R. v. CHICHON, GADUZO and COOPER

SUPREME COURT (Kneller, C.J.): May 31st, 1995

Evidence—co-accused—incrimination of co-accused—statement implicating co-accused admissible against maker only—trial judge to consider whether prejudice to co-accused outweighs probative value against maker, especially whether (a) warning to jury suffices to ensure co-accused's fair trial; (b) exclusion unfair to prosecution case against maker; (c) editing will substantially reduce prejudice to co-accused; and (d) separate trials justified by circumstances of offence

The first accused was charged with importing and possessing with intent to supply cannabis and with simple possession. The second and third accused were charged respectively with counselling and procuring the first accused to possess and supply the drug, and possession of it.

The accused were caught by police attempting to retrieve from the sea a large quantity of cannabis which, it was alleged, the first and third accused had tried to import two days earlier. When questioned separately by the police, the second and third accused denied involvement and did not mention the first accused. The latter, however, implicated them both in the operation in his answers to police questioning and in a statement saying that, as a crew member on a speedboat, he had been hired by the second accused to import the cannabis, and had travelled to Morocco with the third accused for that purpose.

The second and third accused applied for the first accused's answers and statement to be excluded from evidence at their joint trial, or edited to omit references to them. Alternatively, they sought an order that he should be tried separately from them.

They submitted that (a) since the first accused's answers and statement were made in their absence and they had not adopted the substance of his story, that evidence was hearsay and inadmissible against them in court; (b) however, the evidence was still admissible as part of the prosecution case against the first accused, and could be presented provided the trial judge gave a warning to the jury that it did not constitute evidence against them; and (c) since the prejudicial effect which this would have would outweigh its probative value against the first accused, the evidence should be excluded altogether, edited to remove all references to their alleged role in the offences, or used only in the context of a trial of the first accused alone.

The Crown submitted in reply that (a) since the record of the first accused's interview and statement to the police formed a substantial part of the evidence against him, it would do injustice to the prosecution to

exclude it from evidence on the basis that it was prejudicial to the other accused; (b) whilst it did not constitute evidence against them, their interests could be protected by the judge's direction to the jury that it was of probative value only in the case against the first accused; (c) editing the statement would prove unsatisfactory to both sides, depending on the extent of omission, resulting in a nonsensical account of events or thinly veiled references to the other accused as accomplices; and (d) nor should the first accused be tried separately in circumstances such as these where the offences were so closely related that the interests of justice were best served by their being tried together, to ensure parity of treatment.

Held, ruling on the admissibility of evidence of the first accused's interview and statement:

(1) Since the first accused had implicated himself and his co-accused in a statement under caution, and that account was not adopted by them, the statement was hearsay and inadmissible as against the others at a joint trial. Because it was, nevertheless, admissible as evidence of his own involvement in the alleged offence, the court had four alternative courses to ensure that all the defendants would receive a fair trial, namely: (a) to exclude the statement altogether from evidence (a rarely exercised option); (b) to edit out references to the names of the co-accused or their alleged involvement in the offences; (c) to admit the statement in its entirety, giving a warning to the jury not to regard its contents as evidence against anyone but its maker; or (d) to order that the first accused be tried separately (page 96, lines 19–34; page 96, line 41 – page 97, line 43).

(2) In the present case it would be unfair to the prosecution for the first accused's confession to be excluded for the benefit of his co-accused, since its probative value in terms of establishing his guilt outweighed the potential prejudice to the others. To try the first accused separately would be against the established practice of the court and inappropriate in a case such as this, in which the alleged offences were so obviously connected in time and space that the accused must be seen to receive comparable treatment under the law. Editing the co-accused's names from the answers and statement would not achieve a satisfactory result, since it would nevertheless be obvious to the jury whom the anonymous accomplices were. Accordingly, the interview and statement would be admitted and the jury would be instructed, in strong terms, that this evidence did not form part of the case against the second and third accused (page 98, line 22 – page 99, line 7).

