2253/2000

IN THE CAYMAN ISLANDS COURT OF APPEAL

C.I.C.A. (Criminal) No. 26 of 2001
(Indictment No. 69 of 2000)

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

KEVIN DAWKINS

Appellant

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Honourable Mr. Justice G. Collett, Justice of Appeal
The Honourable Mr. Justice I. Rowe, Justice of Appeal

Laurence Aiolfi instructed by Walkers for the Appellant.
The Solicitor General, Samuel Bulgin, and Cheryll Richards for the Respondent Crown.

Heard: August 21st 2001 Reasons released: November 30th 2001

REASONS FOR DECISION

ZACCA, P.

On August 21st 2001 we allowed the appeal, quashed the conviction and set aside the sentence. In the interests of justice the court ordered a new trial. We promised to put our reasons into writing and this we now do.

The appellant was charged with the offence of accessory after the fact to escaping custody contrary to sections 111 and 308 of the Penal Code (1995 Revision). The particulars of the offence stated: "Howard Antonio Edwards having committed an arrestable offence on or about the 28th day of October 1999, namely escaping custody from Northward Prison, Kevin Dawkins, knowing or believing that the said Howard Antonio Edwards, had committed the said offence, without lawful authority or reasonable excuse, did on the 29th day of October 1999, in George Town, Grand Cayman, in his capacity as an immigration officer, process and clear for departure from the Cayman Islands Howard Antonio Edwards who was then using the false identity of Kenya Burnett with intent to impede the apprehension or prosecution of the said Howard Antonio Edwards.

In view of our decision to order a new trial, it will only be necessary to set out the evidence relied on by the Crown briefly. Howard Antonio Edwards had escaped custody from Northward Prison. He was seen shortly after, on the afternoon of Friday, October 29th 1999 at the home of Marlene Gillings. The evidence was that Marlene Gillings, Kenya Burnett, Cedley Walters and other persons assisted Edwards with transport from that home in Prospect to the airport and with the purchasing of a ticket for him to leave the Island. Cedley Walters was a baggage man at the airport. He spoke with the appellant who was on duty that night as an immigration officer. After all the passengers had been processed, the appellant spoke to Walters and Edwards was then processed as a passenger leaving the Island by the appellant. The allegation was that Edwards used the passport of Kenya Burnett in order to leave the Island. In processing passengers each immigration officer is assigned an exit stamp and a C stamp. The C stamp is used to stamp the pink immigration form on departure. On that night the appellant was using stamp number 34. His

colleague Denise Myles was using stamp number 20. The appellant was the only officer using green ink. Edwards was processed by the appellant as the last passenger for departure but he used the exit stamp of Myles to certify the passport. The date on the exit stamp in the passport was October 29th 1999 but the date on the corresponding pink slip was stamp dated October 30th 1999. There were obvious irregularities in the documents presented and the Crown alleged that the appellant ought to have detected them. One obvious irregularity was the photograph of Kenya Burnett in the passport.

The Crown alleged that the actions of the appellant suggested knowledge and participation on his part in the plan to assist Edwards to leave the Island. At the close of the prosecution case, the appellant chose not to give any evidence. He remained silent.

Several grounds of appeal were before the court but it will only be necessary to refer to two of them.

(1) The trial judge failed to direct the jury as to how they were to treat the statement given by the appellant.

(2) The trial judge incorrectly told the jury that the appellant had given no evidence and that there was therefore no evidence to contradict anything that had been stated by the prosecution witnesses.

Counsel for the appellant submitted that the trial judge failed to assist the jury as to how they were to approach and treat the interviews given by the appellant to the police. He argued

that they contained mixed statements and that it was obligatory on the trial judge to direct the jury as to how they were to consider the interviews.

It is conceded that nowhere in the summing-up does the trial judge refer to the interviews as containing mixed statements, nor does he give any directions as to how they were to be treated and considered by the jury. At the close of the case for the Crown, counsel for the appellant indicated to the judge that she wished to make submissions in the absence of the jury. During the submissions the trial judge at page 230 stated:

> "The statement that he has made to the police is not evidence in the case but something that they are allowed to take into account. I never believe in the .They are to take it into account as a whole, is I think the best direction to give and the modern practice."

