The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 8 of 2017

B E T W E E N:

DETRE FORD

Appellant

-v-

THE QUEEN

Respondent

Before: **Baker, President**
Kay, JA
Bernard, JA

Appearances: Larry Mussenden and Larissa Burgess, Office of the Director for Public Prosecutions, for the Appellant/Respondent
Susan Mulligan, Christopher's, for the 1st Respondent/Appellant
Richard Horseman, Wakefield Quin Ltd, for the 2nd Respondent

Date of Decision: **16 November 2017**
Date of Reasons: **18 December 2017**

REASONS

BERNARD, JA:

Introduction

1. On 17th May, 2017 the Appellant, Detre Ford, was convicted of the offence of aggravated burglary contrary to Section 340(1)(a) of the Criminal Code Act, 1907, and the offence of possession of a prohibited weapon contrary to Section

2(1)(a)(iv) of the Firearms Act, 1973. On 4th October, 2017 he was sentenced to 12 years imprisonment on Count 1, and 8 years on Count 2, both counts to run concurrently and an order was made under section 70P of the Criminal Code. On 16th November 2017 we dismissed his appeals against conviction and sentence and we now give our reasons.

Background

2. On 1st July, 2016 Wakeem Philpott, the co-defendant and another man unlawfully entered the home of Gregory Wade at 25 Barracks Close, St. Georges. The other man had in his possession a dark-coloured block gun which he pointed at the Complainant as Philpott attempted to rob him. Apparently, the weapon jammed and both men fled the scene. Philpott was later seen getting into a black motor car which sped away. The driver of the car was identified as the Appellant who was charged with aggravated burglary and possession of a prohibited weapon.

3. The Appellant advanced nine grounds of appeal, but the central points argued before us related to the judge's refusal to adjourn the trial and issues relating to the Appellant's mobile phone.

The Adjournment Issue

4. Up until shortly before the start of the trial, the Appellant was represented by Mr. Marc Daniels. Regrettably, and for reasons that it is unnecessary to explore, Mr. Daniels went with the Appellant to the scene of the burglary where they met Mr. Wade and another prosecution witness, Mr. Tuzo. This was in breach of the Appellant's bail conditions and resulted on 2nd May, 2017 in Mr. Daniels ceasing to represent the Appellant. The trial was scheduled to begin six days later on 8th May. Later on 2nd May Ms. Mulligan was invited by Mr. Daniels to take over the Appellant's representation. She met the Appellant on 3rd May. On 4th May Ms. Mulligan applied to Greaves J for the trial to be adjourned on the ground that she had inadequate time to prepare the case. The application was refused.

No transcript is available of the proceedings on that day or of the judge's decision, but we were told the judge was anxious to maintain a busy Court calendar; the case was not complicated and there were four days before the start of the trial. It is also the case that the co-defendant, Philpott was in custody.

5. On the morning of 8th May, Philpott, having earlier pleaded guilty to Counts 1 and 2, pleaded guilty to the third Count, namely, unlawfully discharging a loaded firearm. Ms. Mulligan renewed her application for an adjournment, asking that no evidence be called until Wednesday, 10th May. The judge ruled that the case should begin the following day, 9th May which it did. Following the midday adjournment Ms. Mulligan was unwell and the Court adjourned, resuming on 11 May.

6. Ms. Mulligan argued that the defence was prejudiced by the judge's refusal to adjourn the trial because she had inadequate time to explore various avenues of inquiry, such as locating witnesses in the area at the time of the offence and seeing if there was any relevant CCTV footage. Such lines of inquiry seem to us to be highly speculative as to whether anything relevant would be discovered, and in any event they are all matters which, if relevant, could have been pursued by Mr. Daniels.

7. A decision whether or not to grant an adjournment is *par excellence* a matter for the discretion of the judge, and the Court of Appeal will be very slow to interfere with his decision. He has many interests to consider, including those of litigants in other cases. Nothing was drawn to our attention to suggest that Greaves J exercised his discretion on any wrong principle.

