[2018] SC (Bda) 15 App (20 February 2018)

In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2017:058

ART SIMONS

Appellant

-v-

FIONA MILLER
(Police Sergeant)

Respondent

JUDGMENT

(in Court)

Appeal against conviction-prison officer-conviction for possession with intent to supply of cannabis and cannabis resin and attempting to import articles into a prison in breach of prison rules-adequacy of judicial findings and reasons-whether substantial miscarriage of justice-whether convictions should be quashed altogether or retrial ought to be ordered-power to substitute conviction for lesser offence- Criminal Procedure and Jurisdiction Act 2015, section 83(1)(c)-Criminal Appeal Act 1952, section 18

Date of hearing: February 12, 2018
Date of Judgment: February 20, 2018

Mr Craig Attridge, C. Craig S. Attridge, for the Appellant
Ms Jaleesa Simons, Office of the Director of Public Prosecutions, for the Respondent[1]

[1] Neither counsel appeared in the Court below at trial.

Introduction and Summary

1. The present appeal, viewed broadly, required this Court to decide what the minimum standards of a fair criminal trial in the Magistrates' Court require and where the line should be drawn between (1) merely technical errors and procedural defects which can safely be ignored, and (2) errors and defects in the proceedings which undermine the safety of a conviction.

2. In my judgment, this case firstly requires the Court to give deference to the Appellant's fair hearing rights by allowing the appeal and quashing the convictions, despite the fact that the Prosecution case was potentially a strong one. The present case secondly requires the Court to give deference to the public interest in allowing the Prosecution to decide whether or not one or more of the serious charges laid should be retried.

3. The Appellant appealed against his conviction on November 15, 2016 in the Magistrates' Court (Wor. Archibald Warner) following a trial on both counts on the Information upon which he was charged on February 27, 2015. It was alleged that on January 11, 2015, in Sandys Parish, the Appellant:

   (1) had in his possession cannabis intended for supply contrary to section 6(3) of the Misuse of Drugs Act 1972;

   (2) had in his possession cannabis resin intended for supply contrary to section 6(3) of the Misuse of Drugs Act 1972; and

   (3) attempted to introduce five specified articles into Westgate Correctional Facility in contravention of prison rules.

4. Following an abortive initial appeal against conviction which was dismissed on a without prejudice basis, the Appellant was sentenced on July 25, 2017 to serve 15 months imprisonment on Counts 1 and 2, respectively, and six months imprisonment for Count 3, all sentences to run concurrently. No appeal was filed against these sentences.

5. In brief, the Prosecution case was that the Appellant, while employed as a Prison Officer, brought a bag of toiletries containing illegal drugs into the Westgate Correctional Facility ("Westgate") and left the package in a prisoners' shower area. Various prison officers gave evidence broadly supportive of the Prosecution case and the Appellant himself made partial admissions before the trial (both at Westgate and

to the Police) at which he did not give evidence in his own defence. What might have seemed a straightforward case was made complicated by a defence which seemed superficially nonsensical and yet, because of its 'all or nothing nature', resulted in important issues which the Court needed to consider not being addressed by counsel. Count 3 was imperfectly drafted and yet given little more than a passing mention in argument and in the final Judgment.

6. Three grounds of appeal were advanced. Each of these was supplemented in oral argument by reference to the statutory duty imposed on the Magistrates' Court to record the issues to be decided and reasons for deciding those issues: section 83(1)(c) of Criminal Procedure and Jurisdiction Act 2015. It was argued that inadequate findings were recorded in the following respects:

   (1) the crucial finding that Exhibit 9 was the package the Appellant brought into the Prison was not adequately justified, and was expressed in terms which suggested a reversal of the burden of proof. The most cogent complaint here was that no mention was made about the possibility that a key Prosecution witness was a co-conspirator and the impact of this on the reliability of his evidence;

   (2) the Judgment failed to adequately explain what lies were relied upon as supporting an inference of guilty knowledge. This complaint drew force from the fact that no distinction was made between lies motivated by guilty knowledge about the 'contraband offence' and guilty knowledge about the drug offences;

   (3) no clear finding was made in relation to the Defence submission that the absence of DNA evidence entitled the Appellant to the benefit of the doubt.

