[2013] JMCA Crim 18

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO 4/2009

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

CONRAD WALTERS v R

Maurice Saunders instructed by the Norman Manley Legal Aid Clinic for the appellant

Miss Paula Llewellyn QC Director of Public Prosecutions and Mrs Tracey-Ann Johnson for the Crown

7, 30 October 2009 and 22 March 2013

PANTON P

[1] The appeal in this matter was heard on 7 October 2009, and dismissed on 30 October 2009, when the conviction and sentence were affirmed. At that time, brief oral reasons were given, with a promise to reduce the full reasons into writing. The appellant had been convicted before Her Hon Miss Judith Pusey of the offence of conspiracy to defraud and fined $250,000.00 or 12 months imprisonment. The fine has been paid.

The prosecution's case

[2] Due to the nature of the case, it is thought advisable to omit the names of two of the main witnesses. The prosecution's case was that a businessman received a telephone call from a male person on 10 May 2004, at about 10:00 am. The caller identified himself as "Rudey", someone who was not known to the businessman. The caller told the businessman that he was a member of the Joel Andem gang and needed some money or else things would happen to him (the businessman) and his family. The businessman gave the caller a mobile number and asked him to call back in a few minutes. The mobile number was that of the businessman's security consultant .

[3] The businessman then consulted with the security consultant on the matter. At about 2:00 pm, a man identifying himself as "Rudey" called the mobile number. The security consultant pretended to Rudey that he was the businessman. The caller told him that he and his family were in danger, and he wanted to protect them, if he – the businessman - protected his, the caller's family (that is, the Andem family). The consultant asked him if it involved money whereupon the caller said "yes"; he went on to say that he wanted either a bus or the equivalent in cash. The caller was told to call back, which he did on the next day.

[4] When the caller (Rudey) made this call on the following day, he asked the consultant: "mi can come fi di bus or money now?" The consultant enquired as to "what bus or money". The caller became angry, and the consultant inquired of him if he had given him anything to put down. The caller then delivered himself thus: "look here nuh man, bus or blood claat money man". The consultant told him he would call him back.

In the interim, the consultant contacted the police and received certain instructions. The consultant then called Rudey and told him that he could not find the equivalent cash for a bus but could give him $200,000.00. Rudey instructed the consultant to give the money to Sparky who, Rudey said, had a shop across the road from the businessman's home.

[5] On the morning of 13 May 2004, the consultant collected $20,000.00 in notes from the businessman and had them photocopied by the police. The consultant took the money to Sparky's shop where he saw the appellant standing behind the counter. The appellant has admitted on oath that he is called Sparky. The consultant handed the package with the money to the appellant and told him that the businessman had sent him with it. The appellant held the parcel with the money and remarked, "this a nuh $200,000.00". However, he took the envelope and placed it on a shelf behind him in the shop. The consultant told him that that was what he had been given to hand over to him. The police, including Detective Sergeant Phillip McIntosh, who were nearby, held and searched the appellant. In his pocket was a cellular phone, which was admitted into evidence. The consultant examined it and found that the last number called on that phone was the number of the person who had identified himself as Rudey and whose call had been the genesis of this series of events. Detective Sergeant McIntosh arrested and charged the appellant with the offence of conspiracy to defraud. When cautioned, he said , "a one man inna one taxi beg mi collect it fi him".

[6] The consultant pressed the "send" button on the phone and the call was answered by a male person. The consultant, pretending at this time to be the

appellant, while still in the presence of the appellant, advised the person at the other end of the line thus: "I got the money but a bare police deh pan the ends, so don't come here". The person then gave the consultant certain instructions as a result of which he went to a barber shop in Papine. The police accompanied him to this shop, and conducted a search of it but nothing significant was found.

[7] During cross-examination, the consultant said that he did not know anyone by the name of "Spadie"; nor did he know of any other shop that was closer to the businessman's gate than Sparky's. He denied that he had made an error when he said it was Sparky, and not Spadie.

The defence

[8] The appellant gave evidence. He said he operated a shop across the road from the residence of the businessman. On 13 May 2004, the consultant (whom he did not know before) entered his shop with an envelope, and told him that the businessman had asked him to leave it there for someone to collect it. He said he took the envelope and placed it on a shelf. He denied saying that the amount in the envelope was not $200,000.00. He said the police entered the shop and conducted a search. He said that the businessman had never before sent anything to him for anyone to collect, but he never found this occasion strange. The name Rudey was on the envelope, but he did not know anyone by that name. He also did not know who would have been coming to collect the envelope, and it never crossed his mind to inquire of or ascertain the identity of the person. Furthermore, he said that he did not know what was in the envelope, and did not ask.

[9] The appellant said that Sergeant McIntosh took his cellular phone from him, and that the phone that he had seen in court resembles it. He denied making a call to the consultant's phone number. He denied making any calls to the businessman or the consultant.

