[2010] UKPC 20
Privy Council Appeal No 0094 of 2009

JUDGMENT

Andrew Ryan Ferrell (Appellant) *v* The Queen (Respondent)

From the Court of Appeal of Gibraltar

before

Lord Rodger
Lady Hale
Lord Clarke
Sir Christopher Rose
Sir Robin Auld

JUDGMENT DELIVERED BY

LORD CLARKE

ON

29 July 2010

Heard on 18 May 2010

Appellant	*Respondent*
Charles Salter Ishbel Armstrong	Robert Rhoda QC Kevin Colombo
(Instructed by Blake Lapthorn)	(Instructed by Barlow Lyde & Gilbert LLP)

LORD CLARKE:

Introduction

1. This is an appeal from an order of the Court of Appeal in Gibraltar (Sir Murray Stuart Smith P, Sir Philip Otton and Sir Paul Kennedy JJA) made on 16 September 2009 dismissing the appellant's appeal against conviction on 26 May 2009 on counts 1 to 4 and 7 to 15 of an indictment, after a trial before Pitto J and a jury. The judgment of the Court of Appeal was given by Sir Paul Kennedy. Leave to appeal to the Privy Council was given by Dudley J, acting Chief Justice, on 13 October 2009.

2. The appellant was convicted of two counts of possession of a controlled drug (counts 1 and 3), two counts of possession of a controlled drug with intent to supply (counts 2 and 4), and nine counts of concealing or transferring the proceeds of drug trafficking (counts 7 to 15). The controlled drug was cocaine. The appellant was sentenced to five years' imprisonment on each of counts 1 to 4, which were to be served concurrently but consecutively to 18 months' imprisonment on each of counts 7 to 15 to be served concurrently. He was thus sentenced to a total of six years' and six months' imprisonment.

The facts

3. The facts were correctly summarised by the Court of Appeal and were shortly as follows. Between 30 May and 6 June 2008 police officers, in the later stages with the aid of a camera, observed the appellant on a number of occasions when he visited a relatively remote area of the Rock of Gibraltar. On Friday 6 June, the police decided to search him when he arrived by car at Maida Vale, which is on the approaches to the Upper Rock Nature Reserve. Nothing was found on him but dogs led the police to search the area of the driver's seat of his car where they found drugs and £170 in cash. Nearby in an earth wall, where the appellant had been seen to go on previous occasions, there was found a cache of drugs in half gram deals which could be scientifically matched with the drugs in the car. Counts 1 and 2 related to the 4.68 grams of cocaine found under the driver's seat and counts 3 and 4 to 9.71 grams of cocaine found in the earth wall. Counts 5 and 6, of which the appellant was acquitted, related to a small quantity of ecstasy also allegedly found in the earth wall.

4. Enquiries then revealed that since his arrival in Gibraltar in 2000 the appellant had only worked on eighteen days, and had not been in registered employment since November 2003, but he had a bank account with the NatWest Bank into which he had

made frequent payments. Between December 2005 and 27 May 2008 he deposited a total of £69,835, always in cash in amounts of under £1,000. The prosecution case was that that was to avoid the need for the bank to report an unusually large deposit. The appellant had also had a total of seven vehicles registered in his name. Counts 7 - 15 were specimen counts relating to deposits of cash on various dates between 15 August 2006 and 27 May 2008. In evidence at the trial the appellant claimed that he earned the cash by working as a doorman and by smuggling tobacco into Spain.

5. It is convenient to refer to counts 1 to 4 as the 'drugs counts' and to counts 7 to 15 as the 'money laundering counts'. Counts 1 and 3 alleged possession of cocaine contrary to section 7(1) and (2) of the Drugs (Misuse) Act 1973 ('the 1973 Act') and counts 2 and 4 alleged possession of cocaine with intent to supply contrary to section 6(1) and 7(3) of the 1973 Act. Counts 7 to 15 alleged concealing or transferring proceeds of drug trafficking contrary to section 54(1)(a) of the Drug Trafficking Offences Act 1995.

The issues

6. There were a number of issues before the Court of Appeal, which rejected all the grounds of appeal advanced before it. In this appeal three issues are raised on behalf of the appellant. They are (1) whether counts 7 to 15 were properly joined with counts 1 to 4; (2) if not, what are the legal consequences of the appellant having been tried and convicted on the two sets of counts; and (3) if the two sets of counts were properly joined, whether the convictions on counts 7 to 15 are safe.

Joinder

7. Mr Salter submitted on behalf of the appellant that the money laundering counts should not have been joined and thus tried together with the drugs' counts. It is common ground that the principles relevant to joinder in Gibraltar are the same as in England and Wales: see sections 4 and 138-142 of the Criminal Procedure Act 1961. Rule 9 of the Indictment Rules 1961 provides:

> "Charges for any offences may be joined in the same indictment if those charges are founded on the same facts or form or are part of a series of offences of the same or a similar character."

At first instance Pitto J held that the two sets of charges arose out of the same facts. However, it was accepted by the Attorney General, both in the Court of Appeal and before the Board, that he was wrong so to hold. The issue both before the Court of Appeal and before the Board is whether the two sets of offences 'form or are part of a

series of offences of' a 'similar character'. The Court of Appeal held that they are. The question is whether it was correct to do so.

