IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

IND #0030/2019

REGINA

V

BARTON ELSWORTH RIVERS
DENO KALIFA MCINNIS
JONATHAN ASHLEY MOORE
NICKARTHUR ROMANE SANDERSON

Appearances:	**Mr. Scott Wainwright for the Crown**
	Mr. Keith Myers for Defendant Barton Rivers
	Ms. Lee Halliday-Davis for Defendant Deno McInnis
	Mr. Jonathon Hughes of Samson Law for Defendant Jonathan Moore
	Mr. Oliver Grimwood of Barton Attorneys for Defendant Nickarthur Sanderson
Before:	**Justice Marlene I. Carter (Actg.)**
Hearing Dates:	**17th July 2020**
Delivery of Decision:	**20th July 2020**

HEADNOTE

Criminal Law – Conspiracy to import ganja – Evidence of data analyst - Application to exclude opinion evidence.

JUDGMENT

ON APPLICATION TO EXCLUDE EVIDENCE OF ANALYST

1. Counsel for the 2nd defendant, Deno McInniss, has renewed an oral application[1] to the Court for the name of the 2nd defendant as it appears in Schedules[2] to the evidence of the Crown Witness, Joanne Delaney ("the Schedules) to be redacted where the name of the 2nd defendant appears as being attributed to the number ending 924 ("the disputed 924 number") because it is not accepted by the defendant that this is his number. The name of the 2nd defendant appears next to the disputed 924 number in capital letters on the Schedules.

2. Counsel stated that for the jury to be handed the Schedules in their present form would be prejudicial to her client as it would give the jury the impression that the disputed 924 number was accepted as being that of the 2nd defendant. In this regard, counsel emphasized that the Crown's case depended on this evidence to link the 2nd defendant to the conspiracy.

3. Defence counsel stated that it is the opinion of the data analyst that the evidence she will present relating to the usage of the phone is sufficient to attribute the disputed number to the 2nd defendant. However, counsel continues, that because Ms. Delaney is not being called as an expert at the trial, her conclusion/opinion is not one she is qualified to give, and the Schedules should therefore not be presented to the jury in a form whereby that opinion on attribution appears as accepted.

[1] When counsel made the initial application, the court ruled then that a direction by the Court to the jurors would be sufficient to ensure that there was no prejudice to the 2nd defendant by his name appearing in the Schedule next to the disputed number.
[2] Exhibits JD/IA/1a, JD/IA/2a, JDIA/4, JD/IA/6, JD/IA/7 and JD/IA/8

4. Counsel for the 3rd defendant joined in the application for the schedules to be amended to delete any reference to the 2nd defendant being tied to the disputed 924 number. Counsel asked the court to consider whether the reference to "inferred user" as it appears on the Schedules were not also to be viewed as the data analyst giving her conclusions/opinion on the evidence which she was not entitled to do as it was beyond her remit.

5. Counsel for the 4th defendant, described the Schedules in their present form as blurring the lines between the evidence that the data analyst was permitted to put before the jury and her conclusion which she was not permitted to put before them. Counsel asked the court to consider that his client was entitled to know the status of the evidence against the 2nd defendant as it is an essential part of the evidence that the Crown alleges connects *his* client, Sanderson, with the conspiracy. He questioned whether a direction by the Court would be enough to cure what was before the jury on the face of the document.

6. The Crown has resisted the application. The Crown emphasized that the Schedules prepared by Joanne Delaney were to be used as visual aids only so that the jury could understand the crown's case without having to be burdened by the "unnecessarily cumbersome" step of the jury being asked to make their own notation on the Schedule of the disputed numbers. The Crown submitted that the Court could, by its direction to the jury, emphasize that the Schedules are not accepted as being attributed to the 2nd defendant. Crown counsel also asked that the Court consider that any alteration to the Schedules at this point could delay the trial.

AUTHORITIES

7. The Crown drew to the Court's attention two authorities: ***R v Foulger***[3] and ***R v Jurecka and Ors***[4].

8. In ***Foulger***, one of the grounds advanced before the English Court of Appeal was that the trial judge should have excluded the evidence of a civilian data analyst employed by police who had produced charts, maps and a summary collating cell site data in respect of various phones, which were prepared to enable the cell site data to be put before the jury in a readily understandable form. The data analyst was not put forward by the prosecution as an expert nor did the prosecution seek to elicit any expert opinion from her. The argument before the court was: "*the effect of her evidence was that expected to come from an expert.*" The Court of Appeal found that the Judge's ruling on this application was entirely appropriate. The trial judge's ruling was as follows:

> *"In my judgment, the evidence of Julie Sargent is plainly not expert opinion evidence in the sense contended for by the defence. She is an intelligence analyst, a job which no doubt has a certain expertise and skill itself as an occupation, but she is not for example, an expert communications data investigator. Her task has simply been to put the otherwise complicated, or relatively complicated, telephone data into a more user□friendly format. ... She does not purport to express an opinion of any of this data; she has simply produced by way of example a PowerPoint presentation and other graphic illustrations of the information which has already been sourced as the raw telephone data."*

9. In ***Jurecka,*** the defendants were convicted of conspiracy to commit fraud by false representations with respect to the sale of horses. The prosecution relied on seventeen specific transactions as evidencing the broader conspiracy between the parties. The exhibit file included many thousands of text messages from mobile phones, in addition to notes, e-mails and letters over a five-year period.

