In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2017: 21

WALITA BRANGMAN

Appellant

-v-

THE QUEEN

Respondent

REASONS

Order of Retrial – Legal Principles on Whether to Order a Retrial
Conviction quashed for Conspiracy to Import a Controlled Drug
Appeal Allowed after finding that trial Counsel was Ineffective

Date of Hearing: 26 April 2018
Date of Ruling: 26 April 2018
Date of Reasons: 22 May 2018

Ms. Elizabeth Christopher, (Christopher's) for the Appellant
Mr. Loxley Ricketts, Office of the Director of Public Prosecutions, for the Respondent

RULING delivered by S. Subair Williams A/J

Introduction

1. By reserved judgment handed down on 2 April 2018 I allowed the Appellant's appeal and quashed the conviction imposed 7 July 2016 in the Magistrates' Court by Wor. Archibald Warner on Information 15CR00480 for the offence of conspiracy to import

the controlled drug cocaine, contrary to section 4(3) of the Misuse of Drugs Act 1972 as read with section 230(1) of the Criminal Code.

2. On 26 April 2018 the Crown applied for an order of retrial on the basis that this case is of great public and that the offence is of sufficient seriousness to warrant a retrial. The Crown's application for a retrial was opposed by the Appellant whose Counsel argued that she would be unfairly prejudiced in presenting her case due to the lengthy passage of time since she was first charged.

3. I ordered a retrial and indicated that I would later provide written reasons which I now outline below.

Legal Principles on Whether to Order a Retrial

4. Mr. Ricketts submitted that there is no prescribed formula which is to be applied in deciding whether to order a retrial. Instead the Court must look to various factors to determine the fairness of the position.

5. Crown Counsel relied on *R v Maxwell (SC(E)) [2011] 1 WLR at para 20*:

"*Most appeals to the Court of Appeal where the court has to decide whether the interests of justice require a retrial do not raise any issue of prosecutorial misconduct. Typically, the court considers questions which include (but are not limited to) whether the alleged offence is sufficiently serious to justify a retrial; whether, if re-convicted, the appellant would be likely to serve a significant period or further period in custody; the appellant's age and health; and the wishes of the victim of the alleged offence. I do not believe it to be controversial that the gravity of the alleged offence is an important relevant factor for the court to take into account when deciding whether to order a retrial in a case which is not complicated by prosecutorial misconduct*."

6. Ms. Christopher relied on *R v Saunders* (1974) 58 Cr. App. R. 248. However, Mr. Ricketts, as a pre-emptive strike to Ms. Christopher's submissions, referred the Court to *R v Grafton The Times 6 March 1992* where Leggatt LJ of the English Court of Appeal departed from the *R v Saunders* approach. In *Grafton* at page 6 it is stated:

"*So far as Suzanne Grafton is concerned, that is an end of the matter, but we must consider whether, in relation to the other defendants, it would be appropriate to order that they be retried. It is submitted by Mr. Holt on behalf of Stephen Grafton that this course would no longer be appropriate. In support of his submission he relies on R v Saunders 58 Cr App Rep 248, [1974] Crim LR 30, in which the Lord Chief Justice at page 255, referring to the law as it then was, said:*

"Of course, the advantages of a retrial superficially seem very great. One is tempted to say what more convenient and just and sensible course it would be if it we allowed a new jury to have a look at this case again with all the evidence before it… The desirably of a retrial in the abstract is something which hardly needs to be emphasised by me.

But, on the other hand, it is not in the Court's knowledge that it has ever before been contemplated that a retrial should take place some three and a half years after the original offence was committed. A delay of one year, perhaps two years, is not uncommon, but none of us can remember a case in which it had been thought right to order a retrial after such a long period, when regard is had to the fact that this appellant has already stood his trial once, and has been in prison for a number of years and would, if a retrial is ordered, have to run the gauntlet and the hazards and prejudice of being tried yet again."

