IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

ON APPEAL FROM THE GRAND COURT

CACR023/2013 (Tamasa CNB)
IND 62/12
#03538/2012
CACR024/2013(Cole)
IND 63/12
#03564/2012
CACR022/2013(Mignott)
IND 60/12A
#03466/2012
CACR026/2013(Burton)
IND 60/12
#03465/2012
CACR025/2013 (Edwards)
IND 14/13
#04170/2012

BEFORE

The Rt Hon Sir John Chadwick, President

The Hon Elliott Mottley, Justice of Appeal

The Rt Hon Sir Bernard Rix, Justice of Appeal

BETWEEN

H.M THE QUEEN

Respondent

- and -

DAVID TAMASA

RENNIE COLE

GEORGE ERIC MIGNOTT

ANDRE NICHOLAS BURTON

RYAN ADRIAN EDWARDS

Appellants

Appearances: James Curtis QC & Ms. Lucy Organ of Samson & McGrath for the Appellant Tamasa; Ben Tonner & Prathna Bodden of Samson & McGrath for the Appellant Cole, Nick Hoffman and Guy Dilliway-Parry of Priestleys for the Appellant Mignott, Anthony Akiwumi (Stuarts) & M Facey-Clarke for the Appellant Burton, and Paul Keleher QC & Ms Keva Reid of

McKinney Reid for the Applicant Edwards. Simon Dennison QC & Tricia Hutchinson –Crown Counsel for the Director of Public Prosecutions.

Hearing: 17, 18 and 19 November 2014
Judgment: 21 November 2014
Reasons for Judgment: 27 May 2015

REASONS FOR JUDGMENT
(CNB ROBBERY)

Sir John Chadwick, President:

1. On 8 May 2013, following a lengthy trial before Justice Henderson and a jury, David Tamasa, Rennie Cole, George Mignott, Andre Burton and Ryan Edwards were convicted of offences of robbery, contrary to section 242(1) of the Penal Code, and possession of an unlicenced firearm with intent to commit an offence, contrary to section 18 of the Firearms Law (2008 Revision). The robbery of which they were convicted took place on 28 June 2012 at the branch premises of Cayman National Bank ("CNB") at Buckingham Square, which is between West Bay Road and Esterley Tibbetts Highway. On 29 October 2013, following a further trial of Tamasa, Burton, Mignott and Edwards for offences of robbery at the premises of West Star Television Company off Eastern Avenue, George Town (at the conclusion of which Tamasa, Burton and Edwards were convicted and Mignott was acquitted) they were sentenced to substantial sentences of imprisonment.

2. Tamasa, Cole, Mignott, Burton and Edwards appealed to this Court against their convictions in respect of the CNB robbery. Tamasa and Burton appealed against their convictions in respect of the West Star robbery; Edwards sought leave to appeal out of time. Those appeals (and the application for leave to appeal out of time) came before the Court in November 2014. At the conclusion of the oral hearings in both sets of appeals, we stated that we would allow the appeals of Tamasa, Cole, Mignott and Burton in respect of the CNB robbery; but that we would dismiss the appeal of Edwards. We further stated that we would allow the

appeal of Tamasa in respect of the West Star robbery; but that we would dismiss the appeal of Burton and the application for leave to appeal out of time made by Edwards. We stated that we would put our reasons in writing and hand them down as soon as convenient. But, in the context of addressing applications by the Crown for orders for re-trials, both in respect of those whose convictions in respect of the CNB robbery were set aside and in respect of the acquittal of Tamasa in respect of the West Star robbery, we thought it appropriate to explain, briefly, the reasons why we had reached the conclusion that the appeals of certain appellants should be allowed and that the appeals of other appellants should be dismissed.

