Trinity Term

[2016] UKPC 18

Privy Council Appeal No 0112 of 2014

JUDGMENT

Wright (Appellant) v The Queen (Respondent) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Neuberger

Lord Clarke

Lord Reed

Lord Hughes

Lord Toulson

JUDGMENT GIVEN ON

30 June 2016

Heard on 7 December 2015

Appellant	Respondent
Michael Wood QC	David Perry QC
Nicholas Dixey	Alistair Richardson
(Instructed by Nelson & Co)	(Instructed by The Government Legal Department)

LORD HUGHES:

1.
The appellant, Dwight Wright, was convicted of offences of rape and indecent assault committed on the same occasion. He had elected trial by judge alone, without a jury. The judge relied, in part, on an adverse inference drawn against him in consequence of his having declined to give evidence at his trial. His case is that this was impermissible because no question had been addressed in open court pursuant to section 149(2) of the Police Law 2010 in order to satisfy the judge that he had been advised of his right to give evidence and of the risk of adverse inference if he elected not to do so.

2.
The Crown case against the appellant was that he had pestered a former girlfriend for some four months or so after their relationship ended and that on the day of the alleged offences he had kicked

down her door and remained against her will for most of the night, obliging her to submit to sexual intercourse and indecent assault by way of oral sex. She had telephoned the emergency services early the next morning after he had left. The police had arrived, had seen the broken door and in due course received her complaint of rape. The appellant was arrested five days later at his home, having hidden under the bed when the police arrived. When taxed by the police with the allegation, he maintained that the complainant had invited him to her home because she wanted to have sex with him, and that all the intimacy which had taken place between them had been consensual.

3.
On arrival in the witness box at the trial the complainant announced that she had given a further statement to the police, saying that she did not wish "to move forward with the charges". She told the court that she did not wish to give evidence, and did not wish to re-live the night in question. She denied that she had been threatened. She did not, however, at any point assert that her original statement of complaint had been false. The judge explained to her that she was bound by her oath to make truthful answer to questions asked, and, little by little, specific questions about events drew from her an account of the evening which plainly constituted complaint of the offences charged. She indignantly refuted the suggestions put in cross examination that she had invited the appellant to her home. There had been a series of telephone contacts between them, whether by voice or text, which she explained as arising from the persistence of his calling of her and the difficulty which there had been in protecting her from his attentions, even when she was advised to stay somewhere other than at her home.

4.
In addition to the two counts for sexual offences, there was a count for possession of a firearm. In due course the judge identified inconsistencies in her evidence about the presence of any gun. None had been recovered. He held that, in the absence of any external support, that charge ought to be dismissed at the half way stage of the trial. He rejected the submission that the sexual offences should similarly be dismissed, and there has been, and could be, no complaint about that decision.

The law

5.
Section 149 of the Police Law 2010 exactly reproduces the earlier provision of English law in section 35 of the Criminal Justice and Public Order Act 1994, as very marginally amended in 2003 to cater for the occasional trial by judge alone. Section 149 provides, so far as material:

"149. (1) At the trial of any person for an offence subsections (2) and (3) apply unless -

(a) the accused's guilt is not in issue; or

(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence,

but subsection (2) does not apply if, at the conclusion of the evidence for the prosecution, his attorney-at-law informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.

(2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment with a jury, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence,

or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

(3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question."

6.
This provision, when introduced in 1994 into English law, had brought about a substantial change to the common law. Previously, the decision of a defendant not to give evidence in his own trial from the witness box had not been capable of giving rise directly to an inference of guilt. The Crown was disabled altogether from commenting adversely upon his decision. The jury had to be told that he was entitled not to give evidence and that guilt could not be assumed from his decision not to do so. The judge was entitled to comment, in an appropriate case, that the defendant's case involved the assertion of positive facts which would be within his own knowledge, but that he had nevertheless chosen not to support them by his own evidence, but although that kind of comment inevitably, and justifiably, weakened the force of the defence, it was not the same as explicitly using the silence of the accused as additional support for the Crown case: R v Bathurst [1968] 2 QB 99 and R v Martinez-Tobon [1994] 1 WLR 388. Section 35 of the 1994 Act reversed this history. It undoubtedly made a real difference to the decisions which fell to be made in the course of the conduct of a criminal defence.

