The Court of Appeal for Bermuda

CRIMINAL APPEALS No. 9 of 2016

Between:

TYRONE BROWN

Appellant

-v-

THE QUEEN

Respondent

Before: **Baker, President**
Bell, JA
Clarke, JA

Appearances: Ms. Elizabeth Christopher and Arion Mapp for the Appellant
Mr. Larry Mussenden and Christal Hanna, Department of Public Prosecutions, for the Respondent

Dates of Hearing: **14 & 17 March 2017**

Date of Judgment: **12 May 2017**

JUDGMENT

"Police Questioning – Advice from an Attorney – Whether Necessary".

PRESIDENT

1. The facts of this case are simplicity itself. On Sunday 17 April 2016 the Appellant arrived on the evening flight from Miami. He had checked in at Kingston, Jamaica with one suitcase but the suitcase did not arrive with him. When the suitcase arrived the following day on a flight from Philadelphia the customs officers were suspicious. It was searched and inside was clothing and a black bag containing toiletries. Stitched into

the black bag were two bags. One contained 472.6 grams of cocaine, the other 422 grams of cocaine.

2. The Appellant was staying at a guest house named Clearview Villas and when he arrived at the airport he told the American Airlines agent that he had last seen his case when he checked it in in Kingston.

3. On Tuesday 19 April 2016 the police went to Clearview Villas and saw the Appellant. He was arrested, cautioned and told that his missing luggage which had arrived was suspected to contain cocaine. He was asked if he owned a black bag and replied "I own one for one year. It has my toothbrush and perfume in the bag". He said he didn't know anything about drugs. He was arrested on suspicion of importation of a controlled drug, taken to Hamilton Police Station and later charged with the offence.

4. On 31 August 2016, after trial before Scott A.J. and a jury, he was convicted of Importation of a Controlled Drug contrary to section 4(3) of the Misuse of Drugs Act 1972 and on October 2016 he was sentenced to 15 years imprisonment. He appeals against conviction and sentence.

The Conviction Appeal

5. The main issue on the conviction appeal was whether he should have been advised of entitlement to legal advice before being asked if he owned a black bag. His response to that question was plainly incriminating because it linked him to the bag inside the suitcase in which the drugs were found. Efforts were made to exclude this conversation at the trial but the judge rejected them and admitted the evidence referring to section 93 of the Police and Criminal Evidence Act 2006. She said:

> "So, in the circumstances of the case and taking into account PACE, the various codes that were brought to my attention, the case-law and the like I deem that there was no serious breach of anything that took

> place at this time and that the information, the evidence that was collected by the police, to be admitted into court."

6. It is not clear to what extent the point now raised by Ms. Christopher on behalf of the Appellant was argued before the judge, but the judge plainly exercised the discretion given to her by section 93(1) of PACE and concluded that the evidence would not have such an adverse effect on the fairness of the proceedings that it ought to be excluded.

7. The issue of law that we have to decide is whether the Appellant should, at the same time as he was cautioned, have been advised of his right to legal advice and whether, as he was not, the evidence should not have been admitted.

   Section 5(5) of the Constitution provides:

> "Any person who is arrested shall be entitled to be informed, as soon as he is brought to a police station or other place of custody, of his rights as defined by a law enacted by the legislature to remain silent, to seek legal advice and to have one person informed by telephone of his arrest and of his whereabouts."

   It will be noted that this right comes into play as soon as the person is brought to a police station or other place of custody.

8. It is necessary to turn next to the Criminal Code Act 1907.

   Section 461 is headed: "Duties with respect to detention and disposal of persons arrested." It provides:

> "It is the duty of a person who has arrested another person upon a charge of an offence to take him, with as little delay as possible, before a court of competent jurisdiction to be dealt with according to the law, and in the meantime to keep him in safe custody at a police station, or to convey him to a prison if so directed by a Justice of the Peace or by a police officer not below the rank of inspector."

Section 461A is headed: "Right of arrested person to silence and to obtain legal advice". It provides:

> "A person who has been arrested by a police officer or any other person for or in connection with the commission of any offence is not obligated to say anything; and is entitled to obtain legal advice."

Section 461B is headed: "Rights of arrested persons held in custody". It provides:

> "When any person has been arrested and is being held in custody in a police station or other premises he shall be entitled to have notification of his arrest and of the place he is being held sent to one person reasonably named by him without delay, or where some delay is necessary in the interest of the investigation or prevention of crime or apprehension of offenders, with no more delay this is necessary."