7. Grounds 1 and 2 have been made out as regards each of Counts 1and 2 on the Information. No separate arguments were advanced in respect of Count 3. The errors established clearly go to the root of the convictions on the drugs charges and those convictions must be set aside. I accept the Respondent's submission that these charges are sufficiently serious for the public interest to dictate that the matters should be remitted to the Magistrates' Court to be retried, if the Director of Public Prosecutions sees fit to do so.

8. The success of Ground 1 has the following effect on the safeness of the Appellant's conviction on Count 3. The conviction must clearly be set aside to the extent that it relates to the items which the Appellant disputed bringing in (all but one of the items particularized in the charge), because no proper finding was reached that the

Appellant brought Exhibit 9 (the 'Dial' shower gel container and its contents) into the prison at all. The Prosecution should be afforded an opportunity to decide whether they wish to pursue a conviction for a substantially similar version to Count 3 or to seek a conviction on a diluted version of the original charge. Not only have the distinctive characteristics of this offence never received the benefit of full argument. The precise factual and legal basis on which the conviction was entered cannot reliably be identified.

9. Accordingly the conviction on Count 3 as well as Counts 1 and 2 are set aside, and the entire matter is remitted to the Magistrates' Court to be retried, if necessary, before a reconstituted Court.

The proceedings in the Magistrates' Court[2]

10. The Prosecution case advanced the following important evidence:

- at around 7am on January 12, 2015, Officer Bailey charged with carrying out a search of a specific area within Westgate with a dog found a white plastic bag with blue writing (shown in photographs to be a "Buy Bermuda" bag) on it in the shower area which contained shower gel and deodorant. Under cross-examination, he agreed that officers sometimes gave prisoners such items;

- the Appellant's partner (B) on the night in question saw him with a plastic bag at around 9pm on January 11 before their night shift started. After hearing of contraband being found, this partner called the Appellant to find out what he knew about it. The Appellant said he had brought the package in for a prisoner at the request of a girl on Parsons' Road and he hoped there was nothing in it (the witness denied the suggestion that the Appellant said he "knew" there was nothing in it). After being told that he would have to prepare a report to his superiors, the Appellant then said that he had initially brought in the toiletries for himself, and then later decided to leave them in the shower area because he didn't like the scent of the shower gel;

- under cross-examination B agreed that in his own report about that shift, a different prisoner to the one the Appellant initially said he had brought the toiletries for had been asking about toiletries he was expecting from T, another prison officer on duty in the same area on

[2] Of the Court's own motion certain witnesses' names have been anonymised to avoid unwarranted reputational damage and/or to reduce the risk of interference with them before any retrial.

the same shift. B also stated that the same prisoner had asked the same question on January 9 and 10, 2015, but he saw no need to report this as it was not unusual for prison officers to obtain permission to bring such articles for prisoners. He also agreed that he saw T entering the relevant section of the prison with a large brown shopping bag at around 9.55pm on the night of January 11, 2015;

- Chief Officer Downy participated in the search in which the plastic bag containing a Dial body wash container in which suspicious material was found and led the internal investigation. He met the Appellant on January 14, 2015 and received his Report. The Appellant looked worried and said he needed his job. He explained that he had originally brought the items found in the shower for himself (he would occasionally shower before leaving work) but decided to leave them for prisoners after discovering he did not like the scent. Under cross-examination he agreed that he did not have the items actually found during the search with him when he interviewed the Appellant, so he did not show him the bath gel in question. He confirmed that the Appellant had lost his job because he had admitted bringing goods into prison without permission. He also agreed that when he prepared his own Report on this incident he recorded a recommendation that T should be investigated;

- T was on duty during the same shift and, at around 10pm on the evening in question, was told by the Appellant that he had brought in shower gel and deodorant for a prisoner. T told the Appellant that he did not trust such items and the Appellant responded that he had checked both items and even squeezed some of the gel out of its container. The Appellant had the deodorant in his hand at this juncture and T could see its cap. T explained the brown paper bag he was seen with contained his own food: fillet fish and salad. The latter point was supported by a more senior officer who gave him permission to take the food to the area in question;

- T denied suggestions in cross-examination that he had substituted another shower gel container as part of his plan to make a delivery to the prisoner who spoke to B about expecting toiletries from T. He denied ever seeing the shower gel that the Appellant brought in but agreed that he saw the deodorant and that it had a clear cover. He denied that the Appellant told him that he was only leaving the toiletries in the prisoner's shower area because he did not like the smell of the gel;

- Acting Detective Sergeant Bundy interviewed the Appellant under caution on February 10, 2015. He agreed under cross-examination that the Appellant suggested that, *inter alia*, T's DNA might be on the articles in the package. He further stated that DNA samples were taken from the Appellant but that testing was never carried out due to "budgetary constraints". The interviewing Officer did not himself see any of the Exhibits, including the Dial shower gel, and agreed that the Appellant told him in the interview that he bought Tone bath gel and Dial deodorant from a lady vendor in Parson's Road;

- In his interview under caution, the Appellant accepted that the deodorant found had been brought in by him, but insisted that he did not bring in Dial bath gel and that his DNA would not be found on the item in which the contraband was concealed.