The findings of the Resident Magistrate

[10] The learned Resident Magistrate accepted the evidence presented by the prosecution and concluded that the words and conduct of the appellant, when he accepted the money, suggested that he had intimate knowledge of the arrangements surrounding the money. In addition, she laid stress on the fact that the appellant, when cautioned, said that it was a taxi man who had asked him to collect the money. She reasoned thus:

> "The fact that the money was accepted by this accused and placed on a shelf in his shop with or without comment by him places him in the middle of the story and reduces the matter to a question of credibility – is he to be believed when he said he knew nothing about the purpose of the money.[?] The fact that he admitted to the Investigating Officer that he knew he was to get the money as he said a taxi man asked him to collect it, settles the argument regarding whether he was the wrong person as he expected the delivery of something from [the businessman]."

[11] The learned Resident Magistrate continued:

> "The issue is therefore narrowed to the sole question as to whether he was an innocent agent or integrally involved in the scheme. The court accepts that he was involved. He admitted in cross- examination that the

> money he collected could not have been two hundred thousand dollars. The court believed (the consultant) that the accused said it was not two hundred thousand dollars. When this is juxtaposed with the telephone call made by [the consultant] it is clear he is no mere innocent agent but integrally involved."

The grounds of appeal

[12] The original grounds of appeal were abandoned and leave granted to argue the following:

> "1. The learned Resident Magistrate erred both in her findings of facts [sic] and in law in finding that the Appellant was party to an agreement to defraud or to commit an unlawful act.
>
> (i) The learned Resident Magistrate erred in finding or inferring that there was evidence of an agreement between the Appellant and one 'Rudey' or some unknown person.
>
> (ii) The learned Resident Magistrate erred in finding (a) that the Appellant had knowledge that one 'Rudey' or some unknown person was 'to defraud [the businessman]' of money and (b) that with that knowledge, he (the Appellant) participated in the unlawful act.
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> 2. The learned Resident Magistrate erred in law in that she omitted or failed to apply the principles of law relating to circumstantial evidence. In particular, -
>
> (i) The learned Resident Magistrate failed to make any finding as to whether, having regard to the evidence, the circumstances were consistent with the Appellant having committed the act (or acts) alleged, and also whether the facts

were such as to be inconsistent with any other rational conclusions than that the appellant was the guilty person.

(ii) The learned Resident Magistrate failed to consider or to direct herself as to the necessity of applying the rule on circumstantial evidence.

(iii) The learned Resident Magistrate failed to approach the matter with an open mind and to properly direct herself, and consequently the conviction by her was unreasonable.

3. (i) The learned Resident Magistrate erred in (a) admitting into evidence the 'cellular' (mobile) telephone instrument as exhibit 1, and (b) relying on information and content purportedly obtained from the aforesaid instrument to infer that there was an agreement by the Appellant to commit a wrongful act.

(ii) The learned Resident Magistrate erred by admitting as evidence (despite objection by counsel for the Appellant) and relying thereon, matters which were essentially hearsay, and, (it is submitted) inadmissible as evidence. These matters included information which was purportedly (see evidence of [the consultant] pp 8-9) displayed on a cellular (mobile) telephone, and also things purportedly said by a third person (not called as a witness at the trial) to the [consultant].

4. (i) The evidence of [the consultant] (about the telephone number) as it relates to (a) the origin of the telephone call received by him by a person purported to be 'Rudey' and (b) the telephone tendered in court as Exhibit 1 was discredited and was unreliable.

(ii) The learned Resident Magistrate erred in relying on that evidence as a basis for convicting the Appellant.

5. The learned Resident Magistrate erred (i) in admitting into evidence, the evidence of witnesses [the consultant] and Detective Sergeant Phillip McIntosh that the Appellant said – 'but dis nuh $200,000.00' – when he was handed the envelope and (ii) in admitting into evidence, the evidence of Detective McIntosh that the Appellant said – 'a one man inna one taxi beg mi collect it fi him' – after being cautioned, both alleged responses being in breach of the Judge's Rules.

6. The verdict is unreasonable and cannot be supported having regard to the evidence."

The submissions

[13] Mr Maurice Saunders, for the appellant, concentrated his attack on the conviction on the basis that there was no agreement on the part of the appellant to have participated in a fraud on the businessman. At most, he was receiving money for someone else to collect from him. He was, Mr Saunders said, a vehicle like a postal agency. He was an innocent receiver, a hapless victim. No inference, he said, could be drawn from the circumstances so as to convict him. There was neither mens rea nor actus reus. Mr Saunders said that there was suspicion, but that did not amount to proof. The receipt of the money coupled with the statement made by the appellant was not sufficient, he said, to mean that there had been a demand for the payment of $200,000.00.

[14] Mrs Tracey-Ann Johnson, for the prosecution, submitted that the evidence had to be considered as a whole and that the learned Resident Magistrate had sufficient material to ground a conviction for the conspiracy charged.

[15] Mr Saunders contended that the appellant must have been a suspect prior to being handed the envelope, and that the sergeant must have already determined in his mind to charge the person who would receive the envelope for the offence. In that situation, he said, the appellant ought to have been cautioned and "reminded of his right to silence at that stage". This submission by Mr Saunders ignored the reality of the situation as the appellant was indeed cautioned, and his statement to the officer was after he had been charged and cautioned.