THE MOBILE PHONE ISSUE

8. Among the items found in the car was the Appellant's mobile phone. When it was examined there was no activity after 1.34 p.m. That was the evidence of the prosecution's analyst, Loryn Bell. The burglary took place at approximately 2:50

p.m. The prosecution case was that the lack of activity was consistent with the Appellant being a party to the burglary. His defence was that he had nothing to do with the burglary and that by chance Philpott had thumbed a lift. He was in the locality because he had been to Tobacco Bay to meet a friend called Josh whom he'd tried to contact on his phone. When he gave evidence he was challenged about why, in those circumstances, there was no activity on his phone after 1.34 p.m.

9. Ms. Mulligan summarised her complaint in this way:

> *"The trial judge erred, in the absence of evidence being called by the Crown through either the cellular phone service provider or a qualified expert, by inviting the jury to speculate and draw inferences from their own cellular phone bills and by highlighting his own understanding of cellular phone records in order to contradict the Appellant's evidence.*
>
> *These errors were compounded when the judge told the jury during the course of the Appellant's evidence, that if (he) really wanted the jury to know what was in his locked phone the phone was in court and he was the one with the password, thereby reversing the onus and planting the idea in the jury's head that (he) had something to hide on his phone."*

10. Loryn Bell's evidence was that call data records relating to the Appellant's phone showed no outgoing or incoming communications after 1:34 p.m. When Loryn Bell was cross-examined it was not suggested that a call that did not connect would or might not be recorded by the phone activity log. Nor was any issue raised with the prosecution that the evidence of Ms. Bell, or the findings in her report, fell short of what was required. It was only when the Appellant gave evidence that it was suggested that an attempted call would not be shown on the activity log. As this was part of the defence case, albeit on a relatively peripheral issue, it should have been put to Ms. Bell.

11. When the judge summed up he said this at p.77:

> *"Now, you've heard argument put by the prosecution suggesting that the reason for the silence on the phone was because of the participation of the defence, the Defendant in the crime, as the watchman and transporter. And they are saying that you should reject his assertion, in his evidence, that he tried to call Josh, and it didn't get through because Josh said he note had no money on his phone.*
>
> *But you are experienced people, with cell phones, and you might or might not know whether, when you make a call and it does not connect, whether it is still shown on your bill, on the data that comes out from the phone, the people that send it to you.*
>
> *I don't know if you might see, for example, no seconds, or what, when it relates to that call. I don't know if on the bill, if you see, as the exhibit here shows, that it has codes that indicate what happened. Did it connect? Did it not connect. Did it go to voicemail? I don't know. You look at the exhibit and you will see. You are entitled to use your experience in these matters, in assessing this evidence, without importing evidence into the case."*

12. The judge returned to the subject when dealing with the Appellant's evidence. He said this at page 91:

> *"He was challenged on why the -----there was no further communication on the phone, despite him saying, and he said he did try to contact Josh, once he got to St George, and he knew he would have got into St. George somewhere 'round three o'clock, near three o'clock, 'cause----well, 2.30 or so 'thereabouts, 'cause we know that the ----we know that the CCTV from----from by the pub, roundabout starts at 2.18.*
>
> *All right? And there are no communications, according to the Prosecution, by way of exhibit, after 1.34. And he gave an answer to that. But you would think that if he was going to meet Josh, at Tobacco Bay, and he got there*

and didn't see Josh, that it might not have been sufficient to ask Tia if she see this fella with locks.

You might think if you were expecting to meet a man there, who you talked to, who you phoned from time to time, you'd been in contact, which he admits, you would call the man and say, where are you?

What's going on? The prosecution said there's no evidence at all to support that. Now he doesn't have to provide any evidence, but the prosecution says there's none. All right. I said he doesn't have to provide any evidence, and you heard that the phone was locked, so the police could not get at WhatsApp messages, if there were any WhatsApp messages. But we have the phone there, produced. Still there. Could open it. Unlock it.

I do not know that you need to go out there anyhow, to look at that kind of evidence."

13. Ms. Mulligan complained that the judge was in effect inviting the jury to speculate and do their own research and that he was in effect importing evidence into the case. She also made the point that during the Appellant's evidence the judge told the jury that if the Appellant really wanted them to know what was on his phone, he was the one with the password, the phone was in Court and he could easily unlock it. This, she argued, was tantamount to directing the jury that the onus of proof was on him to prove there were calls on his phone.