11. The following points were raised by Mr Richardson for the Defence at the end of the trial:

    - was the shower gel discovered the same one the Appellant left in the shower?

    - Was B credible?

    - T was not reliable and his own behaviour was suspicious;

    - if the Court was to rely on lies, it was necessary to find that a lie had been told and exclude innocent explanations;

    - any doubts about the DNA issue should be resolved in favour of the Appellant (reference was made to *Leo Simmons-v-The Queen* [2015] Bda LR 118, in which I ruled that an express finding on the implications of the failure to carry out DNA tests was required).

12. No notes were made by the Learned Magistrate of any submissions in respect of Count 3 by either counsel. The Magistrates' Court was apparently not assisted in any material way to consider the difference between the first two and the third charges both legally and factually. This made it difficult (if not impossible) for the Learned Magistrate to appreciate the significance of a very plausible defence to the drugs charges which was not explicitly advanced.

The Judgment of the Court

13. The Learned Magistrate correctly identified the main issue in the case as being whether or not the Dial body-wash or shower gel found to contain drugs was the package the Appellant admitted bringing into the prison and, if so, whether he knew or had reason to suspect that the article in question contained cannabis and cannabis resin. He carefully identified the case put by the Defence to the two main Prosecution witnesses, and concluded that:

- B was a "*truthful and forthright witness*"; and
- T's evidence, if it was believed, supported B's evidence of his conversation with the Appellant;
- T's cross-examination was "*the focal point of the Defendant's lines of defence*";
- the Appellant lied about a material issue, namely the reason he brought the package into Westgate and the only motive for that lie "*must be*" a realization of guilt;
- in light of the evidence as a whole, if the DNA tests had been carried out and proved that the Appellant's DNA was not on the key Exhibit, this "*would* [not] *change the purport of the evidence against the Defendant*" (the omitted "not" was, on a fair reading of the Judgment, clearly an accidental omission);
- he accepted the evidence of B and T as to where the Appellant told them he got the package from;
- it was improbable that there were two packages, or that someone switched the gels, and he was accordingly satisfied so as to feel sure that the Appellant brought Exhibit 9 into the prison;
- the fact that the Appellant lied to conceal the true reason why he brought the articles into Westgate provided a basis for inferring that he knew or suspected that the shower gel contained drugs.

14. As far as Count 3 is concerned, a summary finding was recorded that, in light of the finding that the Appellant had brought the listed items into Westgate, this charge was also proved.

Ground 1: validity of finding that the Appellant brought Exhibit 9 into the prison based on probabilities

15. Having effectively acknowledged that the "focal point" of the Defence case was the suggestion that T was not a reliable witness because had the opportunity and motive to switch the crucial package, it is surprising that no express finding was made as to T's credibility and his possible involvement in the alleged "switching". The following finding distorted the essence of the Defence case to a material extent:

    "*I find it improbable that the Exhibit 9 found by the prison search party is not the contraband package that Defendant brought in and placed in the shower. Otherwise were two packages placed in the shower? If so one had to be switched out. I find this is improbable.*"

16. This lukewarm conclusion would only have been justified if the Court had also expressly found that, (a) despite the credible B's evidence that another prisoner in the same cell area was expecting T to bring him toiletries within the same broad time-frame, and (b) despite the fact that T (in a very general sense) had the opportunity to carry out such a switch, T was found to be a credible witness and the suggestion that he was the true culprit was unequivocally rejected and accordingly failed to raise any doubts about the matter. The gravamen of the Defence case was that the switching did not happen by coincidence, but by design.

