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The Criminal Appeal Reports 1991

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tive that the standard of a strong or probable presumption of guilt be satisfied, that is a higher standard than the standard of a prima facie case. Mr. McCoy, who presented the case for the petitioner most attractively, submits here that it is the higher standard which must be satisfied to justify committing the fugitive under the Hong Kong Order and, since the magistrate indicated only that he was satisfied that a prima facie case had been made out, that was insufficient.

It is puzzling to find a section which prescribes two standards in the alternative, a lower and then a higher, for if the lower standard of proof is satisfied, one may ask rhetorically what purpose is served by providing, in the alternative, that a higher standard will also suffice to justify committal. The two phrases have a very long history in English legislation, but the solution to the problem as to how a section containing the two phrases in the alternative is to be construed is clearly provided by a passage in the speech of Lord Reid in the case of *Armah*, to which their Lordships have already referred, at pp. 225 to 226. Reviewing the history of these provisions, Lord Reid came to a provision in section 25 of the Indictable Offences Act, 1848, from which he quoted in the following terms:

> " ' . . . if, in the opinion of such justice or justices, such evidence is sufficient to put the accused party upon his trial for an indictable offence, or if the evidence given raises a strong or probable presumption of the guilt of such accused party,' then the justices are to commit him to prison."

Lord Reid continued:

> "In my view this section, though using different words, was clearly referring to the two different standards set out in the Act of 1826: in effect it provided that even if the evidence only came up to the lower standard set out in the Act of 1826 the accused should be committed to prison."

So whatever be the historical explanation for this apparently anomalous inclusion in a single section of the two standards of proof, the lower and the higher, that passage in Lord Reid's speech is, in their Lordships' opinion, clear authority establishing that it is sufficient to justify the committal to which the section relates that the lower standard of proof should be satisfied. For those reasons, their Lordships will humbly advise Her Majesty that this petition should be dismissed.

Petition dismissed.

Solicitors: Philip Conway, Thomas & Co., for the petitioners. Macfarlanes for the respondents.

JOHN JOSEPH O'BOYLE

COURT OF APPEAL (The Lord Chief Justice, Mr. Justice Rose and Mr. Justice Tucker): July 24, 30, 1990

Evidence—Confession Made by Defendant Ruled Inadmissible—Co-Conspirator Seeking Leave to Cross-Examine Defendant on it—Application for Separate Trials Rejected—Whether Judge's Discretion Properly Exercised.
Trial—Conduct of Judge—Defendant Threatened by Judge to Give Evidence—Whether Material Irregularity.

The appellant was charged with separate conspiracies on counts 1 and 2 of an indictment. A co-defendant, R, was charged only on count 2. At their trial a statement, said to be a confession, made by the appellant in the United States of America to D.E.A. officers was ruled inadmissible against him. Whereupon R sought to cross-examine the appellant on that statement. The appellant submitted that such cross-examination of him was irrelevant and thus should not be allowed; alternatively, if relevant, a separate trial should be ordered. The trial judge overruled both submissions. In consequence the appellant wished to give no further evidence on the ground that he was to be questioned on a confession that had been ruled inadmissible, and refused to re-enter the witness box. The trial judge ordered him to do so, stating that a refusal would result in leave being given to R's counsel to cross-examine him from the dock; that if he tried to leave the dock or remain below, then he would be compelled forcibly to return. The appellant re-entered the witness box against his will, was cross-examined by R's counsel about the D.E.A. confession, did not admit it, and officers from the D.E.A were recalled pursuant to section 4 of the Criminal Procedure Act 1865 and gave evidence at length about it. The judge directed the jury to disregard the statement in relation to the appellant; but consider it in relation to R. The appellant was convicted and appealed.

Held, that (1) although it was necessary to retain intact so far as possible the discretion of a trial judge; the instant case was wholly exceptional, if not unique. The judge had given insufficient weight to the fact that separate trials would do little, if any, harm to a co-defendant or prosecution, whereas a joint trial would almost guarantee the appellant's conviction whatever direction was given to the jury. Thus, the judge had wrongly exercised his discretion.