14. It is understandable why the judge approached matters as he did because it was not apparent that there was an issue about the phone records until the Appellant gave evidence, and that there was an issue that should have been made clear in cross-examination of Loryn Bell. Ms. Mulligan raised the subject at the conclusion of the summing up and the judge then gave the jury the following further direction at pages 116 to 119:

"……It is contended by the Defence that the issue relating to the absence of calls on the data provided by Mrs. Loryn

Bell, in relation to the Defendant---remember that issue? The Prosecution's contention that there was no evidence that the Defendant made any call to Josh…….or anyone, for that matter, after 1.34; in other words, they're saying that the last call would have been prior to his even entry into St. George, because you know by 2:18 he was by Swizzle Inn. All right? Goodie.

And so I think the Prosecution's suggestion on that is, look, this whole Josh story is a lie. Makes no sense, that he's gone to Tobacco By, asking a woman about if she see a man with locks, or whatever it is, but no evidence that he made any call about "Josh, why you not here?" Right? Goodie. And the Defence position is, on that, that the – remember he testified, the issue came up when he testified, right, and he said, in response, I think, to the Prosecution, when she put the question to him, he said, Well, I tried to contact but it didn't connect, because he, like, he didn't have any minutes.

The Defence contention is that the Prosecution could – that to draw an inference that there was no call or no connection is wrong. They are saying that's not a reasonable inference to draw, because the Prosecution could have asked Mrs. Bell if the service provider had provided her with data in relation to attempted calls. Right? And the Prosecution did not do so, and therefore the Defence contention is, there is no evidence of what data – what that data would have -- if that data could have shown attempted calls. Right? So that's a matter

for you that you might consider one, whether, whether it's important or not is a matter for you.

As I remember Ms. Bell's evidence, though, she said her instructions was to look at all the activity of that phone, from day A to date B. I don't remember the exact time, but it was that time spanning on that day, up to the time that he came into Police custody. Right? And this is what she has.

So the Prosecution say, on that you can draw a reasonable inference that he didn't make any attempted call. That's what they are saying.

The Defence is saying, No, you can't make that inference. All right? Goodie.

Two. In relation to the unlocked phone, you remember that the evidence is that the phone was unlocked -- was locked, so that Mr. Richardson could not get into it to see if, for example, there was WhatsApp data, and those kinds of data, Messenger, WhatsApp, et cetera, et cetera. Right? He could only retrieve the data from the SIM card. You remember that? All right.

And when I was summing up to you, I told you, Well, look, if they wanted to contend, right, that there would be – the WhatsApp thing on the phone was available; who got the lock? Right?

> *The problem with that, however, is that you should be cautious not to put any weight on that. I don't think it is important anyhow. Right? The simple reason is this. I have directed you also that the Defendant is under no duty to prove anything. He doesn't have to provide you, the Prosecution or you or anybody, with any evidence that he sent a WhatsApp message to anybody. You understand? The burden of proof doesn't reverse to him. Right? So he didn't have to unlock the phone to show that he did make a message or not. It's the Prosecution who has to disprove it.*

15. The judge finally returned to the subject at p. 121, line 9:

> *From a prosecution's perspective, their contention is about the call data, again with that absence call, and they are saying that how could they have asked Miss Bell about this call, when it was the Defendant that raised the issue about bringing in this call. There was no issue about any call after. It was the Defendant who raised it while he was on the stand. All right.*

16. Any prejudice to the defence was remedied by the judge's further direction after Ms. Mulligan had raised the matter with him. The problem would never have arisen if the issue had been raised with Ms. Bell in cross-examination. One option would have been to recall her after the Appellant raised the subject in his evidence, but that may have been impractical. In the end it was perfectly clear to the jury that the jury they had to try the case on the evidence and there was no burden on the defence. It was, of course, open to them to draw appropriate inferences on such evidence as they had heard.

The Other Grounds of Appeal

17. The remaining grounds of appeal although not formally abandoned were not vigorously pursued by Ms. Mulligan. It is alleged in Ground 4 that the jury was kept late in the day and that the judge rushed through the defence evidence which was heard about 5 pm on the day before the jury retired. No written or oral submissions were made in support of this Ground. The judge's summing-up began at 2:38 p.m. on 16th May and the jury was sent home at 5.07pm. They returned the following morning at 9:39 a.m. for the judge to conclude his summing up before they retired at 9:56 a.m. The judge dealt fully with the Appellant's evidence and his case in his summing up. Nothing was drawn to our attention to suggest his evidence was rushed by the judge.