Cases cited:

(1) *Lobban* v. *R.*, [1995] 1 W.L.R. 877; [1995] 2 All E.R. 602.
(2) *R.* v. *Assim*, [1966] 2 Q.B. 249; [1966] 2 All E.R. 881; (1966), 50 Cr. App. R. 224.
(3) *R.* v. *Buggy* (1961), 45 Cr. App. R. 298.
(4) *R.* v. *Gunewardene*, [1951] 2 K.B. 600; [1951] 2 All E.R. 290.

(5) *R.* v. *Grondowski*, [1946] K.B. 369; (1946), 31 Cr. App. R. 116.
(6) *R. v. Lake* (1978), 68 Cr. App. R. 172, *dicta* of Lord Widgery, C.J. applied.
(7) *R.* v. *Moghal* (1977), 65 Cr. App. R. 56; [1977] Crim. L.R. 373.
(8) *R.* v. *Pearce* (1979), 69 Cr. App. R. 365; [1979] Crim. L.R. 658.
(9) *R.* v. *Rhodes* (1959), 44 Cr. App. R. 23.
(10) *R.* v. *Rogers*, [1971] Crim. L.R. 413.
(11) *R.* v. *Rudd* (1948), 64 T.L.R. 240; 32 Cr. App. R. 138.
(12) *R.* v. *Sang*, [1980] A.C. 402; [1979] 2 All E.R. 1222.
(13) *R.* v. *Silcott*, [1987] Crim. L.R. 765, considered.
(14) *Scott* v. *R.*, [1989] A.C. 1242; [1989] 2 All E.R. 305; (1989), 89 Cr. App. R. 153.
(15) *Youth* v. *R.*, [1945] W.N. 27.

A. Trinidad, Crown Counsel, for the Crown;
M.P. McDonnell for the first accused;
G. Licudi for the second and third accused.

KNELLER, C.J.: Mr. Licudi, counsel for Arthur Gaduzo and Simon Cooper, submitted that Matthew Chichon's alleged answers to questions put to him by Det. Insp. Rodriguez in the Royal Gibraltar Police Force Drug Squad's office between 10.30 a.m. and 11.40 a.m. on September 24th, 1993 and his alleged statement to P.C. Moreno under caution on September 25th, 1993 between 7.40 p.m. and 9.00 p.m. at the Central Police Station should be excluded or edited by deleting his express or implied incriminating references to Gaduzo and Cooper, or that Chichon should have a separate trial from that of Gaduzo and Cooper.

Mr. McDonnell for Chichon presented Chichon's objections to the admissibility in any event of his answers and statement or, alternatively, Chichon's request that they should be edited so that references to Gaduzo and Cooper are erased. I have no note of Mr. McDonnell's response, if any, to Mr. Licudi's application for a separate trial for Chichon. Mr. Trinidad for the Crown opposed Mr. Licudi's application for the exclusion of Chichon's answers and statement, for their amendment or for a split trial.

The indictment charges the defendants as follows:

Chichon: Count 1—Importing a prohibited import; Count 2—Possession of a controlled drug; Count 3—Possession with intent to supply a controlled drug.

Gaduzo: Count 1—Counselling and procuring Chichon to possess and supply a controlled drug.

Cooper: Count 1—Possession of a controlled drug.

The prohibited import and the controlled drug in each count are one and the same. They are 300 kg. of cannabis resin. The alleged offences are said to have occurred at the end of September 1993 in Gibraltar. Gaduzo is alleged to have counselled and procured Chichon on

September 21st to commit the offence of possession of the drug with intent to supply it to another person or persons on September 24th. Cooper is said to have been in possession of the drug on September 23rd.

