IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEALS 17/2018 & 7/2020
IND 60/2016 & 50/2017
SC#03715/2016, #05487/2016 & #3678/16

BETWEEN:

WAYNE CARLOS MYLES

Appellant

- and -

Her Majesty the Queen

Respondent

BEFORE:

The Rt. Hon Sir John Goldring, President
The Hon John Martin QC, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal

Date of Hearing**:** Thursday 30th April 2020

Appearances: Appellant – in person
Ms. Kerrie-Ann Gillies of the DPP for the Respondent

JUDGMENT

Transcript of oral judgment dated 30 April 2020 and Approved for Release 28 May 2020 and Amended on 5th November 2020

GOLDRING, PRESIDENT.

1. These are applications by Wayne Carlos Myles for leave to appeal against conviction and sentence.

2. On the 9th of November 2017, following a trial in the Grand Court before Mr. Justice Quin and a jury, he was convicted of one count of conspiracy to supply cocaine, contrary to section 321 of the *Penal Code (2013 Revision).* He was acquitted on a similar count. They were respectively counts 7 and 8 on the indictment.

3. He was sentenced on the 11th of May 2018 by Justice Wood to 3 years' imprisonment, less period spent in custody and when tagged.

4. On the 22nd of May 2019, following a trial before Justice Carter sitting alone, the Applicant was convicted of three counts of living on the earnings of prostitution, namely counts 1, 2 and 11, and three counts of attempting to live on the earnings of prostitution, namely counts 3, 6 and 8, contrary to section 139 (1)(a) and 139 (2) of the *Penal Code (2013 Revision).*

5. He was found not guilty of a number of counts of living on the earnings of prostitution, namely, 4, 5, 7, 9 and 10.

6. On the 27th of February 2020, he was sentenced to 2 years' imprisonment concurrent on counts 1, 2 and 11 and 16 months concurrent on the remaining counts; the 2 years to run consecutive to the sentence which he was then serving.

The facts

The conspiracy

7. On the 22nd of October 2015, a man called Alexander Ebanks was arrested. He was in possession of cocaine and drug paraphernalia. He had two mobile phones. Analysis of them revealed involvement in the supply of drugs on a significant scale from at least June 2015.

8. On the 25th of August 2016, following a *Goodyear* indication and a guilty plea, Ebanks was sentenced to 5 ½ years' imprisonment for a series of offences, including conspiracy to supply drugs, conspiracy to import cocaine and possession of drugs with intent to supply.

9. Ebanks' phones revealed drug trafficking with a number of individuals. They included the Applicant. The evidence of such contact and its relationship with drugs was overwhelming.

The phones connected with the applicant

10. There was clear evidence that the Applicant was the owner and user of two mobile phones, numbers 928 8917 and 546 7296. There was also evidence that he was known as "Beenie" and as "Jason". As to phone 928 8917, among other things, the Applicant's application for a driver's licence gave that telephone number, so too did a money transfer carried out by him in January of 2016. When he was arrested, in June 2016, the SIM in what was then a Samsung phone had that number. It had previously been used on other mobile phones.

11. Analysis of the Samsung, among other things, revealed messages seeking references for the applicant, messages for Beenie between December 2014 and June 2016, messages from Jason between November 2014 and June 2016, and an incoming message to Jason wishing him a happy birthday on the 14th of April 2016, the date of the Applicant's birthday.

12. As to phone 546 7296, the applicant made three calls to the police using that number in May 2010, December 2011 and January 2012. He made a fourth call on the 16th of April 2015 from phone 928 8917.

13. The Applicant disputed that he was known as "Beenie". DC Mendez, a local police officer, gave evidence that he had known the Applicant for 5 years. He saw him often; he knew him both as Wayne Myles and as Beenie; he would greet him as Beenie; the applicant responded to either name.

The connection between Beenie and Jason and Alexander Ebanks

14. Both of the Applicant's telephone numbers were stored on Ebanks' phone under the name "Beenie". Although challenged as inadmissible in a *voir dire*, that evidence was ultimately admitted as a fact.

15. Miss Delaney, a police intelligence analyst, set out in a schedule, which was ultimately, as we understand it, agreed, the messages between the Applicant's phones and Ebanks.

16. A witness called Patrick Gittelsohn, a special agent with the United States Drug Enforcement Administration, gave expert evidence of the meaning of the messages.

Without going into the detail of the schedule setting out those messages, it contained what Mr. Gittelsohn described as communications between Beenie and Ebanks regarding amounts of and prices for cocaine. There was also reference to such things as "re ups", which, said Mr. Gittelsohn, was slang in the world of drug trafficking for re-supply (of drugs).

17. When interviewed, the Applicant made no comment. At trial, he did not give evidence.

The prostitution counts

18. Analysis of the phone 928 8917 also revealed messages in which the Applicant was offering prostitution services by sending promotional messages and photographs. The messages showed agreement regarding price and location for prostitutes to work. On occasion the messages indicated the transaction had been completed. On occasion it did not, in which case the applicant was convicted by the judge of an attempt.

19. In this case, too, Miss Delaney gave evidence. There was set out, again, in a schedule the messages. They were helpfully reproduced in Justice Carter's very clear judgment. Although Miss Delaney gave evidence as to their contents, the fact of the matter is they speak for themselves. It is not, we think, necessary to set out further detail of those counts.

20. Count 1 on the indictment related to several phones; counts 2 and 3 related to sending messages to Ebanks' phone; count 6 related to a phone ending in 32; count 8 related to a phone ending in 64; count 11 related to a phone ending in 01.