Dictum of Salmon, L.J. in *Flack* (1969) 53 Cr.App.R. 166, 171, [1969] 2 All E.R. 784, 788 applied. Dictum of Lord Goddard C.J. in *Grondkowski and Malinowski* (1946) 31 Cr.App.R. 116, 119, [1946] K.B. 369, 371, and of Devlin J. in *Miller* (1952) 36 Cr.App.R. 169, 175, [1952] 2 All E.R. 667, 670 considered.

(2) The judge could not threaten to have the appellant brought forcibly into court as he did. He could have taken steps to punish him for contempt; he could have continued the trial in his absence. The threat of force was improper; although force might sometimes be necessary to restrain violence or prevent apprehended danger. In the circumstances of the present case the threat had the effect of compelling the appellant to return to the witness box and eventually to bring into operation the provisions of section 4 of the Criminal Procedure Act 1865. Thus, the irregularity could not be described as other than material. Accordingly, as the case was not one for the application of the proviso to section 2(1) of the Criminal Appeal Act 1968, the appeal would be allowed and the conviction quashed.

[For joinder of two or more defendants in one count, see *Archbold*, 43rd ed., paras. 1–70; for separate trials, see, *ibid.*, para. 1–73. For discretionary matters, see, *ibid.*, paras. 7–39, 40. For no cross-examination upon inadmissible confession, see *ibid.*, para. 15–59.]

Appeal against conviction.

On November 25, 1988, at the Central Criminal Court (Judge Kenneth Richardson Q.C.) the appellant was convicted on count 1 of an indictment charging conspiracy to contravene section 170 of the Customs and Excise Management Act 1979 and section 3 of the Misuse of Drugs Act 1971, contrary to section 1(1) of the Criminal Law Act 1977, as substituted by section 5 of the Criminal Attempts Act 1981; and count 2 charging conspiracy to contravene section 4(3)(*a*) of the 1971 Act, contrary to section 1(1) of the 1977 Act, as so substituted.

He was sentenced to concurrent terms of 18 years' imprisonment.

The facts and grounds of appeal appear in the judgment.

The appeal was argued on July 24, 1990.

Stephen Solley Q.C. (not below) and *Laura Cox* (both assigned by the Registrar of Criminal Appeals) for the appellant.

Roy Amlot Q.C. and *Peter Grieves-Smith* for the Crown.

Cur. adv. vult.

July 30. **THE LORD CHIEF JUSTICE** read the judgment of the Court: On November 25, 1988, in the Central Criminal Court, this appellant, to whom we have now granted leave to appeal, was convicted after a 34 day trial of conspiracy to be knowingly concerned in the importation of cocaine on count 1, and conspiracy to supply cocaine on count 2. He was sentenced to 18 years' imprisonment on each count to run concurrently. On January 30, 1987, one David Wesley Medin was arrested as he travelled by taxi from Grays, Essex to London. He had in his possession a suitcase containing 36 kilos of almost pure cocaine worth about £10 million. It was not long before he admitted his part in a wide-ranging conspiracy to import large quantities of cocaine from South America to the United Kingdom and elsewhere in Europe. He named others who, according to him, were involved, one of them being the appellant. Medin was charged with conspiracy to import and also conspiracy to supply cocaine. On April 27, 1987, he pleaded guilty to both counts and was sentenced to nine years' imprisonment concurrent on each, later reduced on appeal to six years. He gave evidence at the trial of this appellant and indeed was the mainstay of the prosecution case.

The cocaine which he was carrying was part of a consignment which had been flown into Heathrow in December 1986, concealed in bulldozer push-arms which had been successfully cleared through Customs by the appellant.

