

IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 23/15 (S)

IND 115/14

C07295/14

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and

Devon Wright Jr

Appellant

CRIMINAL APPEAL 24/15 (C & S)

IND 115/14

C07295/14

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and

Andrew Saintangelo Lopez

Appellant

CRIMINAL APPEAL 25/15 (S)

IND 115/14

C07295/14

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and

Randy Dale Connor

Appellant

Before:

The Rt. Hon Sir John Goldring, President

The Hon John Martin, Justice of Appeal

The Hon Dennis Morrison, Justice of Appeal

Appearances: Crister Brady (Brady Law) for Wright, Lee Halliday-Davis (Brady Law) for Connor and Courtenay Griffiths QC instructed by Amelia Fosuhene (Brady Law). Ms Cheryl Richards QC, DPP and Candia James for the Crown.

Hearing and Judgment: 8 March 2017
Reasons released: 23 March 2017

MARTIN JA:

1. On 17 December 2014 at about 7.40 p.m. three men – all of whom were hooded and masked, and two of whom were armed, one with a shot gun of a distinctive gold colour and the other with a handgun – entered Blackbeard's Liquor Store at Grand Harbour, George Town. They stole CI\$4604.42 and US\$582.00 from the till, and a purse containing cash and credit cards and other items of value from Kelly Ann Watson, who was a customer in the store. A second customer, Alberto Thompson-Lopez, was roughly handled but nothing was taken from him. After taking the money and the purse, the three men left the store and were driven away by a fourth man in a black Ford Escape vehicle.
2. Soon afterwards, four men were arrested. They were Andrew Santangelo Lopez, Bron O'Hara Webb, Randy Connor and Devon Emmanuel Wright. The Ford Escape, which belonged to Lopez' mother, was found parked at the rear of the house in which Lopez lived. It contained documents in the name of Kelly Ann Watson. Ms Watson's purse was found on the floor of a storeroom at the rear of the house. Also found in the storeroom were sums of cash amounting in total to CI\$4536 and US\$594, and various items of clothing and shoes, some of which matched distinctive clothing shown on CCTV images as worn by the robbers. On the following day the shotgun was discovered in the attic of a laundry room adjoining Lopez' bedroom. It was subsequently found by a ballistics expert to be a lethal barrelled weapon within the meaning of the Firearms Law. It was loaded with three live rounds of ammunition. The second firearm carried by the robbers was not recovered.
3. The four men were arrested in the storeroom or as they emerged from it. They were subsequently charged with two counts of robbery and one of possession of an unlicensed firearm. Wright eventually pleaded guilty to all three counts, and on 25 November 2015 was sentenced to 8 years imprisonment on each of the robbery counts and 9 years imprisonment on the firearms count, the sentences to run concurrently. Lopez, Webb and Connor were found guilty on all three counts on 26 August 2015 at the conclusion of a jury trial and on 25 November 2015 were each sentenced to 10 years imprisonment on each of the robbery counts, and 12 years imprisonment on the firearms count, the sentences to run concurrently.
4. Lopez now applies for leave to appeal against his conviction and, if that fails, against his sentence. Connor and Wright apply for leave to appeal against sentence. Webb initially applied for leave to appeal against conviction and sentence, but has abandoned that application.
5. At the conclusion of the argument we dismissed all the applications for leave to appeal. We now give our reasons for doing so.

Lopez

Conviction:

6. The basis of Lopez's application for leave to appeal against conviction is what are said to have been misdirections on two matters by the trial judge, Justice Belle. The first of those matters concerns lies told by Lopez in interview about his whereabouts on the day of the robbery. It is said that the judge failed to give an adequate Lucas direction. The second matter concerns the direction given by the judge as to Lopez's character. It is said that the judge gave the impression that the relevance of Lopez's good character was merely part of the argument put forward by the defence rather than something that the jury had to accept from the judge as a matter of law. These misdirections on two major issues affecting credibility are said to have made the trial of Lopez, in which the central issue was his credibility, unfair and his conviction unsafe.

