In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2017: No: 28

MANDAYA THOMAS

Appellant

-v-

THE QUEEN

Respondent

REASONS
(In Court[1])

Appeal against conviction-admission of fresh evidence on appeal-section 16 Criminal Evidence Act 1952-expert report casting doubt on whether alleged controlled drug is prohibited by the Misuse of Drugs Act 1972

Date of Decision: July 5, 2017
Date of Reasons: July 28, 2017

Mr. Vaughan Caines, Marc Geoffrey Barristers and Attorneys Ltd, for the Appellant
Ms Jaleesa Simons, Office of the Director of Public Prosecutions, for the Respondent

Background

1. The Appellant pleaded guilty on August 24, 2016 to two counts of importing Acetyl Fentanyl into Bermuda on May 9, 2015 in the course of the trial following the Learned Magistrate (Wor. Archibald Warner) ruling that he was satisfied the

[1] The present Judgment was circulated to counsel without a hearing to hand down Judgment.

Prosecution had proved that the drugs in question were as matter of law controlled drugs.

2. Mr Caines, appearing *pro bono*, cross-examined the Government Analyst on the basis that the relevant drugs were not controlled under the Misuse of Drugs Act. Legal Aid only became available after conviction and an expert report was obtained which I found could not with reasonable diligence have been adduced at trial and which rendered the conviction unsafe. I accordingly quashed the conviction and remitted the matter for retrial before another Magistrate.

3. At the request of Crown Counsel, I now give brief reasons for that decision.

Admission of fresh evidence on appeal: the governing principles

4. Section 16(2) of the Criminal Appeal Act 1952 confers a broad jurisdiction to admit fresh evidence on appeal. For present purposes the following jurisdiction was clearly available, namely the power to supplement the appeal record:

> "(d) *by ordering or allowing the production and the examination at the hearing of the appeal of any document, exhibit, article or thing, whether or not it was in evidence in the proceedings before the court of summary jurisdiction…*"

5. In *Pitman-v-The State* [2008] UKPC 16, the conviction was set aside because "*fresh evidence, if admitted and accepted as correct, could have a bearing on the safety of the conviction*" (at paragraph 30). However, as Lord Carswell went on to point out in *Pitman*:

> "*31… These factors are not, however, conclusive of the issue of admission of fresh evidence, and an appellate court has the overriding statutory power to admit it if it is in the interest of justice: see Benedetto v The Queen [2003] UKPC 27, [2003] 1 WLR 1545, and cf Smalling v The Queen [2001] UKPC 12…*"

The merits of the appeal

6. The Prosecution relied upon the Government Analyst's July 19, 2016 Certificate which concluded that the relevant drug was controlled. That this was not a routine case was clear from the fact that her initial July 27, 2015 Certificate had concluded that the powder in question was not in fact controlled under the Act.

7. The Appellant placed before the Court the expert report of Mr Julian Dunnill of Keith Borer Consultants, a Forensic Scientist since 1990 with a BSc in Physiology. He

agreed with the Government Analyst that what was seized was 92 grams of Acetylfentanyl, an analogue of Fentanyl. However, he opined that it was more likely that the drug seized was manufactured in its own right and was not a derivative of Fentanyl in a chemical sense.

8. The Dunnil Report, which was not adduced at trial because Legal Aid was only granted for the purposes of the present appeal, clearly had the potential to raise a doubt on the issue of whether or not the relevant drug was controlled. The factual dispute turns on the following definition in provisions of the Act which have seemingly been unaltered since 1972:

   - Schedule 2 Part I paragraph 1(a): lists "FENTANYL" as a controlled drug;
   - Schedule 2 Part I paragraph 1(e) (upon which the Crown relied) provides:

     > "*any compound (not being a compound for the time being specified in sub-paragraph (a) above) structurally derived from fentanyl by modification in any of the following ways, that is to say-*
     >
     > ...
     >
     > *(vi) by replacement of the N-propionyl group by another acyl group…*"

9. The Dunnill Report implies that this definition is outdated and overly cumbersome (in chemical terms at least). On its face, the Report casts doubt on whether the drugs analysed by the Analyst in this case were in fact structurally derived from Fentanyl as the Analyst (at the second time of asking) said that they were. Mr Dunnill opines that it is far easier to make Acetyfentanyl synthetically than as a derivative of Fentanyl. This fresh evidence potentially undermines the Prosecution's case on an essential element of the offences charged, although it is not for this Court to determine what weight should actually be given to it.

10. Here the expert report was capable of belief and there was a reasonable explanation for the failure to adduce it at trial. In the exercise of my discretion I decided to admit the Dunnill Report into evidence under section 16(2) (d) of the Criminal Appeal Act 1952. In deciding to do so, I took into account in particular two distinctive features of the present case:

    (1) the Government Analyst produced two conflicting Certificates, the first certifying the drugs seized from the Appellant were not controlled drugs and the second certifying that they were; and

    (2) the Appellant's counsel, acting as an *amicus curiae* (as he put it), raised the issue of whether the drugs were controlled at trial, doing his best without expert evidence which could not at that point have been obtained.

11. Having decided to admit it into evidence for the purposes of the appeal, it was clear that the Appellant ought to be afforded an opportunity to deploy her expert report at a fresh trial and should not be denied that opportunity because she could not afford to obtain such evidence in the absence of Legal Aid being granted for the purposes of the initial trial. The safeness of the conviction was undermined because if the Report had been admitted at trial, it might have been believed or might at least have raised a doubt in the Magistrate's mind as to whether the drugs the Appellant admittedly imported into Bermuda were controlled under the Misuse of Drugs Act 1972.

12. This conclusion, of course, takes into account the possibility that the Dunnill Report might be entirely discredited if the Government Analyst were given an opportunity to comment on it. She might still be able to satisfy a Magistrate that the conclusions she testified about in her evidence at the first trial were unimpeachable after all. The weight to be attached to the fresh evidence, if any, is entirely a matter for the Magistrates' Court to decide.

13. Nevertheless, Parliament would be well advised to consider making appropriate amendments to the Schedule to the 1972 Act to take into account changes in the drugs scene which have occurred over the last 35 years and to simplify the work of analysts and prosecutors in cases involving drugs such as Fentanyl, its derivatives and/or its modern synthetic equivalents.

Summary

14. For these reasons on July 5, 2017 I quashed the Appellant's conviction and remitted the matter for retrial before another Magistrate.

Dated this 28th day of July 2017 ______________________________

IAN RC KAWALEY CJ