The prosecution case was that the appellant, who had extensive contacts in South America, had organised the supply and packing and shipping. He had, admittedly, legitimate experience in dealing in heavy machinery. Medin's role was financial and administrative. Of the others involved, two require mention. McNeil who was to work on the European side. It was he who alerted the authorities and brought the conspiracy to an end. He was introduced by a man called Raftrey who, in his turn, had been recruited by Medin because of his connection with the European drug world.

McNeil was granted immunity from prosecution as an informant. Raftrey's defence was that he had been threatened by this appellant; that he feared for his life because of those threats and because of the appellant's connection with the Mafia. Such was the basis of the duress which he alleged. It was weakened by the fact that he had had some connection at least with the conspirators before any question of duress could have arisen.

The appellant's defence was that he knew nothing about the importation of cocaine. He had throughout been labouring under the misapprehension that what was being imported was computer chips. All his activities in South America, at Heathrow and later at Chesterfield, where the push-arms were dismantled and their contents taken out after arrival at Heathrow, were carried out in that belief.

Although the evidence of Medin was the foundation of the prosecution case, there were other matters which told against the appellant. For instance, Detective Chief Inspector McCarthy gave evidence, disputed by the appellant, of what, if believed, amounted to confessions of his involvement in the smuggling of cocaine. McCarthy gave evidence that these confessions were made by the appellant upon his arrest in Michigan, United States of America, on April 28, 1987. The prosecution further relied upon the signing by the appellant of the relevant Customs forms

relating to the push-arms and also the appellant's presence and actions at Chesterfield and thereafter in London.

In order to understand the basis of much of the appellant's case, it is necessary to describe certain events which took place in the United States of America during one of the appellant's visits there. His brother Tom O'Boyle was at the material time Chief of Police at Marysville, County Clare. Through him the appellant arranged in December 1986 a meeting with one Russillo of the U.S. Drugs Enforcement Agency (DEA). The appellant presented himself as an informant and described how during the course of business dealings in Bolivia he had stumbled across a conspiracy to import into the United States of America a tonne of cocaine. In February 1987, after Medin's arrest and disclosures to the police had become known, there was, according to Russillo, a further interview with the appellant at which another DEA officer as well as Russillo were present. On this occasion the appellant said that he had learnt earlier on that the supposed computer chip consignment into the United Kingdom was in fact cocaine; that he had thereafter taken part in organising the shipment from South America and its reception in England, adding that he was being threatened by the Bolivians. If Russillo and his fellow officer were to be believed, the appellant was in effect confessing that the prosecution case was true.

Before arraignment counsel for the appellant applied for him to be tried separately from Raftrey. The basis of the application was that it was hoped to limit the evidence which Medin was likely to give to the effect that the appellant was linked in some way with the Mafia, since the link was essentially hearsay. It was pointed out that since the appellant alone was charged on count 1, it meant that he would be prejudiced on that count by Raftrey's presence as a co-defendant on count 2. Raftrey's counsel at this stage supported the application.

The judge refused to order separate trials on the basis that there were insufficient reasons for departing from the usual rule that conspirators should be tried together.

Next counsel submitted that the evidence of the DEA officers should not, pursuant to sections 76 and 78 of the Police and Criminal Evidence Act 1984, be admitted. There then followed a trial within a trial in the absence of the jury to determine the issue. The two DEA officers, Russillo and Weinman, gave evidence. They made it clear that the appellant was neither cautioned nor informed of his rights and was speaking to them as an informant; that he was reluctant to make any admissions; that he was told, in order to overcome his reluctance, that whatever he said to them was said in confidence and would not be used in evidence; that if he did disclose everything to them, they might be able to give him help so far as the English police were concerned.

After argument the judge ruled that the confession, if admitted, would have an adverse effect on the fairness of the proceedings and excluded it pursuant to section 78 of the 1984 Act. This ruling came towards the end of the prosecution case and immediately afterwards counsel for Raftrey made it clear that she intended to have the appellant's confession to the DEA officers admitted as evidence before the jury as part of Raftrey's defence. She gave notice that she intended to cross-examine the appellant about it when he gave evidence and, further, if he did not admit the confession, that application would be made to recall the DEA officers to give evidence about it in accordance with the provisions of the Criminal Procedure Act 1865 (Lord Denman's Act).

