[2020] JMCA Crim 46

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CRIMINAL APPEAL NO COA2019PCCR00015

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE FRASER JA

VALDANO SMITH v R

Kemar Robinson for the appellant

Orett Brown and Daniel Kitson-Walters for the Crown

29 September 2020

FRASER JA

Introduction

[1] By this appeal the appellant, Valdano Smith, seeks to set aside his conviction and sentence for the offence of possession of cocaine contrary to section 8B(1) of the Dangerous Drugs Act. He stood trial for this offence together with his co-accused Anthony Robinson before the Parish Court for Kingston and Saint Andrew (Criminal Division). His co-accused was also tried for the offence of trafficking in cocaine. The trial commenced on 22 May 2018. On 12 April 2019 the appellant and his co-accused were both found

guilty of the offence of possession of cocaine and his co-accused was additionally found guilty of trafficking in cocaine.

[2] On 28 June 2019 the appellant was sentenced to pay a fine of $1,000,000.00 or imprisonment for nine months at hard labour. His co-accused was also sentenced to pay a fine of $1,000,000.00 or imprisonment for nine months at hard labour on the charge of possession of cocaine. In respect of the offence of trafficking in cocaine, his co-accused was sentenced to nine months' imprisonment at hard labour suspended for two years.

[3] The appellant was initially also charged together with his co-accused for the offence of conspiracy to export cocaine contrary to common law. However, after they were sentenced as indicated on 28 June 2019, the Crown offered no evidence against them both for that offence. They were accordingly found not guilty of the offence of conspiracy to export cocaine by the learned Judge of the Parish Court (LJPC) and discharged for that offence.

The grounds of appeal

[4] The appellant filed four grounds of appeal:

> a. "The learned [Judge of the Parish Court] erred when she did not uphold the no case submission on behalf of the Appellant therefore denying the Appellant a not guilty verdict;
> b. The learned [Judge of the Parish Court] erred when she relied on the evidence of the appellant's co accused as the basis to convict the Appellant;
> c. The evidence does not support a verdict of guilty. The learned [Judge of the Parish Court] failed to properly assess the evidence and arrive at a verdict based on the evidence adduced; and
> d. The learned [Judge of the Parish Court] failed to take into consideration the good character of the Appellant in determining

> her verdict and though brief mention was made this was insufficient in law."

The trial

The Crown's case

[5] On 22 January 2016, Detective Sergeant (Det/Sgt) Pencle of the Major Organized Crime and Anti-Corruption Branch (MOCA) received a briefing at MOCA from Detective/Superintendent Anderson, Director of Operations at MOCA, in relation to a possible narcotics operation. Det/Sgt Pencle then, in turn, briefed a team of three other police personnel comprising Detective/Corporal Denzil Willie, (Det/Sgt) Berry and (Det/Sgt) Barnett. After this briefing, Det/Sgt Pencle and the team left MOCA together in an unmarked service vehicle and travelled to Hampton Green, Saint Catherine. There, Det/Sgt Pencle observed the appellant who was not previously known to him, boarding a black Toyota Delta motor car. Det/Sgt Pencle did not see the appellant with anything when he saw him board the Toyota motor car. The appellant drove off. Det/Sgt Pencle followed the appellant to March Pen Road, Saint Catherine. The appellant stopped under a tree next to a blue Honda CRV motor car that was along the roadway. Det/Sgt Pencle lost sight of the appellant. However, he saw when the Honda CRV motor car drove off towards Kingston. Det/Sgt Pencle followed the Honda CRV to White Marl, Saint Catherine and then to the drop off area at the Norman Manley International Airport (NMIA).

[6] Det/Sgt Pencle observed a uniformed police officer approach the Honda CRV motor car and speak and gesticulate to the occupants. Det/Sgt Pencle noticed that the appellant

was seated in the front passenger seat and the appellant's eventual co-accused whom he, Det/Sgt Pencle, also did not know before, was seated in the driver's seat.

[7] After four minutes of observation Det/Sgt Pencle and his team approached the Honda CRV motor car. Det/Sgt Pencle told the appellant and his co-accused that he had reason to believe they possessed drugs inside the vehicle. The appellant and his co-accused were asked to exit the vehicle. They complied and were searched. They were asked if there was anything illegal inside the vehicle. The appellant said he had nothing to declare and not that he was aware. The co-accused said go ahead and 'do your thing'. The car was searched in the presence of both the appellant and the co-accused by Detective/Corporal Willie. A travel bag was found on the back seat of the car behind the driver's seat. The bag containing 20 parcels of cocaine weighing 21 pounds 15.51 ounces in total.

[8] Detective/Corporal Willie asked the co-accused to whom the bag belonged and he responded he did not know. When the appellant was asked if the package belonged to him, he replied that the bag did not belong to him. The co-accused subsequently said they were coming from March Pen where the appellant had placed the bag into the car. The appellant, the co-accused and the officer Constable Dyke, who had come up to the Honda CRV and spoken to the appellant and the co-accused, were all arrested. After questioning, Constable Dyke was released and the appellant and his co-accused arrested and charged.