Lies:

7. In the course of his evidence at trial, Lopez admitted that he had lied to the police when interviewed by them. He had lied about his movements on the day of the robbery; and he had denied driving the Ford Escape, whereas CCTV images subsequently obtained showed that he had, as he ultimately accepted, borrowed the vehicle from his mother in the afternoon of the day of the robbery.
8. The judge's summing up to the jury concerning these lies was, so far as relevant, in the following terms:

"The long and short of it is that I must tell you therefore how to deal with the lies. As I said before, if a person lies and you come to the conclusion that they have lied and the evidence is based on lies or untruths, you can reject everything they had to say. Mr Lopez has explained why he made these untrue statements. He wasn't sure about the reason for his arrest. He knew that he was not involved in any robbery and therefore he distanced himself from the Ford Escape which appeared to have been involved. I mentioned already the West Bay trip that he said he had taken which he then retracted and said no he didn't go to West Bay. Now obviously his evidence adds up to I was not involved in this robbery. I am not one of the persons who robbed Blackbeard's. And what I'm saying to you is that you should not conclude that he is a liar therefore he is guilty. You have to look at the reasons why he said he lied and take into account those reasons that he gave. It is a matter for you. If you feel that the reasons that he gave satisfactorily explained the lies, then that could run contrary to other inferences that you are being asked to draw. But you must not say he lied therefore he is guilty of robbery. It is not necessarily logical. It is not logical to conclude that way;

that he lied and therefore he is guilty of robbery. If he is being truthful about the reasons why he did not tell the truth, then it may very well be that he is innocent and not guilty and you therefore have to take those things into account in a determination as to whether or not you find him guilty of the offence. Obviously what he is saying is he wasn't available, he wasn't around to be part of any robbery and that the first time he was seeing Connor, Webb – not the first time he was seeing Devon Wright for the day - but certainly that night at the time when he saw them was after he was apprehended by the police, arrested, told to lie down and then these other individuals were brought and put next to him and taken to the police station. You must decide therefore what weight you would give to his explanations and to everything that he said in evidence just like any other witness. It's just that in his particular case it is important not to conclude that based on the fact that he himself is saying that he lied, that he is guilty. Sometimes people lie because of possible embarrassment at what the truth is. That embarrassment may not be necessarily guilt of any – and sometimes it is a way to bolster a genuine defence. So please take those things into account as you go about going through the evidence".

9. Mr Griffiths QC complained that this direction was defective in that it failed to direct the jury that if they accepted that Lopez had told lies for an innocent reason, they must not hold it against him; and that if they concluded that Lopez had lied for the reasons he gave, they must not hold the lies against him. The essential necessary direction was to the effect that only if the jury were sure that Lopez did not lie for an innocent reason could his lies support the prosecution case. As worded, the direction left holding the lie against Lopez as an optional decision for the jury.
10. In *R v Burge and Pegg* [1996] 1 Cr App R 163, a decision of the Court of Appeal of England and Wales, it was held that a Lucas direction "will normally be sufficient if it makes the two basic points:
 1. that the lie must be admitted or proved beyond reasonable doubt; and
 2. that the mere fact that the defendant lied is not in itself evidence of guilt since defendants may lie for innocent reasons, so only if the jury is sure that the defendant did not lie for an innocent reason can a lie support the prosecution case".
11. In the present case, the first requirement was satisfied by Lopez' admission in evidence that he had lied.
12. As to the second requirement, the judge three times told the jury that they must not treat Lopez' lies as evidence of his guilt: "you should not conclude that he is a liar therefore he is guilty"; "you

must not say he lied therefore he is guilty of robbery"; "it is important not to conclude that based on the fact that he himself is saying that he lied, that he is guilty".

13. In the light of these references, we do not accept Mr Griffiths' contention that the direction left holding the lies against Lopez as an optional decision for the jury. In our judgment, the direction, although far from perfect, made clearly to the jury the critical point that Lopez's admitted lies were not material they could take into account when assessing his guilt. In the sense that they did not go on clearly to tell the jury that they could take the lies into account if the jury were sure that Lopez had not lied for an innocent reason, the judge's remarks failed to satisfy the strict requirements of the second limb of the *Burge and Pegg* test. However, that omission was beneficial to Lopez: the clear effect of the judge's statement was that they could not take into account the lies at all, whatever the explanation for them. In the circumstances, we consider that the direction was adequate.