Raftrey's counsel relied on the decision of the Privy Council in *Lui Mei Lin* v. *R.* (1989) 88 Cr.App.R. 296, [1989] 1 All E.R. 359. In that case the Privy Council held that a defendant had an unfettered right to cross-examine a co-defendant on a statement which he had made if the statement was relevant, even though the trial

judge had previously ruled that the statement had not been made voluntarily and that the prosecution could not adduce it in evidence against the maker of the statement. In these circumstances, not surprisingly, the application for a separate trial for the appellant was renewed. It was opposed both by the prosecution and by counsel for Raftrey. The judge rejected the application saying that he had already considered the separate trials' point, and added, "I think it is wrong and I will not order severance." He added, with regard to the intimation which counsel for Raftrey had given:

> "I cannot find that the evidence of a concluded conspiracy in Jamaica is so irrebuttable that I can preclude Raftrey from putting forward that defence" [sc. Duress].
>
> If so, it is conceded that [the confession] is relevant to the defence of duress and I have no power to fetter or interfere with counsel's unfettered rights to cross-examine O'Boyle about it. I therefore have to reject that application."

The main burden of the appellant's argument is that that decision of the learned judge, namely that there should be no separate trial for the appellant, was wrong. Mr. Solley for the appellant concedes that in the light of the authorities, and in particular *Grondkowski and Malinowski* (1946) 31 Cr.App.R. 116, [1946] K.B. 369, and *Miller* (1952) 36 Cr.App.R. 169, the general rule is that conspirators should be tried together in order (*inter alia*) to avoid each taking advantage of the other's absence to secure an unjust acquittal. Indeed Lord Goddard C.J., in the former case said at p. 119 and p. 371 respectively this:

> " . . . in some cases it would be as much in the interest of the accused persons as of the prosecution that they should be [*i.e.* tried together]. Suppose for instance that the defence of one was that he or she was acting under the positive duress of the other. If would obviously be right that they should be tried by the same jury who might see in one prisoner a harmless or nervous looking little man or woman, and in the other a savage brute whom they might deem capable of forcing his co-prisoner against his will into assisting in a crime."

In *Miller* Devlin J. (at p. 175 and p. 670 respectively) had this to say:

> "I think that in charges of this sort justice ordinarily requires that the whole matter should be tried as one case, and that it needs a very strong and exceptional case before it is split up into two separate trials. If separate trials were to be ordered as a matter of course simply because one prisoner proposed to attack the character of another, then a separate trial, and the possible advantages in the case of the guilty prisoner, could always be obtained simply by the threat that one prisoner proposed to attack the character of his fellow-prisoner."

It is submitted that this is a strong and exceptional case and indeed Mr. Solley goes so far as to suggest that it is difficult to imagine a case where more harm could be done to a defendant and less to the prosecution and co-defendants than the present. The judge had already ruled, manifestly correctly, that to admit the DEA confession would have an adverse effect on the fairness of the proceedings. It was obtained in circumstances which cast grave doubt on its voluntary nature and reliability. It amounted to a confession of guilt on count 1. Once before the jury, it would be a practical impossibility for them to ignore it. The appellant could be tried on count 1, which was the gravamen of the case against him, on which he alone was charged, without any danger of inconsistent verdicts or of one defendant taking advantage of the absence of another. So far as Raftrey was concerned, the disadvantage to him of not being able to attack the appellant by recourse to the procedure provided by Lord Denman's Act, was in the circumstances minimal.