17. If the other prisoner in the same area was around the same date expecting T (a relative) to bring toiletries for him as B (who the Learned Magistrate found to be a credible witness) testified, the idea that T might have had his own shower gel and was waiting for an opportune time to pass it on to the prisoner was not on its face an entirely fanciful proposition. Nor was the implication that (assuming T was himself passing on a more illicit form of contraband than shower gel) that T would have seized the opportunity to distance himself from the guilty package and implicate the Appellant. Of course, this all could of course have been dismissed as little more than an illusion conjured up by a skilful Defence counsel. But bearing in mind that Officer Downey himself noted in his own Report into this incident that he thought T should investigated, as Mr Attridge pointed out, in my judgment the possibility that T switched the shower gels was, based on the Crown's own evidence, an important issue which needed to be dealt with by express findings.

18. It is also impossible to reject the argument, which Mr Attridge crucially relied upon, that the Learned Magistrate's reasoning does not support the pivotal finding that he was satisfied so as to feel sure that the package found during the search was precisely the same one the Appellant had admittedly brought into Westgate. A civil plaintiff's case can be rejected on the grounds that it is improbable because he bears the burden of proving his case on the balance of probabilities. A suggestion raised by the

Defendant in a criminal case which if true would establish his innocence cannot be rejected merely because it is improbable. It can only be rejected if, properly analysed, it fails to raise any reasonable doubt about the Defendant's guilt. Despite the fact that it is obvious that the Learned Magistrate is well aware of the criminal standard of proof, the way in which this crucial finding is articulated (combined with the absence of express findings on the key issues) provides no confidence at all that the issue was approached in a legally valid manner.

19. Ms Simons bravely sought to support the ultimate findings made on this issue by reference to the fact that the Crown case clearly supported the final result. This submission was simply not responsive to the main thrust of this ground of appeal. Even if there was sufficient evidence to support the findings, the Magistrates' Court failed to properly consider a potentially valid limb of the Defence case.

20. This ground of appeal succeeds. This is not because of a mere mistake in terminology. Rather it is because it is impossible to ascertain from the Judgment on what basis the Learned Magistrate rejected the central tenets of the Defence case. No express findings were made on T's credibility or possible involvement in the drugs offences, essential points for determination which:

    - section 83(5) of the Criminal Jurisdiction and Procedure Act 2015 required to be expressly recorded with accompanying reasons; and

    - were sufficiently serious points, in the context of the case as a whole, that they could not reasonably have been rejected merely by implication.

Ground 2: knowledge and suspicion that Exhibit 9 contained illegal drugs and a misdirection in relation to lies

21. This ground of appeal complained that, most importantly, the Learned Magistrate "*failed properly or at all to…give reasoned findings for concluding that the Appellant had lied out of a realization of guilt.*"

22. Ms Simons' response to this ground of appeal as articulated in the Appellant's Skeleton Submissions was almost entirely sound. The Learned Magistrate did not err in law in his approach to the lies issue. His Judgment does explain what he considered to be a lie on a material issue: why he brought in the toiletries and who he brought them in for. The Judgment does explain that the Court concluded that the different versions he gave were motivated a by a realization of guilt.

23. The one issue which the Respondent was unable to contradict was the Appellant's complaint that the Judgment does not expressly record the fact that the Learned Magistrate had considered innocent explanations for the lie. This point was not, to my mind, fully developed in Mr Attridge's written submissions, which only really identified technical rather than substantive aspects of this omission. In fact this point had far more substance to it than initially appeared to be the case.

24. In many cases, plausible innocent explanations for a lie will simply not exist and so the failure to mention them may be merely technical and the defect in the judgment can safely be ignored. As I noted in the course of the hearing, the most obvious and significant innocent explanation for the lie was virtually ignored altogether, both by Defence counsel at trial and (understandably) by the Learned Magistrate in his Judgment. The Appellant may have lied not because he knew or suspected there were drugs in the package he brought in, but because he realised that bringing even toiletries into prison for a prisoner without permission was disciplinary and criminal offence. Or to put it another way, bringing in articles without permission for yourself was a far less serious offence than bringing in articles of any description for a prisoner.

25. The statement which the Learned Magistrate clearly (and unsurprisingly) identified as a lie was what he told his superior officer and the Police: that he had brought in the toiletries for himself and only left them in the prisoners' shower area after he discovered that he did not like the scent of the shower gel. The Learned Magistrate clearly and explicitly accepted the evidence of B as reflecting the true position: the Appellant had in fact been given the toiletries to bring in for a specific prisoner housed in the area where the Appellant agreed he left whatever he brought in.