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[3] [2012] EWCA Crim 1516
[4] [2017] EWCA Crim 1007

10. The bundles provided to the jury were subdivided by reference to these seventeen transactions/sales, and the papers and documents for the jury were organised according to each sale. The Crown also produced, in relation to each of the transactions relied on, a "working document" or note summarising the relevant evidence for the jury.

11. The court recognized the utility of admitting working documents of the sort used by the prosecution and reiterated that there was

> *"no absolute objection to proceeding in such a fashion, provided the source and nature of such documents are clear and the jury are at all stages reminded, where appropriate, that such documents are not agreed and are there as aides memoire of the evidence bearing on the particular aspect of the case."*

12. With regard to the nature of such working documents, the court went on to state:

> *"Their proper use should be confined to a convenient reminder to the jury of the facts relied on by a given party and, in brief and neutral terms, of the conclusions sought to be drawn from those facts."*

13. The Court agreed with the following reasons given by the single judge for refusing leave to appeal on the issue of the use of the working document:

> *"There can be no absolute bar to a document such as this being given to the jury. Indeed, it happens often with documents such as schedules of telephone calls.* ***It is therefore an issue of judicial case management, and of ensuring fairness to all parties.*** *Provided the Judge directed the jury, as he did that they did not amount to evidence but were simply submissions, it is hard to see what prejudice would be caused..." (Emphasis supplied).*

COURT'S CONCLUSIONS

14. There is nothing that is inherently unfair for the prosecution to present large volumes of evidence of the kind it seeks to do in this case - telephone calls, messages and cell site evidence - in a simple, coherent form to enable the jury to better follow the way that the prosecution puts its case. There is nothing that is inherently unfair if such a presentation also includes, as in ***Jurecka***, "*the conclusions sought to be drawn from those facts*".

15. This court does not doubt that Senior Crown Counsel would ensure that the witness Joanne Delaney would not be permitted to relate to the jury any evidence of her conclusions and/or opinions derived from the data that she has analysed, and that he could keep her within the confines of the evidence that she was entitled to present to the jury. There is consensus between the Crown and all defence counsel that Joanne Delaney is not being called or put before the jury as an expert witness.

16. For this court the central issue is whether the Schedules in their present form can be said to be fair to all of the parties. In ***Jurecka,*** the defence were given the opportunity, as had been afforded to the prosecution, to provide defence working documents for the jury's consideration. Although these were only provided by counsel for one of the three defendants in that case, the content of the working documents provided on behalf of that defendant covered the entire case, was not confined to matters relevant only to him and addressed or recorded much of the material relevant to the other two defendants. In ***Jurecka,*** the court referring to the prosecution working documents cautioned,

"It is quite right that if such documents are to be admitted the defence as well as the prosecution should be given the opportunity to place their working documents before the jury in similar manner and format to any lodged by the prosecution. How far such a process may properly go, must be decided on a case by case basis...".

In this case, the defence do not seek to have a defence schedule put before the jury.

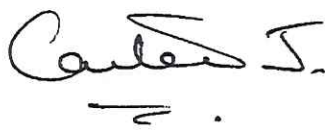
17. To this Court's mind, the Schedules present the collated evidence in a brief and coherent form. However, the notations in the Schedules as they relate to the 2nd defendant and the disputed 924 number are not as neutral as they should be. Counsel for the 2nd defendant describes the attribution of the disputed 924 number to the 2nd defendant as being the only evidence that ties the defendant to the alleged conspiracy.

18. The Crown agrees that this evidence relating to the disputed 924 number is the foundation and main evidence against the 2nd defendant. That the attribution of the disputed 924 number is not accepted by the defence is therefore a crucial factor which, to this Court's mind, leans in favour of ensuring that this evidence is presented as accurately as possible. The fact of this non-acceptance should be before the jury on the face of the document in order to ensure neutrality and fairness in all the circumstances of this case.

19. I have considered whether the Court can ensure fairness by giving the jury a direction which emphasizes, where appropriate, that the Schedules merely present the prosecution's case, which is that the reference to the 2nd Defendant being associated with the disputed 924 number is the only conclusion to be drawn from the facts. I believe that the Court can effectively address these matters by direction to the jury. However, in the particular circumstance of this case, if the Schedules are a visual representation of the Crown's case, this visual should nevertheless more accurately reflect the true position of the disputed number in the prosecution's case.

20. To delete the reference of the attribution of the 2nd defendant to the disputed 924 number entirely would diminish the utility of using the Schedules to assist the jury to understand the evidence presented by the Crown. In order to ensure fairness to all parties, this being the overriding consideration on this application, the court's order is that the Schedules should be modified to reflect that the disputed 924 number is not accepted by the 2nd defendant. The notation "McInness (Disputed)" or "McInniss (Not Accepted)" should be set next to the 2nd Defendant's name as it appears with the disputed 924 number wherever it appears on the Schedules.

Dated this the 20th July 2020



Mme. Justice Marlene Carter
Acting Judge of the Grand Court