We sympathise with the trial judge, faced as he was with the Privy Council

decision on the one hand and the heavy weight of authorities supporting the advisability of holding a joint trial on the other. We are also conscious of the necessity to maintain intact so far as possible the discretion of the judge in this and in other cases (see Salmon L.J. in *Flack* (1969) 53 Cr.App.R. 166, 171, [1969] 2 All E.R. 784, 788). However, we have come to the conclusion that this was a wholly exceptional, if not unique, case and that the judge gave insufficient weight to the fact that separate trials would do little, if any, harm to co-defendant or prosecution, whilst a joint trial would almost guarantee that the appellant would be convicted whatever direction was eventually given to the jury as to how they should approach the difficulty. It was, in our judgment, a wrong exercise of his discretion. Although no one could have foreseen what would happen, the judge's ruling did give rise indirectly to further difficulties. The appellant was in this situation. If he decided not to give evidence, there would be nothing to set against the evidence which Medin had already given. If the appellant decided to go into the witness box, he would be cross-examined on a confession which had been ruled inadmissible, and then further evidence would be given on it by the DEA officers, since the appellant did not admit the confession. The introduction of this evidence at that stage of the trial would understandably have great effect upon the jury.

The trial proceeded. Russillo and Weinman were called and gave evidence about matters leading up to the interview in February 1987. They were not asked about the appellant's confession. The prosecution closed their case. The appellant then went into the witness box and gave evidence making, however, no reference to the DEA confession. During cross-examination by counsel for Raftrey, when it became clear that the appellant was about to be asked about the DEA confession, objection was taken again by the appellant's counsel in the absence of the jury. Two applications were made: first, that cross-examination of the appellant upon his confession should not be allowed on the basis that the confession was not relevant, since Raftrey's admissions in his interview with the police, accepted by him, showed him to have been party to the conspiracy before he ever met the appellant and accordingly before he could have been the subject of duress. Secondly, if it was relevant, then even at that stage there should have been an order for a separate trial. Both those applications were rejected.

As a result of those rulings the appellant left the witness box saying that since he was going to be asked questions about a confession which had been ruled inadmissible, he wished to give no further evidence. He declined to return to the witness box. There was then an adjournment, during which counsel for the appellant was allowed to speak to his client in the cells. Having heard the submissions of counsel the judge then ruled as follows:

> "The defendant being part heard and having announced his intention of not returning to the witness box, I am satisfied that, pursuant to section 72 of the 1982 Act, if a defendant does not make himself liable for cross-examination, it is the duty of the court to make sure that he is so liable. Therefore I order his return to the witness box and if he will not do so peacefully I give leave for cross-examination to take place in the dock. Should the defendant, following my order, decide to try and leave the dock or stay below, I shall most reluctantly have him compelled forcibly to return to the dock."

The appellant, after considering the matter, stated that he did not propose to cause difficulties for the prison officers who might be compelled to use force upon him and that, since he had no choice, he would go back into the witness box against his will. He returned to the witness box and then, in the presence of the jury, was cross-examined by Raftrey's counsel about the DEA confession. Since he did not admit it, and in particular did not admit statements he was alleged to have made to

the DEA officers concerning the presence of certain Bolivians in London on December 7, the DEA officers were recalled to give evidence about it and dealt with the confession at some length in chief and in cross-examination. The point was emphasised in the final speech of Raftrey's counsel.

Finally, the judge gave the following direction to the jury on this aspect of the case:

> "But, and you may see the justice in this, I had no power to stop Miss Curnow on behalf of Raftrey from putting that confession to O'Boyle and calling the evidence. That is why Russillo came back into the witness box again. The reason—I say it, it may be pretty obvious—is that Miss Curnow cannot be fettered in putting forward her defence fully in relation to Raftrey, and that involved, as you well know, saying: Well, O'Boyle was the man who scared me stiff. He was the representative of the organisation, and so on. So it was very relevant, obviously, to Miss Curnow's case, Raftrey's case, that O'Boyle had said things he had about the Bolivians being over here to protect their interests and so on to the Drug Enforcement Agents.
>
> So it boils down to this: When you are considering the case against O'Boyle—and this may sound difficult, but I am sure you will not find it—disregard the confession to the Drugs Enforcement Agency entirely. When you come to consider the case of Raftrey and consider whether what Raftrey was telling you was true about how he was threatened and all the other things, then you can have it in mind. As I say, as you try to approach it fairly I do not think you will find it very difficult."