26. There were several potentially relevant and significant pieces of evidence before the Court which would have supported a potential finding that, despite the Appellant's lie, he did not know or suspect that he was in possession of the illegal drugs in question:

- T testified in his examination-in-chief that when he raised the danger of bringing in things for prisoners, the Appellant told him that he had checked the gel container to make sure it did not contain contraband;

- B testified that the Appellant told him after the search that he "hoped" there was nothing in the toiletries, after having effectively admitted bringing the package in for a prisoner in breach of Prison Rules. It was put to B that the Appellant had said he "knew" there was nothing there;

- if T's account was true and correct, it was believable that B was mistaken and that the Appellant had told B that he "knew" there was nothing concealed in the toiletries he brought in for the prisoner;

- Chief Officer Downey stated that when interviewed, the Appellant expressed concern about his job. The lie was, potentially at least, more consistent with the motivation to minimize the seriousness of a breach of the Prison Act and Regulations and keep his job, than it was to distance the Appellant from the far more serious drugs offences which he realized he had committed and which he ought of have known would have left his future employment position in no doubt;

- the latter point in favour of the accused could of course have been ultimately rejected if the Court had found that the Appellant's apparent concern for his job when interviewed by his superior was itself simply another 'lie' reflecting the Appellant's desire to distance himself even further from what he knew was in the package he had delivered. But no such finding was recorded.

27. It was only properly open to the Learned Magistrate to find that the Appellant lied about how he got the package and who he brought it in for because of a realization of guilt about the drugs that were in the shower gel if he:

    (a) excluded the possibility that he was solely motivated by a realization of guilt in relation to Count 3;

    (b) found that the Appellant lied to both T and B in asserting that he had (i) checked the shower gel and found nothing in it, and (ii) hoped that there was nothing in the package he brought in, respectively; and

    (c) found that when the Appellant was interviewed by Chief Officer Downey, he was engaging in deception and only pretending that he felt there was a prospect of saving his job by contending that his leaving the package for prisoners was a fortuitous rather than premeditated decision.

28. None of these issues were expressly considered or decided in the context of an unusual case where it did not automatically follow that the finding that the Appellant lied about his bringing in the package for a prisoner because of a realization of guilt supported the mental element required to be proved in respect of Counts 1 and 2. It might equally have reflected a realization of guilt in respect of Count 3, and Count 3

alone. It is trite law that an inference can only be drawn against the accused if it is the only reasonable inference from the facts proved.

29. Even though the Defence did not expressly raise these issues by drawing the Court's attention to the distinction between the two sets of charges (perhaps because it was hoped to secure an acquittal on all three charges), in my judgment these were important points for determination which needed to be explicitly decided and explained but which were not. The possibility that the Appellant was in effect a 'patsy' was really what the case was all about.

30. Unhappily for the Learned Magistrate, it does not appear that he was assisted by either counsel to focus on the distinction between the drugs offences and the non-drugs charge. This would have brought greater clarity to the evidential significance of the 'lie'. In the adversarial system, courts are usually entitled to decide cases on the basis of the arguments placed before them. A well-recognised exception in the criminal law sphere is the need to consider potential defences not expressly raised by the accused, a principle which is legally an incident of the burden of proof. Practically the principle is potentially engaged wherever an accused person cannot advance a defence to one charge without effectively admitting another one.

31. In my judgment the distinction between guilty knowledge of drugs and guilty knowledge of other contraband was of fundamental importance to a fair and proper analysis of the question of whether or not the Prosecution had proved that the Appellant knew or suspected that Exhibit 9 contained cannabis and/or cannabis resin for the purposes of Counts 1 and/or 2. This ground of appeal also succeeds.

Ground 3: the absence of DNA evidence made it impossible for any doubt to be resolved against the Appellant

32. Ignoring what was clearly a typographical error in the Judgment, the Learned Magistrate dealt impeccably with the DNA evidence issue in legal terms. In short, he found that even if the DNA samples had been tested and the Appellant's DNA had not been found on the key container, he would still have been satisfied of the Appellant's guilt.

33. Having found that the first two grounds of appeal succeed, it is not necessary to make any formal findings on this ground of appeal. It is not easy to see how the ultimate conclusion reached by the Magistrates' Court on the absence of DNA issue can in any event be properly assessed in the absence of any primary factual findings on the various critical issues identified above.

