In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2016: 19

VALISA HOLDER

Appellant

-v-

FIONA MILLER
(Police Sergeant)

Respondent

JUDGMENT

(in Court)

Appeal against conviction in Magistrates' Court-importation and possession with intent to supply of controlled drugs-failure to record adequate findings-whether substantial miscarriage of justice occurred-whether fair to conclude appeal hearing without appellant's counsel

Date of hearing: September 12, 2016, February 16, 2017
Date of Judgment: February 23, 2017

Ms. Auralee Cassidy, Kairos Philanthropy, for the Appellant[1]
Ms. Victoria Greening, Office of the Director of Public Prosecutions, for the Respondent

[1] Counsel did not appear for the Appellant at the resumed hearing on February 16, 2017.

Introductory

1. The Appellant appeals against her conviction on November 30, 2015 in the Magistrates' Court (Wor. Tyrone Chin) on charges of importation of a controlled drug and possessing a controlled drug with intent to supply contrary to sections 4(3) and 6(3) of the Misuse of Drugs Act 1972. The Appellant was charged on an Information dated December 18, 2014 with committing these offences on September 10, 2014. The drug involved was cannabis and quantity of the drug was just over 1100 grams with a street value of between $19,000 and $55,000.

2. The facts of the present case fell into an all too familiar pattern. A passenger arrives at the Bermuda International Airport and collects her luggage in the Customs Hall. She is stopped by Customs. The luggage (here an air mattress) is searched. Illicit drugs are found in the luggage. These mere facts create a compelling case against her. She is charged, pleads not guilty, tried and convicted. The result is unsurprising and the evidence is rightly characterised by Crown Counsel as "overwhelming".

3. Against this background, the present appeal raised the following short point. Can the failure to explicitly record adequate findings for a conviction in and of itself constitute sufficient grounds for a successful appeal?

4. I also give reasons for my decision to conclude the hearing of the appeal, which was adjourned because the Appellant's counsel was afforded almost all of the allotted hearing time to address the Court on September 12, 2016, in the absence of the Appellant's counsel on February 16, 2017.

The trial in the Magistrates' Court

5. Ms. Greening rightly pointed out that the trial was a long one. There were only four live Prosecution witnesses and the Appellant herself gave evidence. Yet the trial spanned 14 days, the sort of time which might be occupied by a murder trial involving one defendant in the Supreme Court. The length of the trial was, in part, attributable to the generous amount of time afforded to the Appellant's counsel. The Learned Magistrate's impressively detailed notes paint the following picture:

    - Forensic Support Officer Perinchief was asked 54 questions in examination-in-chief by Crown Counsel, and 86 questions in cross-examination;

    - Customs Officer Simons was asked 131 questions in examination-in-chief by Crown Counsel, and 227 questions in cross-examination;

- Acting Detective-Sergeant Bundy was asked 97 questions in examination-in-chief by Crown Counsel, and 87 questions in cross-examination;

- Prosecution witness Robinson was asked 29 questions in examination-in-chief by Crown Counsel, and only 12 questions in cross-examination.

6. Bearing in mind that the Appellant did not dispute importing the air mattress containing the drugs into Bermuda and the only issue at trial was the defence that she did not know the drugs were in the mattress, the only real issue was whether her defence raised a reasonable doubt about the Appellant's guilt. Officer Simons' evidence was that the Appellant told him during the search that her friend Robinson called the Appellant in Atlanta and asked the Appellant to purchase the mattress for her. However, the Appellant's case at trial, as put to Robinson (who testified that she asked the Appellant to purchase school supplies), was that the Appellant occasionally purchased gifts for Robinson, which was not denied. The incriminating weight of this lie, if accepted as such, about how she came to be in possession of the mattress doubtless explains why the bulk of the cross-examination focussed on attempting to demonstrate that the evidence of Officer Simons was unreliable. He also crucially testified about her nervousness and attempts to distance herself from the mattress when she was initially stopped and questioned.