7.
It should be noted, however, that the pre-existing provisions of the law of evidence in the Cayman Islands were not identical to those in England and Wales. Ever since 1978, the Cayman Evidence Law has contained a provision, subsequently re-enacted on various occasions and now to be found in para (b) of the proviso to section 18:

"(b) the failure of a person charged with an offence to give evidence shall not be made the subject of comment by the prosecution but the court or jury may draw any reasonable inference from such failure;"

8.
Thus, although the new provisions introduced in 2010 by section 149 of the Police Law were attended by the same procedural rule as was attached to the 1994 English provisions, that is to say the section 149(2) requirement for the judge to satisfy himself that the defendant has been advised of his right to give evidence and of the possible risk of adverse inference if he chooses not to do so, section 18(b) of the Evidence Law had never contained any such procedural requirement.

The course of this trial

9.
At the conclusion of the Crown evidence, the judge was invited by defence counsel to rule that there was no case to answer. As mentioned above, he ruled against this submission except in relation to the count for unlawful possession of a firearm. After he had delivered his rulings, counsel for the defendant told the judge:

"If we're going straight on, My Lord, depending on the court reporter, my client would like to give evidence, so you would be hearing from him."

The judge thereupon enquired whether there were to be any other witnesses. On being informed that there were none apart from the defendant, he offered counsel the opportunity of beginning next morning, which invitation was accepted.

10.
Next morning, however, defence counsel told the judge that the position had changed:

"COUNSEL: My Lord … the Crown having closed their case. I have spoken with my client, and he thought about matters overnight, and, in fact, he has given me instructions this morning, sir, that he does not wish to go into the witness box. The defence case would rest.

THE COURT: Okay. Thank you.

COUNSEL: I would just seek to then address you, My Lord, after my friend.

THE COURT: Yes. I'll just make a note."

The judge went on to ensure that he had the correct version of agreed facts. Next, he addressed counsel for the defence again.

"THE COURT: Yes, Mr Furniss.

COUNSEL: My Lord. As I indicated, My Lord, the defendant does not wish to give evidence and that will be, as a result, the defence case.

THE COURT: Yes, I've made a note of that, thank you. So we go to argument then?"

Speeches for each side ensued. The procedure set out in section 149(2) was thus never followed.

11.
After Crown counsel's closing speech, the judge raised the question of adverse inference from failure to give evidence, to which possibility she had not, it seems, either referred or given thought. The upshot of a rather inconsequential exchange was that the Crown abjured any submission that the judge should refrain from drawing any such inference. It is plain, however, that counsel for the defence did tell the judge in the course of his submissions that he would address the failure to give evidence, because a further exchange occurred at the conclusion of his speech, in the course of which the judge reminded him of his announced intention to do so. The judge indicated that he was considering drawing an adverse inference given the absence of any explanation from the appellant either for breaking down the complainant's door or for hiding under the bed when sought by the police. The judge and counsel discussed R v Cowan [1996] 1 Cr App R 1, a decision upon the equivalent English legislation. Counsel hypothesised a possible alternative explanation for hiding under the bed (an unconnected wish not to be arrested) and offered the submission that the appellant had sufficiently made his position clear to the police, that what had occurred had been consensual. He did not suggest any possible innocent explanation for the kicking in of the door, no doubt because none was plausible. This discussion occupies about ten pages of transcript.

12.
In due course, in a careful judgment, the judge did draw an inference adverse to the appellant from his failure to answer the charges by evidence from himself. He referred to both to section 149(3) of the Police Law and to section 18(b) of the Evidence Law. He remarked that the inference permitted by each was, in this case at least, the same. In particular, he directed himself that if there had been an innocent explanation either for the broken door or for the behaviour of the appellant when the police

came looking for him, he could have been expected to give it. The natural inference from the decision not to do so was, he directed himself, that the appellant had concluded that subjecting himself to cross examination (it would appear principally on those topics) would not assist his defence. The judge was thus asking himself whether he was satisfied that the failure to give evidence was attributable to the appellant having no answer, or none that would stand up to cross examination. That was a straightforward application of the approach which has prevailed in England and Wales and elsewhere since the introduction of the rule permitting adverse inferences of this kind.

13.
But for the failure to observe the requirements of section 149(2) this approach could not be criticised. Does the omission to ask in open court, as required by that subsection, whether the defendant had been advised of his right to give evidence and of the risk of adverse inference if he did not, mean without more that the conviction must be quashed for material misdirection?

Conclusions on section 149

14.
For the Crown, Mr Perry QC submitted that the legislative intention behind section 149(2) is not that the defendant must be issued with a warning as to the risk of adverse inferences if he chooses not to give evidence. The purpose of the section, he submitted, is to emphasise to the jury (in the ordinary case) that the decision whether or not to give evidence is for the defendant alone. That way, he says, the jury can see that if he elects not to do so, this is his own decision and it is consequently not unfair that the consequence of an adverse inference may follow.