3. In relation to the appeals in respect of the CNB robbery, we said this (so far as material):

> "2. Section 9(1) of the Court of Appeal Law (2011 Revision) requires that. subject to section 12 (which is not in point in this case), the Court shall allow an appeal against conviction if it thinks:
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> > ". . . (c) that there was a material irregularity in the course of the trial".
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> In the present case there is no doubt that there was an irregularity in the course of the trial.
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> 3. Section 149(2) of the Police Law 2010 requires that, where that subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself and, in the case of proceedings on indictment with a jury, in the presence of the jury, that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that if he chooses not to give evidence it will be permissible for the jury to draw such inferences as appear proper from his failure to give evidence. The section does not apply if at the conclusion of the evidence for the prosecution, the accused's attorney informs the court that the accused will give evidence. That was not the position in the present case. At the conclusion of the prosecution evidence, the advocates representing each defendant informed the judge that their client would not be giving evidence. So the law required the judge to satisfy himself in the presence of the jury that each defendant was aware that if he chose not to give evidence it would be permissible for the jury to draw such inferences as might appear proper from his failure to do so.
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> 4. In the present case the judge did not satisfy himself in the presence of the jury – or, so far as appears from the transcript, at all - that each

defendant or any of them was aware that if he did not give evidence, inferences might be drawn from his failure to do so. That, as I have said, was plainly an irregularity: it became a material irregularity, because in the course of his summing up to the jury, the judge directed the jury that the defendants' silence at trial might count against them. He said this (transcript, 11 April 2013. page 121 line 22 to page 123 line 9):

> "Ladies and gentlemen, everyone has a legal right to remain silent in the face of police questioning. There are only limited circumstances in which you can make use of that kind of silence to draw an inference against a defendant. Those circumstances have not arisen in this case with regard to any defendant; therefore, I instruct you as a matter of law that you must disregard all of the evidence and all of the admissions of fact which touch upon the subject of questions asked by the police which the defendant in question failed to answer or declined to answer. The defendants have not given evidence. That is their right. Each of them is entitled to remain silent and to require the prosecution to make you sure of his guilt. The burden of proving guilt remains on the Crown. You must not assume a defendant is guilty because he has not given evidence. But two matters arise from their silence. In the first place you try this case according to the evidence and you will appreciate that the defendants have not given evidence at this trial to undermine, contradict or explain the evidence put before you by the prosecution. However, some defendants did answer questions in interview and they now seek to rely on those answers and are entitled to do that.
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> In the second place, their silence at trial may count against them. This is because you may draw the conclusion that a defendant has not given evidence because he has no answer to the prosecution's case or none that would bear examination. If you do draw that conclusion, you must not convict him wholly or mainly on the strength of it but you may treat it as some additional support for the prosecution's case. You must consider this question separately with respect to each defendant. You may draw such conclusion against a defendant only if you think it is a fair and proper conclusion and only if you are satisfied about two things: first, that the prosecution's case is so strong that it clearly calls for an answer by that defendant and secondly, that the only sensible explanation for his silence is that the defendant has no answer or none that would bear determination".

5. A direction in those terms compounded the failure to warn under section 149(2) of the Police Law. A direction to the jury that they could draw inferences from silence exacerbated the very danger of which section 149(2) was intended to ensure that the defendants were aware when they decided to remain silent. Mr. Dennison QC - who appears for the Director of Public Prosecutions on this appeal but who did not appear at the trial - accepts (correctly, in our view) that the judge's failure to observe the

requirement in section 149(2) of the Police Law, taken with the judge's direction to the jury, that they could draw inferences from silence, constituted a material irregularity at this trial. Put shortly, it rendered the trial unfair.

6. In those circumstances, section 9(1) of the Court of Appeal Law requires the Court to allow these appeals unless it is satisfied that the circumstances fall within the proviso to that section. The proviso is in these terms:

> 'Provided that the Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if the Court considers that no substantial miscarriage of justice has actually occurred."

As the Judicial Committee of the Privy Council pointed out in *Barlow v The Queen* (*New Zealand* [2009] UKPC, the correct approach to the proviso is for the appellate court itself to decide whether a substantial miscarriage of justice has actually occurred. Only if satisfied on a review of the evidence as a whole that no miscarriage of justice occurred - that is to say, that the guilty verdict was the only reasonably possible verdict - should the appellate court apply the proviso and dismiss the appeal notwithstanding the material irregularity that has occurred.