9. Mr. Mussenden, Director of Public Prosecutions, who appeared for the prosecution points out that section 461A is silent as to the point at which the person should be told of this entitlement and indeed whether the entitlement arises before the person is taken to a police station. He submits that it is necessary to look at the Police and Criminal Evidence Act 2006 ("the 2006 Act"), the Codes of Practice, the Judges' Rules and authorities for further assistance.

10. .Sections 58-61 of the 2006 Act spell out the rights of an individual in Bermuda. Section 58 says that a person who has been arrested shall, as soon as he is brought to a police station, be informed of his rights under sections 59, 60 and 61. Section 59 provides that a person who has been arrested is not obliged to say anything. Section 60 covers the right of a person who has been arrested and is being held in custody in a police station or elsewhere to have someone informed and section 61(1) provides that:

> "A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a barrister and attorney privately at any time."

11. The remaining provisions of section 61 all deal with detail and are not relevant to the present issue save that they are all directed to circumstances in which the person is arrested and held in a police station or other premises. It is in my view of note that the right to be told about the rights under sections 59-61 is triggered as soon as the person is brought to a police station.

12. Mr Mussenden reminded us that the Codes of Practice in force in Bermuda are Codes A, B, D, E and F, but not Code C, which is the code for the detention, treatment and questioning of persons by police officers. Therefore it is necessary to look at the Judges' Rules which were in force in England and Wales before Code C see e.g. *Peart v The Queen* [2006] UKPC 5 There are five principles underlying the Rules, the fifth of which is overriding. It states :

> "That it is a fundamental condition of the admissibility in evidence against any person equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority or oppression"

It is also relevant to mention the third principle.

> "That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so."

13. Relevant to the present case is Rule 2, which provides that a person should be cautioned as soon as the police officer has reasonable grounds for suspecting him of having committed a criminal offence. Thereafter he may be questioned, but there is no obligation under the Rules to provide access to legal advice. But as Lord Carswell pointed out in *Peart*, judicial power is not limited by the Rules and the court may refuse to allow in

evidence a prisoner's statement even if the terms of the Judges' Rules have been followed. The bottom line is fairness.

14. The issue of access to legal advice has arisen a number of times in the cases. In *Attorney-General of Trinidad and Tobago and Anr v Whiteman* [1991] 2 AC 240 the Privy Council was concerned with the constitution of Trinidad and Tobago. Lord Keith of Kinkel, giving the judgment of the Judicial Committee, said at 247E:

> "The language of a Constitution falls to be construed, not in a narrow and legalistic way, but broadly and purposively , so as to give effect to its spirit, and this is particularly true of those provisions which are concerned with protection of human rights. In this case the right conferred by section 5(2)(c)(ii) upon a person who has been arrested and detained, namely the right to communicate with a legal adviser, is capable in some situations of being of little value if the person is not informed of the right."

15. Lord Keith concluded at 248D that persons who have been arrested or detained have a constitutional right to be informed of their right to communicate with a legal adviser both upon a proper construction of section 5(2)(h) of the Constitution of 1976 and on the basis of a settled practice existing when the Constitution was introduced. He endorsed the observation of Davis J.A. in the Court of Appeal:

> "I am not prepared to lay down any general rule as to the precise point in time when a person in custody ought to be informed of this right, but it should be as early as possible, and in any event before any 'in-custody interrogation' takes place"

He then added that it was possible to envisage circumstances where it would not be practicable to inform a person of his right immediately upon his arrest and that it was incumbent upon police officers to see that the arrested person is informed of his right in such a way that he understands it. The mere exhibition of notices in the police station is insufficient.

16. We were referred to the Bermuda authority of *R v Flood and Ors* [2005] Bda L.R 3 in which Greaves. J gave a ruling on a *voir dire*. That was a case in which there were several serious errors on the part of the police and none of the statements made by the defendants was admitted in evidence. The judge having considered the authorities, including *Whiteman*, then said this about the right to legal advice:

> "Applying, the above authorities I would say therefore that in Bermuda a person, arrested or detained by the Police, has a constitutional right (and a statutory right) to be informed, and the police have a duty to inform that person, as soon as is reasonably practical of his constitutional right to consult an attorney–at–law. The police are under duty to inform that person in a language that he understands, and should do so before he is interrogated. That is so whether he is detained at a police station or any other place. In some cases that mere service upon him of a (prisoner's rights) form may not be enough if he does not understand it. If this legal right is breached by the police, especially if deliberately, it may render any resulting admissions by the detainee inadmissible. The admissibility of such admissions obtained upon such a breach is a matter for the discretion of the trial judge…"

17. Another case which Ms. Christopher relied on was *R v Osborne and Cann* [1994] No. 62 in which Meerabux J. ruled that certain statements by one of the defendants were inadmissible. That case, however, involved statements made during a "preliminary conversation" with the defendant at the Hamilton Police Station after he has been detained and I do not think that it adds anything to the authorities. The defendant's constitutional rights as well as his right under the Judges' Rules were plainly breached.

