[2010–12 Gib LR 39]

FERRELL v. R.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Clarke of Stone-cum-Ebony, Sir Christopher Rose and Sir Robert Auld): July 29th, 2010

Criminal Procedure—charges—joinder—counts of drug dealing and laundering of drugs money properly joined as of "similar character" under Indictment Rules 1971, r.9—frequent small bank deposits shortly before discovery of drugs intended for supply allows inference that money laundered in course of ongoing drug dealing if no other credible explanation for source of money

The appellant was charged in the Supreme Court with drug dealing offences and laundering money obtained from dealing in drugs.

A cache of drugs was discovered in the appellant's possession. Prior to his arrest, the appellant had also made frequent deposits of under £1,000 into his bank account over a number of years, amounting to £69,835. The appellant was charged with Counts 1–4 ("the drugs counts") and Counts 7–15 ("the money laundering counts"). The last act of money laundering pre-dated the alleged acts of drug dealing by 10 days, the appellant had not been in registered employment since 2003, and he had seven vehicles registered in his name. In the Supreme Court (Pitto, J. and a jury), the appellant gave evidence that the money had come from working as a doorman and from smuggling tobacco into Spain. The jury disbelieved this account, inferred an ongoing course of drug dealing, and convicted him on the drug dealing and money laundering counts.

The Court of Appeal dismissed the appellant's appeal, holding that the charges had been properly joined and that the convictions were safe.

On further appeal, the appellant submitted that (a) the joinder of the drugs and money laundering counts was improper as they were not of a "similar character" by the Indictment Rules 1971, r.9; (b) the prosecution was required to prove that the laundered money had come from drug dealing and the jury had not been entitled to infer this; (c) if joinder were improper, the convictions were unsafe; and (d) if joinder were proper, the conviction on the money laundering counts was unsafe because the court should have exercised its power to separate the trial under the Indictments Act 1915, s.5(3).

The Crown submitted in reply that (a) the joinder of the drugs and money laundering counts was proper under r.9; (b) in the absence of

credible evidence to the contrary, the jury had been entitled to infer that the laundered money was the proceeds of ongoing drug dealing; (c) the question whether the convictions were safe in the absence of proper joinder did not arise; and (d) if joinder were proper, the conviction on the money laundering counts was safe because there had been no prejudice or embarrassment to the appellant's defence that justified separate trials under s.5(3) of the Act.

Held, dismissing the appeal:

(1) The joinder of Counts 1–4 ("the drugs counts") and Counts 7–15 ("the money laundering counts") had been proper. The factual and legal nexus between the counts made them of a "similar character" under the Indictment Rules 1971, r.9. The drugs counts concerned the supply of drugs, which involved receiving money and banking it, and gave rise to the likelihood of money laundering. The prosecution was required to establish that some of the money laundered on each count came from drug dealing. Although the money laundering deposits pre-dated the established drug dealing activities, the appellant could not offer any credible explanation of the source of the money and the jury was therefore entitled to infer that it had come from previous drug dealing over an extended period. Further, the evidence relating to the drugs counts was admissible on the money laundering counts as probative of the allegation that the appellant was laundering drugs money. The proximity in time between the last money laundering transaction and the appellant's observation and arrest by police on the drugs charges could be taken into account. The drugs counts and money laundering counts had therefore been properly joined and it was unnecessary to consider the consequences of improper joinder (paras. 11–15).

(2) The appellant had been properly convicted of money laundering. It had been desirable for the jury to consider the drugs and money laundering counts together for the reasons already given. Any application to sever the counts would have failed because there was no prejudice or embarrassment to justify ordering a separate trial under the Indictments Act 1915, s.5(3) (paras. 16–17).

Cases cited:

(1) *Ludlow* v. *Metropolitan Police Commr.*, [1971] A.C. 29; [1970] 2 W.L.R. 521; [1970] 1 All E.R. 567, considered.

(2) *R.* v. *Anwoir*, [2009] 1 W.L.R. 980; [2008] 4 All E.R. 582; [2008] 2 Cr. App. R. 36; [2008] EWCA Crim 1354, referred to.

(3) *R.* v. *Clayton-Wright*, [1948] 2 All E.R. 763; (1948), 33 Cr. App. R. 22, referred to.

(4) *R.* v. *Harward* (1981), 73 Cr. App. R. 168; [1981] Crim. L.R. 403, referred to.