The case for the Crown, very briefly, is that Gaduzo arranged for 14 bales of cannabis to be collected from Morocco and delivered to Estepona by a speedboat from Gibraltar. Chichon was hired by Gaduzo to take part in a "drugs job" for Ptas. 1m. He was the coxswain of a local speedboat—a Black Phantom—in which he, Cooper and a Spaniard travelled to Morocco and collected the 14 bales of cannabis for Estepona. However, they were not landed because the coast was not clear. Cooper telephoned Gaduzo who ordered them to return to Gibraltar, which they did. Back in local waters Cooper again telephoned Gaduzo who told them to hide the bales, which they did by throwing them into the sea somewhere off the east coast of Gibraltar. The next night they went to where they thought the bales were hidden, but it was too dark to find them. Cooper made two dives on another occasion and when he found them he tied them to a rope running out to sea. Later, when they were being recovered, the police arrived and interrupted a group hauling them aboard a launch.

Gaduzo and Cooper do not mention Chichon in their answers to questions put by Det. Insp. Rodriguez. Chichon referred to them and the part he said they played in this operation. His answers incriminate Gaduzo and Cooper to a high degree. But as Chichon's answers and statement were made to the police in the absence of Gaduzo and Cooper, they are hearsay and, under the general rule of law, are not evidence against Gaduzo or Cooper. They are evidence against Chichon alone (see *R.* v. *Rudd* (11), *R.* v. *Gunewardene* (4) and *R.* v. *Rhodes* (9)).

The answers and statement of Chichon would be admissible in evidence against Gaduzo and Cooper if they had been made to the police or others in their presence and if they had admitted the parts that incriminated them so as to make them in effect their own. Gaduzo and Cooper in their answers to questions by the police have not adopted Chichon's answers and statement. They would also be admissible if repeated by Chichon in the witness-box in a joint trial (see *R.* v. *Rudd* (64 T.L.R. at 240)).

If Chichon's answers and statement had been made in the course and pursuance of a joint criminal enterprise to which Gaduzo and Cooper were parties they would be admissible because they would be direct evidence of the furthering of the crime. The answers and statement of Chichon were not made in the furtherance of the joint criminal enterprise. It was over and done with.

If Chichon's answers and his statement are admitted against him in a joint trial with Gaduzo and Cooper it involves inadmissible evidence being given before the jury and possible prejudice against Gaduzo and Cooper as a result, but the practice requires that the trial judge in such a case should warn the jury that Chichon's answers and statement count for

nothing in the cases of Gaduzo and Cooper (see *R.* v. *Gunewardene* (4) ([1951] 2 K.B. at 610) and *R.* v. *Lake* (6) (64 Cr. App. R. at 175)).

If Chichon's answers and statement to the police implicating Gaduzo and Cooper are so prejudicial to them that this outweighs their probative value in the case of Chichon—it must be remembered they have no such value in the cases of Gaduzo and Cooper—the court may exclude them in the exercise of its inherent jurisdiction to secure a fair trial for the defendant or defendants (see *Scott* v. *R.* (14) ([1989] A.C. at 1256) and *R.* v. *Sang* (12)).

So this court can take one of these four courses. First, it can exclude Chichon's answers and statements on the ground that to admit them would improperly prejudice Gaduzo and Cooper and outweigh the probative value against Chichon. He would welcome such a step (see *R.* v. *Rogers* (10)). The learned editors of 1 *Archbold's Criminal Pleading, Evidence & Practice*, 1995 ed., para. 4–297, at 562 describe this as a very unusual course to take, adding that "it does not seem to do justice as between the prosecution and the maker of the statement."