The grounds of appeal against conviction

21. The applicant, in addition to succinct oral submissions to us, has filed a document headed "Appellant Skeleton Arguments" and a further document with a similar title and the addition of the word, "Addendum".

22. He first submits, in respect of the conspiracy conviction, that there was a miscarriage of justice, that the conviction was unsafe or unsatisfactory. He said to us that he was not the owner or controller of either of the phones. In his written submissions, he makes a number

of points regarding the digital evidence. He makes, both in writing and orally to us, the submission that the role of the jury was usurped by Miss Delaney, the witness who prepared the schedule, and Mr. Gittelsohn, the expert who gave evidence regarding the meaning of its contents.

23. We do not agree. The prosecution was entitled to set out the primary evidence upon which the Crown relied in an understandable way for the assistance of the jury. That is the role the schedule performed.

24. Mr. Gittelsohn was an expert. He was entitled to give his expert opinion in relation to that evidence. The judge directed the jury regarding that evidence with great care. He made it plain that they were entitled to accept or reject any part of that evidence, that they, in other words, were the final arbiters of the facts: see pages 48 and 49 of the summing up.

25. In his oral submissions, Mr. Myles makes a further point. He submitts that he should have been permitted an adjournment to instruct his own expert once he learnt that the phone or phones had been sent to Canada for analysis. The reality is that in the final analysis what those phones contained could hardly have been disputed. It is clear that the issues they raised were completely understood by the Applicant's advocate, as the transcript of the cross-examination reveals.

26. The Applicant also submits that the judge should not have permitted Police Constable Mendez to give the evidence to the effect that the Applicant was known as "Beenie". He submits in his written skeleton argument that the officer was corrupt; his evidence was served late; his statement was fabricated and that there was an issue of identification. He further submits that there was a material irregularity in that the officer's statement was not part of the original bundle of documents.

27. There is nothing in any of these points. The Crown was plainly entitled to call Police Constable Mendez. There was a notice of additional evidence some four days before he gave his evidence. The defence was in terms, as again is plain from the transcript, specifically given time by the judge to deal with this evidence if that was desired.

28. In his written submissions, but not repeated in his oral submissions, the Applicant made the point that he should not have been tried with two other defendants. We see nothing in that point.

29. He is critical, too, in his written submissions, of the way he was represented. Having read the summing up and the submissions made by counsel on his behalf, we see nothing in that submission. Indeed, every point which could have been made, appears to have been made on his behalf.

30. Again in his written submissions, the Applicant submits the case should have been withdrawn from the jury. That, in our view, is a hopeless submission, as our summary of the evidence has made plain.

31. The Applicant also makes a point, both in writing and orally, that the summing up was defective. It is clear that in the course of directing the jury on the conspiracy count, there was a slip of the tongue by the judge when at one point he referred to section 332 instead of section 321 of the Penal Code, the material section. That slip of the tongue, assuming, of course, the transcript is accurate, does not in anyway impugn what was an immaculate direction on the offence of conspiracy.

32. There is nothing in any of the grounds in relation to the drugs' conviction which the applicant raises. We, therefore, refuse that application for leave to appeal.

The appeal against conviction in respect of the prostitution offences

33. In his written submissions, the applicant, as we understand it, submits that there was a material irregularity, that there was a miscarriage of justice in that the legal directions were flawed, that the verdicts were unsafe or unsatisfactory, that his trial was unfair and that he was not properly represented.

34. In submissions to us, he makes the point that he had no knowledge of any prostitutes; the way in which he was tried was contrary to the presumption of innocence; there was no prostitute called, and his rights under article 7(2) of the Cayman Islands constitution were infringed.

35. There is, in our judgment, nothing in any of those criticisms. The judgment of Justice Carter, which we have read with care, was, in our view, a model of its kind. It set out the legal principles correctly. It analysed the facts. When the judge was less than sure, she found the appellant not guilty. When she was not sure that the completed offence had been carried out, she convicted of attempt. There is, in other words, no basis to impugn her judgment and her findings and therefore no basis upon which to grant leave.

36. The application in respect of those convictions is refused.

Sentence

37. As far as the drugs' sentence was concerned, the Applicant submits that it was perverse and disproportionate, having regard to the sentence imposed on one of his two co-defendants, namely a man called "Duncan".

38. He submits that he was targeted. His alleged criminality was less serious than Duncan's. No account was taken of his two children and the fact that it was his first conviction.

39. In our judgment, no criticism can be made of a sentence of 3 years for this offending. This was, on its face, professional trafficking in drugs. Indeed, had not a lenient sentence of 5 ½ years been passed on Ebanks, it may well have been that in this case a higher sentence could have been justified.

40. As to the prostitution sentences, there is no basis, in our judgment, to call them into question. The maximum sentence for these offences in Cayman is 4 years. There are no Cayman sentencing guidelines in respect of these offences. In the United Kingdom, the maximum sentence for similar offending is 7 years.

41. Applying the *United Kingdom Definitive Guideline* for similar offending, the judge found that the offences fell, as was agreed, within what is called category 2 as far as harm is concerned. She found a higher level of culpability given, as she found, the expectation of significant financial gain. The resultant United Kingdom's sentences she reduced by 29 percent to take account of the lower maximum sentence which obtains in the Cayman Islands. On that basis, the bracket for the Cayman Islands was one year two months to two

years ten months. In imposing two years the judge said she was reducing the sentence to take account of the fact it would run consecutively to the sentence he was then serving.

42. In our view, no criticism whatsoever can be made of the approach by the judge.

43. In the circumstances, there is no basis to impugn either the convictions or the sentences in either of these cases. In those circumstances, these applications for leave to appeal are refused.