Analysis of the arguments

[16] The Judges' Rules provide that as soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he should caution that person before putting any questions to him. There is no evidence that any question was put to the appellant by the officer prior to charging him. The Rules also provide that where a person has been charged for an offence, he should be cautioned that he is not obliged to say anything but if he says something it will be put in writing and may be given in evidence at the trial.

[17] In the instant case, the first statement by the appellant in respect of the content of the envelope was unsolicited and was therefore admissible as being part of the chain of events in the commission of the offence. The statement as to the taxi man was after

he had been cautioned and was aimed at providing an explanation by the appellant as regards his participation in the events. There was no discernible breach of the Judges' Rules, and so we found that the ground of appeal in this regard was without merit.

[18] At common law, a conspiracy is an indictable misdemeanor consisting in the agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means. The prosecution must prove not only an agreement between the alleged conspirators to carry out an unlawful purpose, as signified by words or other means of communication between them, but also an intention in the mind of any alleged conspirator to carry out the unlawful purpose.

[19] In the instant case, the businessman is called by Rudey who told him that he was a member of a gang who needed money, and if that money was not forthcoming, his (the businessman's) family would not be safe. At this stage, the offence of demanding money with menaces has been committed by Rudey. The businessman gives the caller a cellular number and advises him to call him back in a few minutes on it. The businessman in the meantime consults his security consultant whose cellular number it was that had been given to the caller. The person identifying himself as Rudey then called the number and the security consultant answers, pretending that he was the businessman. The subsequent conversation between Rudey and the security consultant confirmed the menacing demand, which was for either a bus or the equivalent in cash to be delivered to him.

[20] During a conversation between the men on the following day, the protest by the security consultant at the nature of the demand by Rudey, resulted in the latter responding thus: "look here nuh man, bus or blood claat money man". Shortly after this, in a subsequent telephone conversation, Rudey issued the instruction for the sum of $200,000.00 to be handed over to one Sparky who had a shop across the road from the businessman's house. The money was duly delivered to Sparky (the appellant) who, on feeling the weight of the envelope, remarked that it was not $200,000.00. This statement was a clear indication that the appellant was aware not only of the money to expect but also that it was coming from the businessman for delivery to Rudey.

[21] The finding of the cellular phone on the appellant's person and the evidence that the last number called was Rudey's suggest recent contact between the men, and provides the inference that they were not strangers to each other and that their conversation would have been in respect of the imminent handing over of the money. When the appellant was arrested and cautioned by the police, he said that a man in a taxi had begged him to collect the money for him.

[22] The evidence up to this stage shows the appellant and Rudey as partners in a scheme which would have resulted in the businessman being relieved of a sum of money because of fear of being harmed. Further, the appellant gave an explanation for his receipt and possession of the money. Clearly, there was a case for the appellant to answer, and it became a matter of credibility. As it turned out, he told the learned Resident Magistrate that he received the money but did not make any remark as to its contents. He said that the businessman had never sent anything to him before, but he

did not find it strange. It never crossed his mind to ask who would come for the envelope. The name Rudey was on the envelope but he does not know anyone by that name. He did not know, and did not inquire, what was in the envelope. It was the first time that he was seeing the security consultant, and he did not ask him the name of the person who would be coming to collect the envelope.

[23] In the circumstances, the learned Resident Magistrate was faced with two distinct versions of the events from which to choose. It was a matter of the credibility of the witnesses and the appellant. She chose to believe the prosecution witnesses. We are of the view that she was justified in concluding that the appellant's apparent lack of interest in the contents of the envelope, his lack of knowledge of who was to receive it and his unfamiliarity with the individual who delivered it to him, presented an unreal situation; and that the real position was that the appellant was part and parcel of the plot to relieve the businessman of the money in the envelope. The connection with the cellular phone was no mere coincidence.

[24] Mr Saunders criticized the admission of the cellular telephone into evidence on the basis that it is a mobile device that was accessible for use by other persons. However, there was no evidence from the appellant to suggest that the phone had been in the possession of anyone else during the period under question. Even if there had been such accessibility, that does not lessen the importance of the evidence that it was found in the possession of the appellant and that there had been contact on that very device between the consultant and Rudey, whom the appellant said he does not know. Mr Saunders relied on the decision in the case ***Suzette McNamee v R*** (RMCA

No 18/2007 judgment delivered 31 July 2008) for his submission that the evidence ought to have been excluded. That case relates to the admission of evidence from a statement generated by a computer, without the necessary supporting evidence that the computer was in proper order, as required by section 31G of the Evidence Act. That is a far cry from the evidence in this case in respect of the telephone which was found in the actual custody and control of the appellant.

[25] Given the facts as found by the learned Resident Magistrate and the absence of any meritorious arguments against the conviction, notwithstanding the efforts of Mr Saunders, we found that the appeal failed.