7. Adopting that approach, the Court - for reasons which it will set out in its written judgment - is not satisfied that, in relation to the defendants Tamasa, Cole, Mignott and Burton, no miscarriage of justice occurred in this case: that is to say, the Court is not satisfied that, in respect of those defendants, the only reasonably possible verdict was a verdict of guilty. Accordingly, it is not satisfied that notwithstanding the material irregularity, the guilty verdicts should nevertheless be upheld in respect of those defendants. It takes a different view in respect of the defendant Edwards and in his case the Court will apply the proviso and will dismiss his appeal."

4. In those circumstances the Court invited representations on the question whether, pursuant to section 9(2) of the Court of Appeal Law, it should order a new trial; rather that disposing of the appeal by quashing the conviction and directing that a judgment and verdict of an acquittal be entered. After hearing representations on behalf of the Crown and on behalf of the successful appellants, the Court took the view that it was appropriate to order a new trial; and it did so.

5. That further trial took place in January of this year. The defendants were convicted. We are informed that notices of appeal have been filed in this Court; and that appeals from those convictions will be listed for hearing before the Court

later in the year. In those circumstances it is undesirable that we say more than strictly necessary as to the reasons which led us to the conclusion, in November 2014, that we could not be satisfied that, in respect of Tamasa, Cole, Mignott and Burton, the only reasonably possible verdict was a verdict of guilty.

6. With that need for caution in mind, it is, we think, both necessary and sufficient to say that the case against those defendants at their first trial, in April/May 2013 was heavily dependent upon the evidence of an accomplice, Marlon Dillon, who, in August 2012, had pleaded guilty to the CNB robbery. Although there was some circumstantial evidence – in particular, evidence of the movements of the defendants (or, more precisely, the movements of their cell phones) on the day of the robbery – which could be said to support Dillon's evidence, the Crown accepted, realistically in our view, that, if the jury did not believe Dillon, they could not properly convict. The judge directed the jury in those terms. Dillon had given a number of pre-trial statements (including statements in police interviews) which were inconsistent with the evidence that he gave at the trial; and the defence relied on those inconsistencies to submit that he was not a witness whose evidence at trial could be believed. In the event, the jury must have taken the view that they could accept the evidence of Dillon; for that must be taken to be the basis upon which they returned verdicts of guilty. But this Court found it impossible to be confident that, in reaching that view, they did not take account – as the judge had told them they could – of the failure of the defendants to give evidence in their own defence; and impossible to be confident that, had the jury not taken that factor into account (if they did), their verdicts would, necessarily, have been the same. The jury might have drawn an inference from the failure of Tamasa, Cole, Mignott or Burton to give evidence at trial which tipped the balance against them.

7. The Court did not take the same view in relation to Edwards. But, in his case, there was a further factor which the Court took into consideration. Edwards was found to be in possession of money stolen from the CNB Buckingham Square branch in the course of the robbery. The circumstances in which he came to be in

possession of that money called out for an explanation; and the failure of Edwards to give an explanation at the trial was a matter which would have been in the minds of the jury whether or not the judge had given them the direction that he did.

8. Further, in an interview with officers of the RICPS on 21 May 2013 - shortly after the CNB trial - Edwards confessed to having taken part in the CNB robbery: (Taped Interview Transcription, pages 9 and 10. That interview had been held at Edwards request because "I am changing around my life and I just want to confess for all of the wrong that I did": *(ibid*, page 3). In those circumstances this Court was satisfied that, notwithstanding the judge's failure to give the defendants the warning under section 149(2) of the Police Law which they should have been given and his subsequent direction to the jury as to the adverse inferences which they could draw from a defendant's failure to give evidence, no substantial miscarriage of justice actually occurred in this case in respect of Edwards. It would, we think, be an affront to public confidence in the administration of justice if a defendant, who had acknowledged that he was guilty of the crime of which he was convicted and was found in possession of part of the proceeds of the crime shortly after it occurred were to be acquitted on appeal by reason of a procedural mistake by the trial judge.

Chadwick P

Mottley JA

Rix JA