Secondly, it can, with the help of counsel, edit out the parts of Chichon's answers or statement that implicate Gaduzo and Cooper and are inadmissible against them. In *R.* v. *Silcott* (13), in which six defendants were jointly accused of riot, affray and the murder of P.C. Blakelock on October 6th, 1985 at the Broadwater Farm Estate, Tottenham, all references to 40 names, including co-defendants implicated by the defendants in contemporaneously recorded interviews which were confessions, were replaced by a single letter or double letters of the alphabet. Hodgson, J. explained ([1987] Crim. L.R. at 766) that otherwise "it would require mental gymnastics of Olympic standards for the jury to approach their task without prejudice. The prejudice could not be cured by a strong direction to the jury." The exclusion of the names might detract from the authenticity of the confessions but only fairly minimally. The references to names were not exculpatory of the six makers of the statements in the interviews. If they had been and the makers wished to rely on them, it would have been unfair to the makers of the statements to exclude the names (see also *R.* v. *Gunewardene* (4), *R.* v. *Pearce* (8) and *Lobban* v. *R.* (1)).

Thirdly, the court can let Chichon's answers and statement be read out to the jury (if that evidence is proved to be admissible against him) with a direction to the jury that it must be entirely disregarded when they consider the case against and for Gaduzo and Cooper because it is not evidence against them (see *R.* v. *Gunewardene* (4) and *R.* v. *Lake* (6)).

Fourthly, the court may order that Chichon be tried separately from Gaduzo and Cooper. Passages in the judgment of the Court of Appeal in *R.* v. *Lake* are very pertinent for this last course (see 68 Cr. App. R. at 175, *per* Lord Widgery, C.J.):

"The judge declined to order separate trials and we think that he was right. It has been accepted for a very long time in English practice that there are powerful public reasons why joint offences should be tried jointly. The importance is not merely one of saving time and money. It also affects the desirability that the same verdict and the same treatment shall be returned against all those concerned in the same offence. If joint offences were widely to be tried as separate offences, all sorts of inconsistencies might arise. Accordingly it is accepted practice, from which we certainly should not depart in this Court today, that a joint offence can properly be tried jointly, even though this will involve inadmissible evidence being given before the jury and the possible prejudice which may arise from that. Of course the practice requires that the trial judge in such a case should warn the jury that the evidence is not admissible [against a co-defendant] . . . .

However the question of severance is primarily one for the trial judge . . . . Of course if a case is strong enough, if the prejudice is dangerous enough, if the circumstances are particular enough, all rules of this kind must go in the interests of justice . . . ."

See also *Youth* v. *R.* (15), *R.* v. *Grondkowski* (5), *R.* v. *Buggy* (3), *R.* v. *Assim* (2) and *R.* v. *Moghal* (7).

It is essentially a matter for the discretion of the trial judge whether several alleged offenders should be tried together at the same time. If the matters which constitute the individual offences of the several offenders are, upon the available evidence, so related, whether in time or by other factors, that the interests of justice are best served by their being tried together, then they can properly be the subjects of several counts in one indictment and can, subject always to the discretion of the court, be tried together. This includes cases where there is evidence that several offenders acted in concert. It is not, however, limited to such cases (see *R.* v. *Assim*).

In my judgment, it would not be in the interests of justice to exclude at this stage Chichon's answers to questions put by the police and his statement after caution. It would be a very unusual course to take. It would not do justice to the prosecution and Chichon. The substitution of letters of the alphabet or the phrase "another person" for Gaduzo and Cooper would lead the jury along a trail of irresistible speculation and inexorably to Gaduzo and Cooper. Instead, Chichon's answers and statement (if not excluded on other grounds later) should be put before the jury with a clear direction or directions that they are admissible and relevant only to his case and are to be disregarded completely in the cases of Gaduzo and Cooper. It might be that counsel would find it easier to defend each defendant if Chichon were tried separately, and the interests of Gaduzo and Cooper would thereby be enhanced but, taking into account their interests and those of the prosecution, it is clear that in the

circumstances of alleged events which are so related, it would not be right to order separate trials.

Those are the reasons for the orders I made in the exercise of the discretion vested in this court that Chichon's answers and statement would not be excluded or edited but (if admissible) put before the jury with the proper direction and that there would not be an order for separate trials.

Orders accordingly.