Disposition of appeal: Counts 1 and 2

34. I have little difficulty in concluding that this is not the sort of appeal where, although errors of law have been made out, the Court could nevertheless dismiss the appeal on the grounds that "*no substantial miscarriage of justice has occurred*" (Criminal Appeal Act 1952, section 18 (1), proviso). The convictions on Counts 1 and 2 can only properly be set aside.

35. More difficult is the question of whether or not the matter should be remitted to the Magistrates' Court for the Appellant to be retried before another Magistrate. This question can perhaps best be considered after the disposition of the appeal against the conviction on Count 3 has been addressed.

Disposition of Appeal: Count 3

36. Count 3 alleged that the Appellant:

> "*3. On the 11th day of January 2015, in Sandy's Parish, attempted to introduce articles namely: 1 'Dial for Men' men's shower gel container, 1 Right Guard' men's deodorant container, 1 'Bleu Scotch' blue tape (hidden inside the Dial Shower Gel container) and three (3) twists containing tobacco (hidden inside the Dial Shower Gel container), into a prison (Westgate Correctional Facility) in contravention of prison rules.* ***Contrary to Section 26(a) of the Prisons Act 1979***".

37. Although no prepared separate arguments were advanced in respect of Count 3, it is self-evident that having upheld Ground 1 of the appeal in relation to Counts 1 and 2, it necessarily follows that the factual basis for part of Count 3 also falls away. If there was no legally valid finding that the Appellant did bring into the prison the 'Dial' shower gel, no corresponding finding was properly made in relation to Count 3 either.

38. In the course of oral argument during the hearing of this appeal, the elements of the offence charged were cursorily explored and it became apparent that Count 3 erroneously charged an attempt; it was clearly understood by all concerned in the trial Court that the complete offence of introducing articles was what was alleged. Section 26(a) of the Prisons Act 1979 provides:

> "*26. Any person—*
>
> *(a) who conveys, introduces, or attempts to convey or introduce, or causes to be conveyed or introduced, any article, commodity or thing into a prison in contravention of prison rules…*
>
> *commits an offence against this Act.*"

39. Ms Simons read out to the Court the following provision in the Prison Rules 1980 in oral argument:

> "*42(1) No person shall without authority convey into or deposit in a prison, or convey out of a prison, or convey to a prisoner, or deposit in any place with the intent that it shall come into the possession of a prisoner, any prohibited high risk article or any money, clothing, food, drink, tobacco, letter, paper, book, tool or other commodity or article whatsoever.*"

40. Reviewing the text of these provisions for the first time having reserved judgment, it is immediately apparent that section 26 as read with rule 42(1) does not create a 'one-size-fits all' offence. It is clear that that section 26(a) of the Act prohibits only bringing or attempting to bring articles into a prison in breach of prison rules. Rule 42 (1) of the Rules prohibits (1) bringing anything into or out of a prison without authority, (2) conveying any article to a prisoner without authority, (3) depositing any article in a place where a prisoner is likely to get it without authority. Only the first of these three ways in which rule 42(1) may be contravened is clearly engaged by both section 26(a) and the facts of this case.

41. To my mind, conveying an article to a prisoner is very arguably a freestanding breach of rule 42(1), as is depositing an article where it is likely to come into a prisoner's possession. It is not self-evident (in fact at first blush it seems improbable) that these separate prohibited acts are intended to be aggravated forms of bringing articles into a prison without authority in breach of section 26(a) of the Act. On the contrary, section 26(b) of the Act creates a separate offence in this regard:

> "*26. Any person-*
>
> …
>
> *(b) who conveys or attempts to convey, or causes to be conveyed, any article, commodity or thing to a prisoner (whether or not within a prison) in contravention of prison rules…*
>
> *commits an offence against this Act.*"

42. A charge under section 26(b) would arguably engage the other elements of rule 42(1) (conveying or attempting to convey to a prisoner). On the face of it, a charge under section 26(b) could involve bringing an article into prison as part of a process of conveying (or attempting to convey) an article to a prisoner, and would represent a

more aggravated form of the simple offence of bringing an article into a prison without authority contrary to section 26(a). Hence, the Appellant in the present case admitted to his superiors that he had brought the toiletries into prison for his own use, asserting that it was only an afterthought occasioned by happenstance that he left in the prisoners' shower area. If his account was true, it would obviously be a less serious offence than bringing in goods intended for a prisoner without permission.