18. Ground 5 complains that the judge made comments to the jury about counsel wasting time, calling needless witnesses, asking pointless questions and making comments that would have tainted the jury's view of the Appellant. This ground was never particularised with relevant transcript references and is therefore unsubstantiated. The same is true of Ground 7, a complaint about the burden of proof.

19. Ground 8 challenges the judge's direction on the drawing of inferences and contends that the judge should have directed the jury that where circumstances are capable of supporting two inferences, they should draw the one most favourable to the defendant. In our view the judge's direction that before convicting on circumstantial evidence they should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution's case, was adequate for the present case. It was not suggested to us what particular circumstances were capable of supporting two inferences and justified the direction sought.

20. The final ground of appeal is that the judge should have upheld the "no case" submission and in particular that there was no evidence linking the Appellant to the firearm. It was not his case that he was a party to the burglary but knew nothing about the firearm. In truth there was a very strong case against the Appellant.

21. The Appellant went to Philpott's home on the morning of the offence (an unusual event). Shortly before the burglary, the Appellant's car was seen close to, and apparently in convoy with, a motor cycle matching the description of that used by one of the burglars. Soon after the burglary, one of the burglars was seen getting into a car that matched the description of the Appellant's car. Soon thereafter the Appellant's car was stopped by the police with Philpott in the front passenger seat carrying the concealed firearm.

22. When stopped the Appellant gave false information to the police, including denying that he knew Philpott. In Philpott's pocket were a pair of gloves matching those in a box in the rear of the Appellant's car. Also, in the car were two white shirts, accepted by the Appellant to be his that matched the description of shirts used by Philpott to disguise himself during the burglary.

23. Philpott admitted he was one of the burglars and at Hamilton Police Station the Appellant was covertly recorded pressurising Philpott to tell the police that the Appellant had nothing to do with the offence.

CONCLUSION ON CONVICTION

24. The Appellant gave evidence and the jury had an opportunity to hear from him his account of events and to form their view of his credibility. We were satisfied the conviction is safe and accordingly dismissed his appeal.

SENTENCE

25. There were two issues on the sentence appeal. The first was whether the sentence was manifestly excessive, and the second was whether the judge was justified in making an order under Section 70P of the Criminal Code.

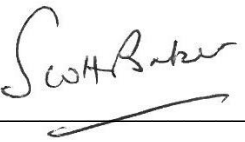
26. Philpott was sentenced to a total of 10 years imprisonment and the judge had to consider the question of disparity bearing in mind Philpott's plea of guilty and the fact that the Appellant's role did not involve entering the property. The judge concluded that the Appellant was, however, a planner of the enterprise and there was no mitigation of a plea of guilty in his case. Furthermore, the Appellant was not of previous good character. In particular he was sentenced to 5 years imprisonment in 2009 for burglary with a weapon and 18 months imprisonment consecutive for unlawfully causing bodily harm to a prison officer.

27. Burglary of residential premises with a firearm is an offence that necessarily carries a very heavy sentence. The Appellant had no mitigation and a previous record. There is nothing excessive about the sentence of 12 years imprisonment.

28. Section 70P of the Criminal Code provides that where an offender receives a sentence of imprisonment for two years or more on conviction on indictment, the Court may, if satisfied, having regard to (a) the circumstances of the commission of the offence; and (b) the character and circumstances of the offender that the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires, order that the portion of the sentence that must be served before the offender may be released on licence is one-half of the sentence or 10 years, whichever is the less.

29. As My Lord Kay pointed out in argument the test in Section 70P is a very broad one. The operation of the Section was discussed by this Court in *Caines v The Queen [2015] Bda LR 6.* The learned judge plainly had the relevant criteria in

mind, and in our judgment was right to make the order. For these reasons we dismissed the appeal against sentence.



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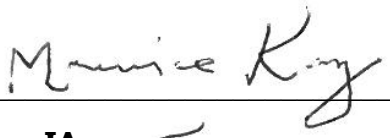
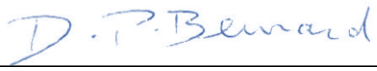


Kay JA



Bernard JA