18. Mr Mussenden submitted that the questions asked of the Appellant and the answers given by him at Clearview Villas did not amount to an interview because he was not being held in custody at a police station or other premises. This submission however only takes his argument so far.

The questions and answers at Clearview Villas, whilst not attracting the necessary requirements and formalities of an interview at a police station, could nevertheless fall with the ordinary meaning of an interview. This seems to me to raise the question at what point one or two questions and answers amounts to an interview. The police are not in my view entitled to interrogate a suspect on arrest or in the course of taking him to a police station in such detail as to amount to what would ordinarily have occurred after his detention in custody at the police station.

19. By declaration of the United Kingdom under article 63 of the European Convention on Human Rights, the Convention applies to Bermuda. Whilst the Convention cannot trump an express provision of the Bermuda Constitution, its terms are capable of informing its interpretation: see *Minister of Home Affairs v Fisher* [1980] AC 319, 28. It is therefore necessary to see what assistance can be found in the jurisprudence relating to article 6 of the Convention.

20. In the course of her reply Ms. Christopher referred the Court at length to the judgment of the Supreme Court of the United Kingdom in *Ambrose v Harris* [2011] UKSC 43. *Ambrose* is an important case because the Court considered in detail the ambit of its own judgment in *Cadder v HM Lord Advocate* [2010] SC 43 and the European Court of Human Rights decision in *Salduz v Turkey* [2008] 49 EHRR 421. The evidence that was in question in *Cadder* had been obtained when the appellant was in custody at a police station before he was interrogated during his detention by officers of the anti-terrorism branch of the Izmir Security Directorate

21. In *Ambrose* there were three references before the court. All involved incriminating answers to questions put by the police to accused without access to legal advice and before being held at a police station. The most

relevant of the references for present purposes is the third. The accused, G, was indicted for drug and firearms offences. The police, having obtained a search warrant, forced entry to a flat in which they found G. He was handcuffed following a struggle and cautioned. He was then detained and searched. Prior to being searched he admitted to having drugs in his jeans' pocket from which a bag of brown powder was recovered that was later found to be heroin. He was arrested for contravention of section 23(4) of the Misuse of Drugs Act 1971. He was not arrested or charged with any other offence during the course of the search. During the search he was asked questions about the items that were found. He was not offered access to legal advice before being asked these questions. Following the search he was taken to a police station, detained and again interviewed in connection with the alleged offences involving drugs and firearms, again without access to legal advice. The Crown did not seek to rely on his answers given during the interview at the police station but did on those given during the search. The defence contended that admission in evidence of what he had said during the search was incompatible with his Convention right to a fair trial.

22. The Supreme Court accepted the defence contention. It was conceded that G was a suspect from the time of his first admission of possession of a quantity of heroin in his jeans. It followed that he had been 'charged' for the purposes of article 6 by the time the police began their search. Although he had not yet been formally arrested and/or taken into police custody there was a significant curtailment of his freedom of action. He was detained and had been handcuffed. The circumstances, said Lord Hope, were sufficiently coercive for the incriminating answers that he gave to the questions that were put to him, without access to legal advice, about the items to be found to be inadmissible. Lord Hope, however, importantly went on to say at para 72 that the same result need not follow in every case where questions are put during a police search to a person who is taken to have been 'charged' for the purposes

of article 6. In the absence of indications of coercion the question would be whether, taking all the circumstances into account, it would be fair to admit the whole or any part of the evidence.

23. Lords Brown Dyson and Matthew Clarke all gave judgments concurring with Lord Hope. Lord Brown observed that the critical question was whether the rule in *Cadder* applied to anything said by an accused in answer to police questioning before he is detained at a police station, providing only that at the time of such questioning he is already a suspect and 'charged' within the meaning of article 6 of the Convention. Lord Brown expressed disappointment that the court did not have any intervention on behalf of the England and Wales prosecuting authorities and noted that the provisions governing the position in England and Wales sat uneasily with the absolute rule in *Cadder*. He noted in para 81 that in Canada, just as in England and Wales, there is no absolute rule that applies to exclude incriminating evidence obtained in breach of a constitutional right to legal advice.

