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 RIGHT 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.

Transcript of oral judgment 21 November 2014
Approved and released 12 January 2015

RULING
ON APPLICATION FOR A RETRIAL
(CNB ROBBERY)

Sir John Chadwick, President:

1. For reasons which we will put in writing and hand down as soon as convenient, we allow the appeals of David Tamasa, Rennie Cole, George Mignott and Andre Burton relating to the CNB robbery. We dismiss the appeal of Ryan Edwards against conviction in that matter. Although, as I have said, our decision is based on reasons which are to be put in writing and handed down, it is appropriate that I should state briefly why we have reached the conclusion that the appeals of four of the appellants should be allowed and that the appeal of the remaining appellant should be dismissed.

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 ". . . (c) that there was a material irregularity in the course of the trial". In the present case there is no doubt that there was an irregularity in the course of the trial.

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.

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.

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 129(2) of the Police Law. A direction to the jury that they could draw inferences from silence exacerbated the very danger of which section 129(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 129(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(1A) 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 section 9(1). 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.

8. I should refer, then, to section 9(2) of the Court of Appeal Law which is in these terms:

> "Subject to this law the Court shall, if it allows an appeal against conviction, quash the conviction and direct that a judgment and verdict of acquittal be entered or, if the interests of justice so require, may order a new trial in accordance with such directions as the Court may give".

In the light of that section, the Court invites representations as to whether it should order a new trial; and should not dispose of the appeal by quashing the conviction and directing that a judgment and verdict of an acquittal be entered.

9. I should also add this. It will be apparent from the brief observations that I have made that this is a material irregularity which should not have occurred. It would not have occurred if the judge had reminded himself of his duty under section 149(2) of the Police Law. It is to be expected that it would not have occurred if counsel (whether for the prosecution or for the defence) had reminded the judge of his duty under that section. And it is to be expected that it would not have occurred - in the sense that what was an irregularity would not have become a material irregularity - if counsel had pointed out to the judge that, having failed to comply with the requirement in section 149(2), he should not direct the jury that

they should or might draw adverse inferences against the defendants because the defendants had chosen to exercise their right to be silent.

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10. The Crown seeks an order for a retrial in relation to the four appellants whose appeals have been allowed in CNB. We are satisfied that the interests of justice do require an order for a retrial in this case. We have been reminded of the observations of this Court in *The Queen v Cousins* [2011] 1 CILR 1 (note) - a decision of this Court given on 29 November 2010 - in which the observations of Lord Diplock in *The Queen v Reid* [1980] AC 343, were summarised and applied. This is a serious offence. It is in the interests of the public and in the administration of justice that there is a regular trial of those who are accused. The reasons why the appeals were allowed were that mistakes had been made in the course of the trial process; not on the basis of any defects in evidence identified by this Court.

11. We do think it important that a re-trial should take place as soon as it can be accommodated by the Grand Court - and we think it appropriate to give effect to that view by ordering that a re-trial is listed for the earliest date available and, if possible, within the first two months of 2015 - so as to minimise the length of time between the commission of the offence and the re-trial and to minimise any further time that these defendants may be spent in prison if bail is not granted until these matters are brought to a conclusion.

12. We should add that questions of bail are not for us. Whether or not bail should be granted is a matter for determination on an application to the Grand Court if any defendant seeks bail. Nothing we have said is to be taken as any indication of our views on that question.

Chadwick P
Mottley JA
Rix JA