15.
This significantly understates the impact of section 149(2). Although it is true that the law does not require a warning in respect of other decisions which an accused may make in the course of his trial and which may bring adverse consequences, this section does. The ancestor section 35 of the English Act of 1994 was plainly designed to impose a safeguard attending the new rule permitting inferences of guilt to be drawn from a decision not to give evidence. It is properly characterised as a public warning to the defendant. It is certainly true that in the Cayman Islands the change wrought by section 149 was less striking than had been achieved by the ancestor legislation in England and Wales, because of the previously existing section 18(b) of the Evidence Law. But if it were open to the court to draw an inference adverse to a defendant by relying on section 18(b) without the warning required by section 149(2) that would have the effect of largely emasculating the latter subsection. The enactment of section 149(2) was plainly meant to have effect. The Board is satisfied that the plain and mandatory words of the safeguard which is contained in section 149(2) must apply equally to the drawing of an adverse inference from a defendant’s absence from the witness box, whichever statute is relied upon for that inference.

16.
The method by which section 149(2) is satisfied is, however, significant. In England and Wales the Consolidated Criminal Proceedings Practice Direction [2002] 1 WLR 2870 makes clear at para 44.2 that in the normal case where the defendant is represented, the subsection proceeds via an enquiry of defence counsel as to whether the defendant has been advised on the two points in question: (1) that he has a right to give evidence and (2) that there is a risk of adverse inference if he chooses not to do so without good cause. Section 113 of the Cayman Islands Criminal Procedure Code (2010 revision) provides that in criminal trials the court’s procedure shall be assimilated so far as circumstances permit to the English practice. The safeguard for which the subsection provides is in place if such

advice has been given. This is a realistic way of proceeding. Whether or not to give evidence is probably the most significant decision which a defendant has to make in the course of his criminal trial. This decision will almost invariably be the subject of close consideration by him in conjunction with his advisers. The decision does not depend wholly, or even always mainly, on the risk of adverse inferences under section 149(3) or its equivalent. Many other considerations are bound to be discussed; the danger of cross examination undermining progress made during the Crown evidence, the risk of cross examination upon previous convictions, the prospect of cross examination by co-defendants with different interests and the possibility of opening up further enquiries by the prosecution are but some of those more frequently encountered, and which must be balanced against the gains which might be made by giving evidence.

17.
Thus, what matters for the purposes of section 149(2) is that the defendant has had the necessary advice. The best way of establishing that he has had it is by asking in open court, and this is what section 149(2) requires. An omission to ask, as occurred in the present case, is therefore an irregularity. If, however, it is clear that the advice has indeed been given, that irregularity is immaterial to the safety of the conviction. That is illustrated by the present case, in which it is beyond argument that the appellant knew very well the first of the things of which section 149(2) requires the judge to satisfy himself, namely that he had the right to give evidence. That is apparent from the first exchange recorded at para 9 above, when his counsel told the judge that he intended to give evidence. The same question as to materiality arises in relation to the second matter mentioned in the section, the risk of adverse inference. If, when it had come to hearing submissions about the drawing of an adverse inference, the judge had remembered that the section 149(2) procedure had not timeously been carried out, and had asked counsel at that stage whether the appellant had had the relevant advice as to this matter before making his decision, a response by counsel which confirmed that indeed he had been so advised would mean that there could not be said to have been a material irregularity. The Board does not overlook the fact that in the course of forceful submissions Mr Wood QC submitted that the conviction would still have had to be quashed if this had occurred, but it is satisfied that that is to carry formalism beyond anything which either the statute or fairness to the accused require.

18.
Accordingly the question which arises is whether the Board can be confident that notwithstanding the omission to carry out the section 149(2) procedure, the appellant had indeed been advised not only that he could give evidence if he wished but also that he risked an adverse inference if he did not and was adjudged to have had no good reason for the omission. On the facts of this case, the answer to that is plainly yes. First, the topic of possible adverse inference is in every case central to the advice which any defendant will routinely be given. That does not rule out the possibility of forgetfulness or even incompetence. After all, neither counsel spotted the omission to implement the section 149(2) procedure. But in this case it is clear from what counsel told the court that there had been at least two different occasions when the question whether or not evidence was to be given by the appellant had been considered by him with his counsel. On the first occasion, the outcome had been a positive decision to go into the witness box, which counsel duly reported to the court at the correct time, immediately before (but for the fortuitous overnight adjournment) the decision was to be carried into effect. The report to the court the next morning shows that overnight there had been a second discussion between the appellant and counsel, and moreover one which had resulted in the decision being reversed. It is in the highest degree improbable that either of these discussions - and certainly both - could have taken place without counsel explaining what would happen if the appellant went into

the witness box (and specifically that he would be taxed with explaining the broken door) and what would happen if he did not (when he would run the risk of adverse inference). In this context, the long-standing rule in section 18(b) of the Evidence Law means that the risk was not a new one which might not have been taken on board. To overlook the absence of the formal section 149(2) questions in court is a far more probable omission than to neglect to address with the client the pros and cons of giving evidence.