I have looked carefully at the judgments in *Ambrose* to see whether there is any tension between article 6 compliance as there described in relation to access to legal advice, and the position in domestic law in Bermuda. I have concluded that there is not. Although the Constitution speaks only of the right to legal advice once a person has been brought to a police station, it seems to me plain that there will be cases in which in order to accord both with the domestic law in Bermuda and to be article 6 compliant a suspect will need to be informed of this right at an earlier stage. In my judgment however the present case is not one of those cases. The facts are clearly distinguishable from those in G. In particular, the element of coercion is not present. The Appellant was cautioned and the initial questions involved no more than a repeat of information previously given by him. The one question to which objection is taken was whether he owned a small black bag to which he answered

in the affirmative and that he'd had it for about a year and that his toothbrush and perfume were in it. He had, appropriately, been cautioned, but chose to answer the question. The judge applied the fairness test under section 93 of PACE. She properly exercised her discretion and admitted the evidence.

Error in Summation

24. The final ground of appeal against conviction, on which leave refused by the single judge, is that the judge erred in her summation by directing the jury that the Appellant had identified some of the items in the black bag. The judge made it perfectly clear to the jury that the black bag was never shown to the Appellant to identify (see summation p.97). This was in order to correct a possible misunderstanding arising from what she had said earlier at p.91. There is nothing in this point and it does not warrant leave to appeal.

Ruling that there was a Case to Answer

25. The one ground of appeal on which leave was given by the judge is that she should have stopped the case on the basis of no case to answer. The appellant checked his suitcase in when he left Kingston. He travelled to Bermuda via Miami but the bag was delayed and arrived the following day. Inside was a black bag into which were secreted drugs. When asked if he owned a black bag he said he did and it contained toiletries. Nothing could be plainer in my judgment than that there was a case to answer but the appellant chose not to give or adduce any evidence. Not only did the suitcase have identifying tags, the Appellant reported its delay to the airline when it failed to arrive.

26. At the same time, but following her ruling that there was a case to answer, the judge gave a ruling on an abuse of process issue that had arisen. Ms. Christopher sought to rely on some observations made by the

learned judge during that ruling but they had nothing to do with the no case ruling that she had already completed.

Sentence

27. The judge imposed a total sentence of 15 years' imprisonment. She arrived at the figure in this way. Her starting point was 11 years which she reduced by one year to 10 years in light of the Appellant's previous good behaviour. She then added a 50% uplift of 5 years under section 27B of the Misuse of Drugs Act 1972.

28. In *Stewart v R* [2012] Bda L.R. 18 the Appellant was convicted of importing just under four kilos of cocaine with a street value of between $424,500 and $735,000. The Court of Appeal refused the Crown leave to appeal but noted that apart from mitigation, which the judge took into account, the sentence would have been 18 years. In the present case the quantity of cocaine was rather less than a kilo and had a street value of between $95,700 and $132,000. In *R v Cox* [2005] Bda L.R. 47 Mantell J.A. said that it was well recognised that in cases of commercial importation of crack cocaine the starting point following a trial was unlikely to be less than 12 years.

29. In *Bean and Simons v R* [2014] Bda L.R 30 sentences of 15 and 12 years' imprisonment for conspiracy to import cocaine were not appealed. The quantity was nearly two and half kilos but there is no indication of its street value. Nor is there reference to any uplift.

30. In my judgment the appropriate procedure for arriving at the correct sentence is set out in *R v Tucker and Simons* [2010] Bda L.R. 39 by Zacca P. at para 16:

> "The proper procedure would be for the trial judge to fix the basic sentence. We understand this to mean the appropriate sentence for the offence charged after

> considering all the circumstances of the case including discounts if any. Having fixed that sentence the section provides that fifty percent of that figure should be added to the basic sentence."

31. The learned judge correctly followed that procedure in the present case, although absence of previous convictions is not ordinarily regarded as a mitigating factor in contested drug importation cases. So the Appellant might be regarded as fortunate to have had the basic sentence reduced from 11 years to 10. She observed that drug abuse is prevalent in Bermuda and that the message needs to go out that offences of the present kind will attract substantial sentences. I agree. That plainly was the view of Parliament who have imposed a maximum penalty of life imprisonment for this offence and in cases like the present where a determinate sentence is passed a 50% percent uplift.

32. It is true that the street value of the drugs in the present case was substantially less than in *Stewart*. On the other hand this was commercial importation and I note the observation of Mantell J.A in *Cox*. In the circumstances I do not think the sentence of 15 years was manifestly excessive.

33. I would accordingly dismiss the appeals against conviction and sentence.

Signed

Baker, P

I agree

Signed

Bell, JA

I agree

Signed

Clarke, JA