8. The Court of Appeal referred to the decision of the English Court of Appeal Criminal Division in *Kray* (1969) 53 Crim App R 569 and to that of the House of Lords in *Ludlow v Metropolitan Police Commissioner* [1971] AC 29. It then summarised the relevant principles as set out in the 2009 edition of *Archbold*. The principles are now set out in the 2010 edition, which includes the following at para 1-158:

> "The fact that evidence in relation to one count was not admissible in relation to another count under the old 'similar fact' principle did not necessarily mean that those counts could not properly be joined pursuant to this limb of the rule: see … Kray … and Ludlow …
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> ... a sufficient nexus must nevertheless exist between the relevant offences; such a nexus is clearly established if evidence of one offence would be admissible on the trial of the other, but the rule is not confined to such cases; all that is necessary to satisfy the rule is that the offences should exhibit such similar features as to establish a prima facie case that they can properly and conveniently be tried together in the interests of justice, which include, in addition to the interests of the defendants, those of the Crown, witnesses and the public;
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> …
>
> it is not desirable that the rule should be given an unduly restricted meaning, since any risk of injustice can be avoided by the exercise of the judge's discretion to sever the indictment …
>
> both the law and the facts should be taken into account when deciding whether offences are similar or dissimilar in character."

9. Like the Court of Appeal, the Board was referred to a number of other cases including *Clayton-Wright* (1948) 33 Cr App R 22, *Harward* (1981) 73 Cr App R 168, *Marsh* (1985) 83 Cr App R 165 and *Williams* [1993] Crim LR 533, but, again like the Court of Appeal, it has formed the view that they are simply examples of the application of the principles expounded in *Kray* and *Ludlow*. The same is true of *Anwoir* [2008] 2 Cr App R 36. The question is whether, in the circumstances of this

case there is a sufficient nexus between the offences charged in the money laundering counts and in the drugs counts.

10. The Court of Appeal accepted the submission made by the Attorney General that there was both a legal and factual nexus between them. Counts 1 to 4, and especially counts 2 and 4, which alleged possession of cocaine with intent to supply, all dealt with the supply of drugs. The drugs would of course have been sold for money, which would then require to be banked and, in all likelihood, laundered. The Attorney General correctly accepted that the prosecution had to show, in the case of each of the money laundering counts 7 to 15 that some at least of the money derived from drug dealing. He submitted, however, that on the facts set out above, it was open to the jury to infer that the money was indeed the proceeds of drug dealing. He accepted of course that all the money laundering counts related to transactions that pre-dated the possession of the drugs in the drugs counts but submitted that, in the absence of a credible explanation to the contrary, it was open to the jury to infer that the appellant had had a system of selling drugs and laundering the money over an extended period.

11. The Court of Appeal accepted that submission and so does the Board. Mr Salter correctly accepted that the evidence relating to the money was evidence that the appellant was laundering money for some illegal or improper purpose. He could not do otherwise. The appellant had no apparently legal means of accumulating significant amounts of cash. Yet he had deposited nearly £70,000 and moreover did so in individual amounts of under £1,000. A jury would be very likely to infer that in doing so he was laundering ill-gotten gains. It would be entitled to do so.

12. The only question is whether a jury was entitled to infer that it was drugs money. In the opinion of the Board, the answer to that question, at any rate in the absence of a credible explanation to the contrary, is yes. The only suggestion made by or on behalf of the appellant was that the cash came from working as a doorman and from smuggling tobacco into Spain. There was however no support for the evidence that it came from tobacco smuggling. On the other hand, there is evidence that the appellant was a drug dealer, albeit at a later time than he was laundering the money. It was open to the jury to reject his explanation and to conclude that there was no reasonable doubt that the money came from earlier dealing in drugs.

13. It was submitted both to the Court of Appeal and to the Board that the evidence on the drugs counts would not be admissible in evidence on the money laundering counts. The Court of Appeal rejected that submission and so does the Board, essentially for the reasons set out above. The evidence of later drug dealing is evidence probative of the allegation that the appellant was laundering drugs money. It is relevant in this connection to note that the last example of alleged money laundering

was on 27 May, which was only three days before he was first observed by police and only ten days before his arrest on the drugs charges.

14. In short, the Board is satisfied that both sets of counts charged a series of offences of a similar character which could and should be tried together and that the first issue must be answered by holding that counts 7 to 15 were properly joined with counts 1 to 4. It follows that the second issue identified above does not arise because it would only have arisen if the counts had not been properly joined.

Are the verdicts on counts 7 to 15 safe?

15. The Board answers this question in the affirmative. The counts were properly joined for the reasons given above. Moreover, if an application had been made to sever the two sets of counts and to order separate trials, it would have failed. The court has power under section 5(3) of the Indictments Act 1915 to order separate trials if it is of the opinion that the accused may be prejudiced or embarrassed in his defence by being charged with more than one offence in the same indictment or that for any other reason it is desirable to direct separate trial of separate counts. The Board can see no proper basis for the exercise of that power in the circumstances of this case. The just course was for the jury to consider all the counts together.

16. The appellant gave evidence to the effect already stated, namely that the cash came from working as a bouncer and from tobacco smuggling. It was a matter for the jury whether they believed that evidence or not. It is plain from their verdicts that they did not. It was open to them to reach the verdicts which they did. The Board can see no reason for concluding that the verdicts were unsafe.

Conclusion

17. It follows that the Board will humbly advise Her Majesty that the appeal should be dismissed.