However in his summing-up the trial judge whilst dealing with the interviews given by the appellant by referring to the questions asked and the answers given, and suggesting inferences that could be drawn adversely to the appellant, failed to direct the jury as to how they were to treat and consider the interviews as a whole.

We are satisfied that the interviews can be regarded as mixed statements including inculpatory and exculpatory statements. It was therefore necessary for the trial judge to assist the jury by directing them as to how they should deal with the statements.

In *R. v. Sharp* [1988] 1 All E.R. 65, it was held that where a statement made out of court by a defendant in criminal proceedings is in fact an admission and in part self-exculpatory, the

whole of the statement constitutes evidence of the truth of the facts it asserts and the judge should direct the jury that both the incriminatory parts and the excuses or explanations must be considered in determining where the truth lies, although where appropriate, as it will usually be, the judge may, and should, point out that the incriminatory parts are likely to be true whereas the excuses do not carry the same weight.

Lord Havers at page 71 stated:

> "My Lords the weight of authority and common sense lead me to prefer the direction to the jury formulated in *R. v. Duncan* 73 Cr App R 359 to an attempt to deal differently with the different parts of a mixed statement. How can a jury fairly evaluate the facts in the admission unless they can evaluate the facts in the excuse or explanation? It is only if the jury think that the facts set out by way of excuse or explanation might be true that any doubt is cast on the admission, and it is surely only because the excuse or explanation might be true that it is thought fair that that it should be considered by the jury. I agree with Lawton L.J. that a jury will make little of a direction that attempts to draw a distinction between evidence which is evidence of facts and evidence in the same statement which whilst not being evidence of facts is nevertheless evidentiary material of which they may make use in evaluatory evidence which is evidence of the facts. One only has to write out the foregoing sentence to see the confusion it engenders."

This view was adopted and followed by this court in *R. v. Randall* 1992-93 CILR 522; *R. v. Walton*, *R. v. Bodner* 1990-91 CILR 272.

The learned trial judge ought to have told the jury that the whole statement including the excuses and explanations must be considered by them in deciding where the truth lies. There was therefore a non-direction amounting to a mis-direction and in effect took away from the jury

their consideration of the exculpatory statements in deciding where the truth lies. This would in itself lead to the court allowing the appeal and quashing the convictions.

Counsel for the appellant also submitted that the learned trial judge incorrectly told the jury that there was no evidence given on the part of the appellant to contradict the evidence of the Crown witnesses. This was therefore a misdirection which would also lead this court to quash the conviction.

The learned trial judge in his summing-up at page 317 directed the jury as follows:

> "Secondly, the accused has chosen not to give evidence. You must not draw any adverse conclusion about that, but, but it is important to remember that the fact that he has not given evidence, ladies and gentlemen, means that there is no evidence before you to contradict anything that any prosecution witness has said."

In his interview, the following questions and answers appear:

> "Q.: I am suggesting that you actively participated in facilitating the flight from Cayman of Howard Edwards also known as Johnny, at the instigation of Reds, and you tried to cover your participation by using the stamp assigned to officer 20 in order to hide the fact?
>
> A.: That is not true sir.
>
> Q.: I am suggesting to you that you did use her stamp and it was to hide your participation in assisting Johnny to escape from Cayman?
>
> A.: That is not true."

The appellant was clearly relying on the exculpatory parts of his statement to the police. The cases cited above clearly show that the exculpatory part of his statement should have been left to the jury for their consideration. To direct the jury that there was no evidence given by the appellant to contradict the statement given by Crown witnesses was to effectively withdraw from the jury their consideration of the exculpatory parts of the appellant's statement.

In the case of *Alexander von Stark*, Privy Council Appeal No. 22 of 1999, Lord Clyde in delivering the judgment at page 7 stated:

> "The function and responsibility of the judge is great and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to ensure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them."

It was therefore incumbent on the trial judge to leave for the consideration of the jury the entire interview in deciding whether or not the appellant was guilty of the charge. This was what the appellant relied on for his defence. It is therefore inappropriate and incorrect to tell the jury that there was no evidence on the part of the appellant to contradict the evidence given by the

Crown witnesses. This was therefore a misdirection and sufficient to warrant the court quashing the conviction of the appellant.

For these reasons we arrived at the decision as stated above.

Zacca, P.

Rowe, J.A.

Taylor, J.A.