7. The Defendant's own evidence was simply that she bought the mattress at Walmart while visiting with a cousin, never opened it and could not explain how the drugs came to be inside a brand new package. This was consistent with her Police Interview in which she stated that these purchases were left unattended for a time at a private home in Atlanta before she returned to her hotel. Oddly, she testified that everyone in her shopping group of 5-6 people bought an air mattress because they were on sale for a good price. She said Officer Simons was lying in his account about her demeanour during the search. The Appellant agreed that she had no Walmart receipts on her arrival at the Airport although she did have an old receipt in her pursue from an earlier purchase there on a previous trip. According to the Judgment, during her evidence the Appellant "*was warned more than several times for shouting and crying which the Court strongly perceived was purely for dramatic effect.*"

8. The Learned Magistrate in a 16-page judgment carefully reviewed the evidence, identified what he considered to be important points and ultimately concluded:

> "*The Court having taken all the evidence* [into account] *finds the Defendant, Valisa Holder, guilty beyond reasonable doubt*…"

The Grounds of Appeal

Ground 1: the Learned Magistrate failed to apply the correct test in rejecting the submission of no case to answer

9. This complaint was in substance unarguable. There clearly was a case to answer based on the undisputed parts of the Crown case. The Appellant did not dispute that she brought the air mattress containing the drugs into Bermuda. Section 32 of the Misuse of Drugs Act 1972 provides:

> "*(1) Without prejudice to any other provision of this Act—*
>
> *(a) where it is proved that a person imported anything containing a controlled drug it shall be presumed, until the contrary is proved, that such person knew that such drug was contained in such thing;*
>
> *(b) where it is proved that a person had in his possession or custody or under his control anything containing a controlled drug, it shall be presumed until the contrary is proved, that such person was in possession of such drug…*"

10. Ms Cassidy made the first supplementary complaint that insufficient reasons were given for the rejection of the no case submission. In my judgment in this legal and factual context it was adequate for the Learned Magistrate to simply record, as he did, as follows:

> "*The Court rules that it has heard sufficient evidence to rule that the Defendant…does have a case to answer. The Court does not support the Defendant's application for No Case to answer.*"

11. Complaint was also made about Officer Simons being permitted to refresh his memory from his statement about the precise nature of the conversation he had with the appellant after he decided to search her. Prior to this, as Crown Counsel pointed out, he had already stated that she was nervous and claimed to be bringing the air mattress for her niece. The witness was permitted to do so after explaining that he prepared his statement immediately after the search (it subsequently emerged that this statement was based in part on notes recorded by another officer).

12. Other complaints were made about the reliability of the evidence which I find had no material bearing on the soundness of the ruling that the Appellant had a case to answer.

Ground 2: no adequate findings and/or reasons were recorded for the decision to convict

13. This complaint had the following strongly arguable limbs to it:

(a) no express legal findings were recorded as to the elements of the offence and the Court's finding on each issue;

(b) the Learned Magistrate misdirected himself as to the burden of proof.

14. The first limb of the argument is well founded in a factual sense. There is no concise express statement of the elements of the offence in the Judgment and nor express findings made in relation to each element. The second limb is, to some extent supported by passages in the Judgment which can be read as suggesting that the Learned Magistrate expected the Appellant to adduce positive evidence of her innocence. The criticised passages were unhappily expressed. Yet there is an important express finding that the charges were proved beyond reasonable doubt. A fair reading of the remarks made about the absence of evidence being adduced by the Appellant of certain matters is merely that the Learned Magistrate was indicating the sort of evidence which might have raised a reasonable doubt in his mind.

15. Moreover at the conclusion of the trial Ms Cassidy tendered written closing submissions which clearly set out what the elements of the offence were and pointed out the obvious fact that the crucial issue was the element of knowledge. She did not at trial advance a plausible argument in support of the proposition that the section 32 presumptions did not apply. So it was not disputed that the Appellant was required to at least raise the lack of knowledge defence as an evidential issue.

16. Meanwhile, Ms Greening's closing submissions took the Learned Magistrate through the elements of the offences and reinforced what the crucial issues in dispute were. After going through the key aspects of the evidence relied upon by the Crown, she concluded with the submission that the Court should be left in no doubt that the charges were proved.