43. Reading the terms of Count 3 in conjunction with the statutory provisions referred to in the charge in a straightforward way, I am bound to conclude that the case against the Appellant ought to have proceeded on the following basis. The Prosecution merely had to prove that the Appellant brought Exhibit 9 (the contents of which are particularized, minus the drugs) into Westgate Correctional Facility. Whether the Appellant's purpose in bringing in the items was to convey them to a prisoner was irrelevant. Subject to the question of whether the Appellant was shown to have brought in the 'Dial' shower gel at all the Prosecution had a 'slam-dunk' case; because the Appellant admitted bringing in the 'Right Guard' deodorant stick. It is regretfully impossible to ascertain from the record what theory of guilt was advanced in respect of Count 3 and on what evidential basis the Appellant was convicted.

44. Mr Attridge made no attempt before the hearing to identify any freestanding ground on which the conviction on Count 3 should be set aside altogether. When I suggested at the end of the hearing that it was an unattractive outcome to set the conviction aside altogether, he made unconvincing attempts to suggest that the Court did not have the jurisdiction to substitute an alternative conviction despite being satisfied that some of the particulars pleaded had been proved. Section 18(2) of the Criminal Appeal Act 1952 provides as follows:

> "*(2) Subject as hereinafter provided, the Supreme Court, if it allows an appeal against a conviction, shall quash the conviction and direct a judgment of dismissal of the information to be entered:*
>
> *Provided that where an appellant has been convicted of an offence by a court of summary jurisdiction and that court could, in respect of the information before it, have convicted him of some other offence, and on the finding of the court of summary jurisdiction it appears to the Supreme Court that the court of summary jurisdiction must have been satisfied of facts which would have justified his conviction of that other offence, then in any such case the Supreme Court, instead of allowing or dismissing the appeal, may substitute for the conviction by the court of summary jurisdiction a conviction of that other offence, and may impose such sentence in substitution for the sentence imposed by the court of summary jurisdiction as may be allowed in law for that other offence so, however, that unless the appellant has appealed against the sentence imposed on him by the court of summary jurisdiction, any*

sentence imposed by the Supreme Court under this subsection shall not be a sentence of greater severity than the original sentence."

45. It is clear from an ancillary provision that the ability to substitute a conviction for another offence includes another part of the same offence. Section 18(4) provides:

> "*(4) Where it appears to the Supreme Court that an appellant who is appealing under section 3 against his conviction though not properly convicted of some offence or part of an offence, has been properly convicted of some other offence or part of an offence, then in any such case the Supreme Court may either affirm the sentence imposed by the court of summary jurisdiction in respect of the conviction, or impose such sentence (whether more or less severe) in substitution for the original sentence, or may otherwise deal with the appellant, in such way as may be allowed in law with respect to the conviction of that other offence, and which appears to the Court to be just:*
>
> *Provided that unless the appellant has appealed against the sentence imposed on him by the court of summary jurisdiction, the sentence imposed by the Supreme Court under this subsection shall not be a sentence of greater severity than the original sentence.*"

46. Accordingly there can be little doubt that this Court possesses the jurisdiction to make the following determinations in respect of the Appellant's conviction on Count 3 on the Information:

    (1) the Appellant was not properly convicted of the offence charged to the extent that the findings reached in relation to his introducing the 'Dial' shower gel and its contents were not properly proved;

    (2) the Appellant was properly convicted of conveying one of the particularised articles, the 'Right Guard' deodorant stick;

    (3) a conviction in relation to that one admitted article could be substituted for the conviction in respect of all articles, which is liable to be set aside.

47. On balance it seems to me to be inconsistent with fairness and sensible case management for this Court to remit Counts 1 and 2 for retrial and to sentence the Appellant now in respect of a diluted version of Count 3. The appropriate sentence for Count 3 can only be determined when it is finally known whether or not he is also to be sentenced in relation to Counts 1 and 2 (assuming he is retried and convicted),

or whether he is only to be sentenced for Count 3 alone. It would also be undesirable for this Court to substitute a lesser conviction based on views as to the terms and effect of section 26(a) of the Prisons Act 1979 as read with rule 42(1) of the Prison Rules 1980 which has not received the benefit of full argument in this Court or in the Court below.

Conclusion

48. It is accordingly clear that although the convictions on all three counts are liable to be set aside, the Information should not be dismissed altogether and the entire matter must be remitted for retrial before a differently constituted Magistrates' Court.

Dated this 20th day of February, 2018 ________________________

IAN RC KAWALEY CJ