The defence cases

[9] The appellant made an unsworn statement in which he indicated that he went to March Pen Road. There he boarded the co-accused's Honda CRV motor car to accompany him to the airport, in order that he, the appellant, could retrieve his licensed firearm from a colleague who worked at the airport.

[10] At the airport he and the co-accused were accosted by a team of police. The police found a bag containing cocaine in the motor car. He disclaimed knowledge of the bag. He denied hearing the co-accused saying that it was his bag. He indicated that, had he heard, he would have denied the claim immediately. A character witness was called in support of his defence.

[11] The co-accused testified in his defence. He maintained that the travelling bag was put into the Honda CRV motor car by the appellant. His testimony was supported by the evidence of two witnesses. These witnesses stated that they saw the appellant put the travel bag into the Honda CRV motor car at March Pen Road.

Submissions

[12] Counsel for the appellant, in written submissions, emphasised that there was insufficient evidence on the Crown's case for the LJPC to have properly concluded that the appellant had physical custody or control of the bag or its contents. Further, that there was no evidence led by the prosecution that the appellant had knowledge, whether directly or inferentially, of the bag or its contents. Consequently, the no case submission should have been upheld. Counsel also submitted that, while as an exception to the

general rule evidence given in court on oath by one accused can be used against another accused, that could not properly be the only basis on which the appellant was convicted. Additionally, the LJPC had not warned herself of the fact that the co-accused was an accomplice or had an interest to serve and hence the LJPC had failed to demonstrate that his evidence was scrutinised with great care.

[13] Counsel further advanced that the LJPC had not properly assessed the evidence to arrive at a reasoned decision. Finally, counsel maintained that the LJPC had not adequately taken into account the good character of the appellant, in that, as a person of good character he was less likely to have the propensity to commit the offence for which he had been charged.

[14] Counsel for the respondent, in the highest traditions of the bar, conceded that the appellant was entitled to succeed on all four grounds advanced by counsel for the appellant, as there was insufficient evidence to vest possession or the inference of guilty knowledge in the appellant. Additionally, the LJPC had not demonstrated that the good character of the appellant had been properly taken into account.

Discussion

[15] Grounds 1 and 3 may conveniently be considered together. On the Crown's case the bag was never seen in and was not found in the physical custody or control of the appellant. It was found in the motor car owned, driven and under the control of the co-accused at all material times, behind the driver's seat. The co-accused alleged that the bag belonged to the appellant. The appellant did not immediately contradict him. His

explanation is that he did not hear the assertion made and if he had he would have rejected it. However, no adverse inference could be drawn against the appellant on this basis, whether the appellant heard the accusation or not: see **Andrew Brown v R** [2019] JMCA Crim 30.

[16] Therefore, at the close of the Crown's case, the evidence, at its highest, disclosed that the accused was a mere passenger of the Honda CRV motor car. This, without more, was insufficient to vest the appellant with either custody or control of the bag or with knowledge that the bag contained cocaine. At the end of the Crown's case, the prosecution had therefore failed to establish both the *actus reus* and the *mens rea* of the offence. That failure was fatal to the Crown's case against the appellant. The submission of no case to answer should therefore have been upheld: see **R v Galbraith** [1981] 1 WLR 1039. It is therefore palpable that, on a proper assessment of the evidence, there was no basis for the LJPC to have arrived at a finding adverse to the appellant.

[17] Concerning ground 2, it is the law that the sworn testimony of a defendant in the course of a joint trial is admissible as evidence implicating his co-defendant. That evidence, subject to a warning that the defendant who so testifies may have his own purpose to serve, (as was given by the LJPC to herself in this case), may be relied upon in support of an adverse finding against the co-defendant: see **R v Cheema** [1994] 1 All ER 639. However, in this matter, we having found that the submission of no case to answer should have succeeded, the LJPC was not entitled to rely on the evidence of the co-accused, to make any such adverse finding against the appellant.

[18] In respect of ground 4, the LJPC failed to adequately consider the effect of the good character of the appellant. On the facts of this case, the truthfulness of the appellant and his co-accused was directly in issue. In such a circumstance the requirement for a good character direction is even more important: see **Jason Richards v R** [2017] JMCA Crim 5 at paragraph [64]. Having given an unsworn statement from the dock, the accused was entitled to benefit from the propensity limb of the direction: see **Craig Mitchell v R** [2019] JMCA Crim 8; **Joseph Mitchell v R** [2019] JMCA Crim 2; **Tino Jackson v R** [2016] JMCA Crim 13; and **Leslie Moodie v R** [2015] JMCA Crim 16. It was therefore incumbent on the LJPC to demonstrate that she had undertaken a proper assessment of the evidence against the appellant in light of this entitlement.

[19] Only a passing reference was made to the character witness called on behalf of the appellant. There was no indication that the LJPC actively considered that evidence, before arriving at a verdict adverse to him. This in a context where it cannot reasonably be said that the sheer force or nature of the evidence against the appellant rendered the good character direction redundant. Especially in light of the determination by the LJPC that the co-accused was "for the most part not a witness of truth".

[20] The appellant having succeeded on all four grounds of appeal, the following is the order of the court:

a) The appeal is allowed;

b) The conviction is quashed;

c) The sentence is set aside; and

d) Judgment and verdict of acquittal entered.