to which he was entitled.

11. In those circumstances we allow the appeal against conviction on the first count. We quash the verdict on that count: we set aside the sentence on that count; and we are minded, subject to any submissions that may be made to us, to direct a new trial on that count.