Mr. Holt submits that the circumstances of this case are not dissimilar to the circumstances of R v Saunders. These appellants were arrested in October 1988. They were charged with offences, some of which dated back to June 1988, and they had been in custody for some 17 months before they stood their trial. This was a case in which the prosecution evidence, at any rate on the count of conspiracy, depended in large part on the evidence of officers who had kept surveillance on the appellants, but also upon evidence by members of the public who gave evidence of what they had seen on specific occasions. Mr. Holt submits that the Crown might not be able to marshal all the witnesses. It seems to us that if that were to occur, it would be to the advantage of the appellants rather than the contrary. It is to be noted that in the case upon which he relies, the Crown did not argue in favour of a retrial. That is to be contrasted with the present case where the Crown contend that any such difficulties as there might be in a retrial would not be insuperable…"

7. In addition to *R v Saunders*, Ms Christopher also relied on *R v Alan Doheny [1997] 1 Cr App R 369* which was factually dissimilar to the circumstances of this case. The relevant distinction is found in the passage which she highlighted from page 9:

   (Phillips L.J sitting in the English Court of Appeal)
   "*Having regard to the strength of the case against the appellant we would normally be minded to order a retrial. We have, however, been persuaded that in the circumstances of this case that the course would not be appropriate. These are:*
   1. *The appellant has already served over half of his sentence and is eligible for parole,*
   2. *A retrial would involve balancing the appellant's alibi evidence, and his own testimony, against DNA results. Time will not have altered the impact of the latter, but the appellant would inevitably be at a disadvantage in seeking to establish his account of his movements at the material time.*"

Analysis

8. In this case the Appellant admitted to having made arrangements for the importation into Bermuda of the tamarind balls from Jamaica. She also admitted to having collected the tamarin balls from Somerset Post Office. It was uncontroversial evidence that the box of tamarind balls was seized from the trunk of the same car where the Appellant was arrested and was found to contain a total weight of 69.99 grams of crack cocaine. The Defence case turns on the *mens rea* side of the offence: did Ms. Brangman possess the requisite knowledge?

9. At paragraph 60 of my judgment on the appeal I stated:

   "*Section 32 of the Misuse of Drugs Act 1972 gave rise to a statutory presumption against the Appellant once it was proved that she had the tamarind balls containing the crack cocaine in her possession. This placed an evidential burden on Ms. Brangman to disprove knowledge. The discharge of the evidential burden would have occurred once she simply raised the issue of knowledge. It is plain to see that her taking the stand would have been one of the most effective ways to do so. The burden would then remain on the Crown to disprove knowledge beyond all reasonable doubt*."

10. Ms. Brangman's central complaint was that she was unfairly deprived of the opportunity to tell her side of the case under oath on the witness stand. The real value of her evidence would obviously be to present her case that she lacked knowledge of any agreement to import illicit substances concealed in the box of tamarind balls. In my judgment, Ms. Brangman, a young woman of apparent good health, is just as able as she then was at the time of her first trial, to give evidence that she had no knowledge of the presence or any agreement to import controlled substances. The best person, of course, to speak on the issue of Ms. Brangman's lack of knowledge, is Ms. Brangman.

11. Ms. Brangman's other principal grievance on appeal was that the learned Magistrate was not made aware of her previous good character and that she ought to have had the benefit of a propensity and credibility direction. She was successful on this ground of appeal also.On my assessment, Ms. Brangman is in just as strong of a position now as she then was to adduce evidence of her good character.

12. In my analysis underlying my decision to order a retrial, I was mostly persuaded by the analysis stated in *R v Maxwell* and *R v Grafton*. I had particular regard to the seriousness of the charge of conspiracy to import crack-cocaine. The 'victim' in these kinds of cases is the general public. More specifically, those victims include addicts, grief-stricken family members and loved ones. It also, no doubt, includes young and vulnerable persons who are exposed to such environmental dangers. In my judgment, such offences (which go beyond simple possession) will always pass the gravity test.

13. The Appellant, Ms. Brangman, served an 8 month period of incarceration (from 27 July 2016 to 24 March 2017) having been sentenced to 6 years imprisonment by the learned magistrate. Without challenge, the Prosecutor submitted that if re-convicted and sentenced to a 6 year custodial term she would serve a further term of 2 years imprisonment when applying her eligibility for parole to the overall sentence. I found that the significant portion of the sentence was not served. This Appellant cannot properly be considered akin to an offender who had substantially served more than half of the sentence imposed. In any event, it remains open and likely that the time served in custody would be taken into consideration if Ms. Brangman is re-convicted and sentenced.

14. In reaching my decision to order a retrial, I was also mindful that the reasons which underlie the success of the Appellant's appeal were not related to the sufficiency of the Crown's evidence but rather to the ineffectiveness of her former attorney. No criticism was made of the learned Magistrate's trial conduct or that of the prosecutor.

Conclusion

15. The Appellant is to be retried by a Magistrate other than the learned Magistrate before whom the first trial was heard.

Dated this 22nd day of May, 2018 _____

SHADE SUBAIR WILLIAMS
ACTING PUISNE JUDGE