Character:

14. Lopez had previous convictions relating to the possession and use of ganja, but no convictions relevant to the robbery and firearms offences with which he was charged. The judge agreed that he was to be treated as of good character. Lopez was therefore entitled to a full good character direction, that is to say a direction dealing with the relevance of good character to two issues: his credibility, and the likelihood of his having committed the offences charged.
15. The judge dealt twice in his summing up with the question of character. He first said this:

"I have to deal with one other direction which is the whole question of the character of two of the defendants.
First of all you have Andrew Lopez who has put in evidence his character and he has admitted to having committed possession and the use of ganja as offences and there is nothing that he has done which would imply that he is the kind of individual – this is what he is saying by putting his character evidence in – nothing that he has done that would imply that he is an individual who would come here and lie. And secondly that he would not have the propensity to commit a robbery. This is what he is basically saying. He might not have said it in those terms but that is what is implied by him saying he is a man of good character, he is not a dishonest person. He is not a robber, not a thief and you should take that into consideration when assessing whether he is lying about this whole situation, although of course he has admitted certain lies as he explained them – that you should take those into consideration and you should also take into consideration he doesn't have the propensity to commit

robbery and offences of dishonesty that go to him being a dishonest individual".

16. At the conclusion of the summing up, but before the jury was put in charge, counsel for Webb raised a question as to the adequacy of this direction. He suggested that it had sounded as though the judge was telling the jury that the defendants were asserting the effect of their good character, rather than the judge telling the jury as a matter of law how good character was to be taken into account. The judge accordingly returned to the topic, in these terms:

"Now, you will also recall that I gave directions on the issue of the good character of two of the defendants, namely Lopez and Webb. It is required by law that you assess the – what is being, what they are being accused of in light of their good character. So it is not because they are saying so, it is because the law requires that you consider that in the case of a person of good character it is less likely that they would come here and tell lies or in other words, that their credibility should not be challenged on the basis of bad character because they have in fact been saying and the law says they are of good character, so they should be taken as persons with good character and therefore their credibility should be judged on that basis.

And secondly, the propensity that they would have to commit an offence that is armed robbery should also be judged on that basis, that they are actually persons of good character. So I hope that all the rest of it made it clear that this is a requirement of law, you take that into account and not merely because they said so".
17. Mr Griffiths QC asserted that the judge's first attempt was confusing and lacking in clarity, and that his second attempt had merely compounded the confusion. The direction should have been more concise, should have clearly identified that the judge was giving a direction of law, and should have made clear the significance of good character to credibility and propensity.
18. In our judgment, the direction given by the judge, although again far from perfect, was adequate to bring home to the jury that as a matter of law they were to take into account Lopez' good character when assessing his credibility and when assessing the likelihood of his having committed the crimes of which he was accused.
19. So far as concerns the credibility element, we note in particular that the judge said " the law requires that you consider that in the case of a person of good character it is less likely that they would come here and tell lies". As to the likelihood of commission of the charged offences, we accept that if the judge's second attempt had stood alone there would be some force in the criticism that the point was inadequately made. But it did not stand alone: in the

judge's first attempt he clearly stated the significance of good character to propensity: "secondly that he would not have the propensity to commit a robbery". This statement was then elaborated, the judge saying: "He is not a robber, not a thief and you should take that into consideration when assessing whether he is lying about this whole situation ... and you should also take into consideration he doesn't have the propensity to commit robbery and offences of dishonesty that go to him being a dishonest individual". The second attempt makes abundantly clear that these are matters of law, not merely of assertion by the defendants: "this is a requirement of law, you take that into account and not merely because they said so".