Should the judge have threatened to have the appellant put by force into the dock if he declined to return to it voluntarily? What the judge clearly had in mind was the thought that if the appellant refused even to return to the dock, it would be impossible for Raftrey's counsel to take advantage of section 4 of the 1865 Act. That provides as follows:

> "If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such a statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness and he must be asked whether or not he has made such statement."

Understandable though his reaction may have been, what the judge in our judgment could not do was to threaten to have the appellant brought forcibly into court as he did. He could have taken steps to punish him for contempt; he could have continued the trial in his absence. The threat of force was not proper. Force may sometimes be necessary to restrain violence or prevent apprehended danger, but it was not in these circumstances, as Mr. Amlot suggests, a proper exercise of the judge's power and duty to control proceedings in his court and was in our judgment a serious irregularity. The threat had the effect of compelling the appellant to return to the witness box and eventually of bringing into operation the provisions of section 4, with all the further consequences we have described. Whatever might have been the situation had the appellant simply declined to submit himself to cross-examination, we do not think that the irregularity can be described as other than material. We have considered anxiously whether this is a case where it would be proper to apply the proviso to section 2(1) of the Criminal Appeal Act 1968. We have come to the conclusion that it is not. Therefore, for these various reasons, in our judgment this appeal must be allowed and the convictions on the two counts quashed.

Appeal allowed.
Convictions quashed.

Solicitors: Crown Prosecution Service, Headquarters.

MOK WEI TAK AND ANOTHER (APPELLANTS) v. REGINAM (RESPONDENT)

PRIVY COUNCIL (Lord Bridge of Harwich, Lord Roskill, Lord Ackner, Lord Oliver of Aylmerton and Lord Jauncey of Tullichettle): November 6, 7, 8, 13, 14, 1989, February 6, 1990

Hong Kong—Bribery—Maintaining Standard of Living Above that Commensurate with Official Emoluments—Whether Offence Capable of Being Aided and Abetted—Prevention of Bribery Ordinance (Laws of Hong Kong, 1980 rev., c. 201), s.10(1)(a).

By section 10(1) of the Prevention of Bribery Ordinance:

> "Any person who, being or having been a Crown servant—(*a*) maintains a standard of living above that which is commensurate with his present or past official emoluments . . . shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living . . . be guilty of an offence."

The appellants were husband and wife. The male appellant was a Crown servant who was charged with maintaining a standard of living above that commensurate with his present official emoluments contrary to section 10(1)(*a*) of the Prevention of Bribery Ordinance. His wife was charged with aiding and abetting him. At their trial the judge directed the jury that the prosecution had to prove beyond reasonable doubt that she knew that her husband maintained a standard of living during the charge period above that commensurate with his official salary as a Crown servant, and that he would also be unable to give to the court a satisfactory explanation as to how he was able to maintain that standard of living by a source untainted by corruption; and that with that knowledge she aided and abetted him so to live by actively assisting him in concealing or otherwise dealing with his money so as to make it possible for him to continue in that standard of living. The jury convicted both appellants. The Court of Appeal dismissed their appeals against conviction and upheld the direction of the trial judge on aiding and abetting the commission of an offence under section 10(1)(*a*) if a person gave assistance to a Crown servant knowing that he was maintaining an excessive standard of living and that no explanation could be given, or was reckless whether or not a satisfactory explanation could be given.

On appeal therefrom to the Judicial Committee of the Privy Council:

Held, dismissing the appeal (Lord Bridge of Harwich and Lord Jauncey of Tullichettle dissenting), that the offence of contravening section 10(1)(*a*) of the Prevention of Bribery Ordinance was the maintaining of a standard of living which could not satisfactorily be explained, the burden of giving that explanation resting on the Crown servant. It consisted not of a single act or a succession of acts, but of a