(5) *R.* v. *Kray*, [1970] 1 Q.B. 125; [1969] 3 W.L.R. 831; [1969] 3 All E.R. 941; (1969), 53 Cr. App. R. 569, considered.

(6) *R.* v. *Marsh* (1986), 83 Cr. App. R. 165; [1986] Crim. L.R. 120, referred to.
(7) *R.* v. *Williams*, [1993] Crim. L.R. 533, referred to.

Legislation construed:
Indictments Act 1915 (5 & 6 Geo. V, c.90), s.5(3):
"Where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or Counts of such indictment."

Indictment Rules 1971 (S.I. 1971/1253), r.9: The relevant terms of this rule are set out at para. 7.

C. Salter and *Ms. I. Armstrong* for the appellant;
R.R. Rhoda, *Q.C.*, *Attorney-General*, and *K. Colombo*, *Crown Counsel*, for the Crown.

1 **LORD CLARKE OF STONE-CUM-EBONY,** delivering the opinion of the Board: This is an appeal from an order of the Court of Appeal in Gibraltar (Stuart-Smith, P., Otton and Kennedy, JJ.A.) made on September 16th, 2009, dismissing the appellant's appeal against conviction on May 26th, 2009 on Counts 1–4 and 7–15 of an indictment, after a trial before Pitto, J. and a jury. The judgment of the Court of Appeal was given by Kennedy, J.A. Leave to appeal to the Privy Council was given by Dudley, Ag. C.J., on October 13th, 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 7–15). The controlled drug was cocaine. The appellant was sentenced to five years' imprisonment on each of Counts 1–4, which were to be served concurrently but consecutively to 18 months' imprisonment on each of Counts 7–15 to be served concurrently. He was thus sentenced to a total of 6 years and 6 months' imprisonment.

The facts

3 The facts were correctly summarized by the Court of Appeal and were shortly as follows. Between May 30th and June 6th, 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, June 6th, 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 4.68g. of cocaine found under the driver's seat and Counts 3 and 4 to 9.71g. 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 18 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 May 27th, 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 August 15th, 2006 and May 27th, 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 1–4 as the "drugs counts," and to Counts 7–15 as the "money laundering counts." Counts 1 and 3 alleged possession of cocaine contrary to the Drugs (Misuse) Act 1973 ("the 1973 Act"), s.7(1) and (2), and Counts 2 and 4 alleged possession of cocaine with intent to supply contrary to the 1973 Act, ss. 6(1) and 7(3). Counts 7–15 alleged concealing or transferring proceeds of drug trafficking contrary to the Drug Trafficking Offences Act 1995, s.54(1)(a).

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 (a) whether Counts 7–15 were properly joined with Counts 1– 4; (b) if not, what the legal consequences are of the appellant having been tried and convicted on the two sets of counts; and (c) if the two sets of counts were properly joined, whether the convictions on Counts 7–15 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 the

Criminal Procedure Act 1961, ss. 4 and 138–142. The Indictment Rules 1971, r.9, 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."

8 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.

9 The Court of Appeal referred to the decision of the English Court of Appeal, Criminal Division, in *R.* v. *Kray* (5) and to that of the House of Lords in *Ludlow* v. *Metropolitan Police Commr.* (1). It then summarized the relevant principles as set out in the 2009 edition of Archbold, *Criminal Pleading, Evidence & Practice*. The principles are now set out in the 2010 edition, which includes the following (*op. cit.*, 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* . . . [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; . . . [I]t 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 . . . [B]oth the law and the facts should be taken into account when deciding whether offences are similar or dissimilar in character."

10 Like the Court of Appeal, the Board was referred to a number of other cases including *R.* v. *Clayton-Wright* (3); *R.* v. *Harward* (4); *R.* v. *Marsh* (6); and *R.* v. *Williams* (7), 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 *R.* v. *Anwoir* (2). 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.

11 The Court of Appeal accepted the submission made by the Attorney-General that there was both a legal and factual nexus between them. Counts 1–4, 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 (Counts 7–15), 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.

12 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.

13 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.

14 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 May 27th, 2008, which was only three days before he was first observed by police and only 10 days before his arrest on the drugs charges.

15 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 7–15 were properly joined with Counts 1–4. 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 7–15 safe?

16 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 the Indictments Act 1915, s.5(3) 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 trials 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.

17 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

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

Appeal dismissed.