20. Having regard to the quotations we have isolated, but having regard also to the tenor of the entirety of both of the judge's attempts, we are satisfied that the jury could not have been in any doubt that as a matter of law they were to take into account Lopez' assumed good character when considering both his credibility and the likelihood that he had committed the offences.
21. As we have said, neither the Lucas direction nor that given in respect of good character could be described as perfect, although in both cases we have held them to be adequate. Had we taken the view that they were not adequate, however, we would have gone on to consider the impact of a failure to give adequate directions having regard to the circumstances of the case as a whole. This approach is warranted by authorities such as *R v Hunter (Nigel)* [2015] 2 Cr App R 9, again a decision of the Court of Appeal of England and Wales, in which it was said (at [89]:
"There can be no fixed rule or principle that a failure to give a good character direction or a misdirection is necessarily or usually fatal. It must depend on the facts of individual cases."
Applying that approach, we would have had no hesitation in coming to the conclusion that, in the light of the overwhelming strength of the prosecution case against all the defendants, no substantial injustice had been done.

Sentence:

22. As we have said, Lopez was sentenced to 10 years imprisonment on each of the robbery charges, and 12 years on the firearm charge.
23. Although Mr Griffiths QC referred to Lopez' youth and the inept nature of the offending, his main point was that the judge had been guilty of double counting. He had taken into account as an aggravating factor when sentencing for the robberies that a firearm had been used, and had taken into account when sentencing for the firearm offence that it had been used in the course of a

robbery. In the result, the sentence imposed on Lopez was manifestly excessive.

24. We accept that the way in which the sentences were structured may give rise to a perception that there was double counting. Although if each offence is viewed individually it is possible to justify the judge's approach, the fact that they were charged together meant that the judge was required to sentence for an armed robbery and could not realistically use each element as a factor aggravating the other.
25. However, this was a very serious armed robbery. It was planned. Weapons were taken. A getaway car was arranged. It took place in the evening in a shopping precinct in George Town where ordinary members of the public could be expected to be present. The robbers were armed, masked and hooded, and must have presented a terrifying sight. When in the liquor store, they robbed one individual and roughly handled another. The overall criminality amply justified a total sentence of 12 years imprisonment.
26. The sentences imposed by the judge were rightly ordered by him to run concurrently with each other. Although we think that it would have been more appropriate to impose sentences of 12 years imprisonment on each of the robbery charges, and the statutory minimum sentence of 10 years imprisonment on the firearms charge, it makes no difference to the overall outcome. We decline to disturb those sentences.

Connor:

27. Connor was also sentenced to 10 years imprisonment on each of the robbery charges, and 12 years on the firearms charge, the sentences to run concurrently.
28. Ms Halliday-Davis for Connor adopted Mr Griffiths QC's submissions on sentence. She pointed out that Connor was 25, had no previous similar convictions, and was the father of a young child. On any basis, he would have to spend the rest of his 20s in prison. She accepted that Connor was the robber armed with a shotgun.
29. In our judgment, there is no reason to distinguish in terms of sentencing between Lopez and Connor. Connor's application is dismissed for the same reasons as are given in relation to Lopez.

Wright:

30. Wright was sentenced to 8 years imprisonment on the robbery charges, and nine years imprisonment on the firearms charge, the sentences to run concurrently.

31. Mr Brady for Wright reminded us that Wright had pleaded guilty at an early stage, and had been given a one-third discount to reflect that fact. On the robbery charges, the judge had taken a starting point of 14 years (as he had done with the other defendants). The Appellant's record included offences of burglary, but no robbery or firearms offences. Mr Brady submitted that on the firearms offence, to which even on a guilty plea Wright was subject to a minimum seven-year term, the judge had sentenced the other defendants to 12 years imprisonment, which would have resulted in an eight-year term for Wright after a one third discount for his guilty plea; but in fact the judge sentenced him to 9 years imprisonment. The appropriate sentences were, in Mr Brady's submission, seven years imprisonment on all the charges.
32. In our judgment, Mr Brady's submission is unrealistic. It fails either to reflect Wright's involvement in this very serious armed robbery or to recognise his very bad previous record. Among other things, he has nine convictions for burglary. The judge was fully entitled to regard him as falling in a different category from the other defendants in that regard. We consider that an overall sentence of nine years imprisonment is a fair reflection of Wright's criminality. We decline to disturb the sentences.