17. In summary, the Appellant's counsel was able to demonstrate a technical breach of the following provisions of the Criminal Jurisdiction and Procedure Act 2015 which came into force on November 6, 2015, shortly before the November 30, 2015 Judgment:

> "83.(5)*The record of proceedings must include the magistrates' court's final judgment in writing, which will include—*
>
> *(a) the point or points for determination;*
>
> *(b) the decision made on such points; and*
>
> *(c) the reasons for the decisions.*"

<u>Ground 3: the decision was against the weight of the evidence</u>

18. This wholly untenable ground was sensibly not pursued.

Findings: merits of appeal

19. Procedural provisions in criminal statutes are generally construed as requiring substantial rather than full compliance absent plain language indicating that strict compliance is required. The Criminal Appeal Act 1952 explicitly prescribes how this Court should approach a situation such as the present appeal where technical defects with the Judgment have been established but this Court is not left with a lurking doubt that any substantial error of law or procedure occurred which affects the substance of the result:

> "*18(1) Subject as hereinafter provided, the Supreme Court in determining an appeal under section 3 by an appellant against his conviction, shall allow the appeal if it appears to the Court—*
>
> *(a) that the conviction should be set aside on the ground that, upon a weighing up of all the evidence, it ought not to be supported; or*
>
> *(b) that the conviction should be set aside on the ground of a wrong decision in law; or*
>
> *(c) that on any ground there was a miscarriage of justice;*
>
> *and in any other case shall dismiss the appeal:*
>
> *Provided that the Supreme Court, notwithstanding that it is of opinion that any point raised in the appeal might be decided in favour of the appellant, may dismiss the appeal if it appears to the Court that no substantial miscarriage of justice in fact occurred in connection with the criminal proceedings before the court of summary jurisdiction.*"[Emphasis added]

20. The Judgment in this case was written in somewhat of an idiosyncratic manner from which only after a careful reading it was possible to extract implicit findings which ought to have been recorded explicitly. The main purpose underlying the statutory requirement to record findings and reasons for a decision in the Magistrates' Court is to enable the party against whom adverse findings have been made (and an appellate court) to (a) confirm that the decision was arrived at in a legally regular manner, and (b) to understand why the case of the disappointed party has been rejected. When the Judgment in the present case is read in light of the record as a whole, there can be no question that in substance the requirements of section 83(1)(c) of Criminal Procedure and Jurisdiction Act 2015 were met in the Appellant's case.

21. This was a comparatively straightforward case in relation to commonly prosecuted offences involving a single disputed issue. There is in these circumstances no basis for doubting that the Learned Magistrate applied the correct legal test as to the ingredients of the offences and the burden of proof in relation to compelling Prosecution evidence and a strikingly implausible defence. I am not left with any lurking doubts about the safeness of a conviction in a case where the circumstantial evidence of the Appellant's guilty knowledge was quite compelling and it is difficult to see how the Learned Magistrate could properly have reached any other result.

Reasons for refusing Appellant's application to adjourn to obtain counsel for the conclusion of the appeal

22. The appeal hearing concluded without the Appellant being legally represented because her counsel of record was overseas and her intended holding counsel failed to appear. Her own counsel had fully addressed the Court at the initial hearing and the resumed hearing primarily took place to allow Crown Counsel to complete her response. The reason why the Appellant's counsel's submissions overran the allotted time estimate was largely due to my own interventions aimed at affording her the fullest opportunity to identify any substantial prejudice flowing from the technical deficiencies which I accepted had occurred. Ms Cassidy, despite valiant efforts to turn straw into gold, was unable to identify any substantial complaints. Ms Greening's concluding submissions at the resumed hearing dealt mainly with the record and no new law was cited which would have given rise to a right of reply.

23. In these circumstances I considered that there was no good reason for adjourning this longstanding matter any further and that there was no material risk that a reasonable bystander might perceive that justice was not seen to be done.

Conclusion

24. For the above reasons the appeal is dismissed. This matter is remitted to the Magistrates' Court for sentencing and (subject to hearing Crown Counsel) I would extend the Appellant's bail until such dated as she is required to attend the Magistrates' Court.

Dated this 23rd February, 2017 _____
IAN RC KAWALEY