19.
That, however, is not all. In the ensuing exchanges between counsel and the judge the latter made it clear that he had in mind the drawing of adverse inference. If the truth had been that the possibility had never been considered by the appellant, nor ever addressed by counsel in any of his conferences with him, counsel simply could not have failed to realise this once this discussion with the judge was embarked upon. If that had been the true position, he would plainly have said so at once. That would have been his clear duty. More, nothing would have been easier than to tell the judge that no such inference could be drawn because it would in the circumstances be unfair to the appellant. There would have been minimal embarrassment involved, since the judge, as well as both counsel, had overlooked the implementation of the section 149(2) procedure. The fact that counsel did not suggest that the appellant would suffer any unfairness is a further confirmation that the advice must have been given. So also is the fact that even now, after the involvement of fresh counsel who have taken this point both in the Court of Appeal and upon further appeal to the Board, there is no hint of any evidence, or even of assertion, by the appellant that he was under any misapprehension as to what might happen if he chose not to give evidence. As Lord Judge CJ made clear in R v Farooqui [2014] 1 Cr App 8, para 126:

“When an appellant wishes to assert that he has not been given appropriate advice in a particular respect, or has not been able to make an informed decision about a matter of materiality in the trial, he must provide the court with a statement setting out the relevant history.”

Often, if such an assertion is made and appears to require investigation the question will arise whether the appellant is willing to waive privilege in order to enable trial counsel to answer it. But with or without such waiver, the assertion is normally a necessary starting point. Lord Judge’s formulation of the usual practice of the Court of Appeal Criminal Division in England and Wales was made in a case where there was the most exceptional and improper conduct on the part of counsel. So extreme was it that it fully justified the conclusion that he had pursued an illegitimate agenda of his own and acted contrary to his client’s best interests in a number of different ways. The appellant’s appeal had to be approached with that finding as a starting point. Nevertheless, on the specific issue of the decision not to give evidence, the absence of any suggestion from the defendant that he had been misled or mis-advised was telling. So, and the more so, it is in the present case where there is no reason to suppose that counsel was doing anything but his best.

20.
For those reasons the Board cannot accept that the irregularity was in this case material. The convictions are not unsafe.

21.
The Board ought not to leave the appeal without underlining the significance of the section 149(2) procedure. It is not a mere formality. As the Court of Appeal observed in the case of Tamasa v Regina (CICA 23 of 2013, 12 January and 27 May 2015) failure to carry it out will in the absence of the

legitimate conclusion that it made no difference be a material irregularity. It is the responsibility of both counsel, as well as of the judge, to ensure that it is carried out as the statute requires.

No miscarriage of justice: the proviso

22.
This conclusion makes it unnecessary to consider the exact basis on which the Court of Appeal upheld the conviction, which may have been by applying the proviso to section 9 of the Court of Appeal Law, that no miscarriage of justice had in fact occurred. It is however necessary to observe that, if it did, the Court of Appeal applied the wrong test. It held, at para 25, that:

"In our opinion, there was evidence in which the judge **could** have reached the conclusion that the applicant was guilty of the offence without drawing the adverse inferences which the judge indicated that he would draw in relation to the breaking down of the door and his hiding under the bed in an attempt to avoid arrest by the police." [emphasis supplied]

That was no doubt true. It is also certainly true that the decision upon the application of the proviso is necessarily one for the appellate court, which to this extent must review the facts and the evidence and form its own opinion: see the line of cases which begins with Stafford v Director of Public Prosecutions [1974] AC 878 and passes through Dial v The State of Trinidad and Tobago [2005] UKPC 4; [2005] 1 WLR 1660 to R v Burridge [2010] EWCA Crim 2847. But the question which must be answered is whether, despite the irregularity whatever it may be, there was any reasonably possible verdict other than guilty, not whether a guilty verdict could have been arrived at: see for example Barlow v The Queen [2009] UKPC 30 and R v Lundy [2013] UKPC 28. The Board does not say that the Court of Appeal could not properly have applied the proviso in this case, applying the correct test, but it is unnecessary to say more about it.

Conclusion

23.
For the reasons given the Board will humbly advise Her Majesty that the appeal against conviction should be dismissed.