[2013] CCJ 11 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No CR 001 of 2013
BB Criminal Appeal No. 8 of 2009

BETWEEN

DA COSTA HANDEL MARSHALL **APPLICANT**

AND

THE QUEEN **RESPONDENT**

Before The Honourables **Mr Justice R Nelson**
Mr Justice A Saunders
Mr Justice J Wit
Mr Justice D Hayton
Mr. Justice W Anderson

Appearances

Mr Marlon Markland Gordon and Ms Safiya Akilah Moore for the Applicant

Mrs Donna Babb-Agard Q C, Deputy Director of Public Prosecutions, for the Respondent

JUDGMENT`
of
Justices Nelson, Saunders, Wit, Hayton and Anderson
Delivered by
The Honourable Mr Justice Nelson
on the 22nd day of October 2013

[1] On February 16, 2003, the police came upon the Applicant Marshall and his confederate Davidson Jones in a boat with a broken engine some eight nautical miles south west of

Carlisle Bay in Barbados waters. The police found the Applicant sitting on some bales of marijuana in the boat. The Applicant was tried and convicted. His appeal from that conviction was dismissed in the Court of Appeal.

[2] We have anxiously considered the application before us dated March 28, 2013 for special leave to appeal against the order of the Court of Appeal of Barbados affirming the conviction of the Applicant for three offences – importation, possession and trafficking in relation to 346.6 kilograms of a controlled drug, cannabis, contrary to the Drug Abuse (Prevention and Control) Act, Cap 131 ("the Act") and leave to appeal as a poor person.

[3] The proposed grounds of appeal are:

(1) that mere knowledge of the possession of controlled drugs in the hands of a confederate was not enough to fix the Applicant with possession of those drugs because he was present;

(2) the opening remarks of the prosecutor, the Deputy Director, were prejudicial to the extent that they deprived the Applicant of a fair trial.

[4] The relevant law with regard to an application for special leave to appeal in a criminal case is to be found in *Cadogan v The Queen* [2006] CCJ 4 (AJ); where Hayton J. laid down the principles applicable to an application of this kind. He said there:

> *"The grant of special leave is … a matter of discretion. However, if there is a realistic possibility of a miscarriage of justice if leave is not given for a full hearing, then leave will be given. Counsel thus needs to raise an arguable case for this, highlighting points in his Notice of Application or in his skeleton argument, but not spending time on … lengthy examination of many cases."*

[5] We deal first with the second ground that the "opening remarks" of the prosecutor "*that the accused was caught red-handed*" prejudiced the trial and rendered it unfair. We accept the submission of the Deputy Director, that the opening remarks were well within the normal standards of prosecutorial ethics and were simply an indication of the type of case that the prosecutor intended to prove. She referred to a passage from Fundamentals of Trial Techniques by Mauet, Caswell and Macdonald (2nd Edn.) which encapsulates the

classic statements about opening remarks: "*The opening statement is the lawyer's opportunity to tell the jury what he expects the evidence will be during the trial; this helps the jury to understand the evidence when it is actually presented*." We adopt that statement of the law. In this case, the Deputy Director did not overstep the limit, in the sense that she maintained scrupulously her position as a Minister of Justice. In our view it is not arguable that the words 'red-handed' went beyond the limits, so we reject that ground.

[6] The first ground, if one could translate it, criticizes the alleged acceptance by both courts below of a principle of law that anyone who is knowingly in the presence of prohibited or controlled drugs, is in possession of such illicit drugs. It seems to us that the learned judge was at pains throughout her summing-up to present carefully the Applicant's defence. For example, Kentish J. said that:

> *"... you should not find from the mere fact that the accused Marshall was on board that fishing vessel at the time that it was loaded out at sea with those bales of vegetable matter... that he was in possession of cannabis."*

[7] Later on she warned the jury "*I must warn you, as prosecuting counsel did, that you cannot find the accused Marshall guilty by association ... and that because Davidson Jones has pleaded guilty to these charges the fact that accused Marshall was on that boat with Davidson Jones automatically means the accused Marshall was also guilty of the charges now before you.*"

[8] What transpired in the case was that the prosecutor put the case through two police witnesses who presented orals or verbals – verbal statements which, according to the witnesses, the accused made when he was taxed with the incriminating situation or facts that confronted him. While there was some objection to these verbals, the learned judge admitted them into evidence and put them before the jury. The Applicant said that Jones had wanted him to go with him to St. Vincent on his boat to collect "weed." Jones would pay him but he hoped to steal some of the "weed" to make money for himself. They picked up the "weed" in St. Vincent but on the way back the boat broke down. On the other hand, the defence put their case through the other occupant of the boat, Davidson Jones. He sought to say that possession of the controlled drug was solely his and not that of the Applicant. The defence case was also that Marshall thought he was going fishing,

and knew nothing about the bales of marijuana. He was a victim of deception. Ultimately, the issue that was before the jury was whether the Applicant or someone else was in possession of the bales of marijuana found on the boat. This was against the background that although Jones and the Applicant were originally jointly charged, after Jones had been convicted on the joint indictment, a fresh indictment was preferred against the Applicant Marshall.

[9] On the fresh indictment, the Applicant alone was being charged for importation, possession and trafficking of a controlled drug, the quantity being some 346.6 kilograms of cannabis. Thus the jury had to decide whether the Applicant was in possession of the controlled drugs. The fact that he might have been in joint or sole possession of the marijuana was neither here nor there because on the new indictment all that was necessary for the jury to find was that he was in possession as charged without the need to specify whether he was in joint possession or in sole possession. They believed that he was in possession. From that finding, it could be inferred that the jury rejected the defence case in rebuttal of the presumption of possession arising out of s. 42(1)(b) of the Act. We think that the first ground must share the fate of the second ground in that it does not have any real prospect of success and we do not see therefore that there is any possibility of a miscarriage of justice. In those circumstances, we would dismiss the applications for special leave.

The Hon Mr Justice Nelson

The Hon Mr Justice Saunders

The Hon Mr Justice Wit

The Hon Mr Justice Hayton

The Hon Mr Justice Anderson