COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
MCC App Side & Cais No. 81 of 2011

BETWEEN

THE ATTORNEY GENERAL

Appellant

And

MISSOURI BAIN THOMPSON

Respondent

BEFORE:	**The Hon. Mrs. Justice Allen, P** **The Hon. Mr. Justice John, JA** **The Hon. Mr. Justice Adderley, JA**
APPEARANCES	**Garvin Gaskin Counsel for the Appellant,** **Harvey Tynes QC with NaShonda Tynes for the Respondent**
DATES:	**"8 July, 2013, 24th September, 2013** **12th November,2013 , 17th January, 2014** **and 27th March, 2014" 28th July, 2014**

Civil Appeal – No Case Submission – Circumstantial Evidence – whether the magistrate, in determining that as there was no direct evidence in support of the charges, erred in law by ruling that the respondent had no case to answer

In 2006 the respondent allegedly sent, from a warehouse in Freeport, counterfeit pharmaceutical drugs to Miami for sale to patients resident in the United States. The drugs were confiscated in Miami and traced back to the respondent who was subsequently charged with numerous offences relating to the same. At the conclusion of the prosecution's case The magistrate upheld a no case submission.

Held:- appeal allowed, decision of the magistrate set aside

Circumstantial evidence is evidence of surrounding circumstances which, by undersigned coincidence, is capable of proving a proposition with accuracy. It is no derogation of evidence to say that it is circumstantial evidence and often, especially in criminal cases, it is the best evidence available.

In the instant case there was a sufficient nexus between the respondent, Dwight McCoy and RxNorth.com from which an agreement to ship counterfeit drugs to Miami could be inferred.

Galbraith [1981] 1WLR 1039
Mulcahy v R [1868] L.R 3H.L 306
R v Taylor, Weaver and Donovan 21 CrimApp 20
Riley v Barran [1965] 8W.I.R
Teper v R [1952] A.C 480-489

REASONS

Reasons delivered by Justice John JA

1. This was an appeal by the Attorney General against the decision of the magistrate sitting in Grand Bahama who at the close of the case for the prosecution upheld a submission of no-case to answer and discharged the respondent.

2. On the 27th March, 2014 after several hearings we allowed the appeal, quashed the decision of the magistrate and remitted the matter for hearing *de novo* before another magistrate. We indicated then that we would give our reasons at a later date. This we do now.

3. The appellant together with another person was charged with 2 counts namely:**1. Conspiracy to abet fraud by false pretences contrary to sections 891 and 348 of the Penal code, Chapter 84** and **2. Abetment of Fraud by false pretences contrary to sections 861 and 348 of the Penal Code.**

4. The Prosecution's case was that, by way of a conspiracy between the Respondent, Dwight McCoy (a US citizen) and Rx North.com (in the person of Andrew Strenipler), the Respondent's pharmacy, Personal Touch Pharmacy, [the pharmacy] was used to import counterfeit pharmaceutical products; namely counterfeit Lipitor, Singulair , Celebrex , Hyzaar , Plavix , inter alia, into Freeport, for onward export to patients in the USA.

5. The patients through Rx North.com ordered the drugs on the representation that they would receive what they ordered, not counterfeit products. The drugs were in a warehouse in Freeport, under the general

management of the Respondent. In June, 2006, the counterfeit drugs were sent by the Respondent, through DHL (courier), pursuant to the alleged conspiracy, to Miami. The drugs were seized by law enforcement at the Miami International Airport. In addition, counterfeit pharmaceutical drugs were seized at the Freeport warehouse by the Police. Those drugs seized were positively tested as counterfeit by the actual manufacturers and the Food and Drug Administration.

6. The DHL airway bill, with the Respondent's pharmacy, as the sender of the drugs that accompanied the drugs to Miami, was also seized. A copy of the said airway bill was also found in the Freeport warehouse. Paper work in relation to respective patients was found, in Miami, with the said seized counterfeit drugs and were subsequently seized, along with the purchase price of the said drugs and the credit card information of the patients, inter alia. This material also matched material seized from the warehouse. The Respondent admitted possession of the drugs in an action filed in the Supreme Court. The warehouse was leased from a local company by Andrew Strenipler , owner of Rx North.com.

7. In addition, the Respondent successfully applied to the Department of Immigration for work permits for Matthew Henderson, and a Mr. McCoy to work for the Pharmacy. A letter was seized, sent from Attorney Sean Callendar, on behalf of the Pharmacy, in relation to McCoy and Henderson, to the Department of Immigration, confirming to the said Department that Rx North.com supplies the Pharmacy with medication which was then exported outside of The Bahamas.

8. Further the Bank account of the Respondent was used by McCoy and Henderson, to pay the rent of the warehouse and other expenses.

9. The Respondent was warned in 2006 by Dr. Marvin Smith (a Pharmaceutical expert) that information was circulating about the Respondent selling counterfeit drugs. The respondent nonchalantly thanked him for the information.

10. The Respondent was also told by Mr. Carol Sands, a fellow pharmacist and the duly authorized supplier of Lipitor, while visiting the Pharmacy, that the Lipitor that she had on her pharmacy's shelf had counterfeit packaging. Again the respondent nonchalantly thanked him for the information. When interviewed by the Police, the Respondent offered no comment.

11. *The Sole Ground of Appeal was that*

"That the decision of the Magistrate was erroneous in point of law in finding that there was only circumstantial evidence of the charges, and that because there was no direct evidence in support of the charges, a sufficient case was not made out against the Respondent: That under all the circumstances of the case, the decision is unsafe and unsatisfactory."

12. Section 203 of the Criminal Penal Code provides as follows:

At the close of the evidence in support of the charge, the Court shall consider whether or not a sufficient case is made out against the Accused person to require him to make a defence, and if the Court

considers that such a case is not made out the charge shall be dismissed and the accused forthwith acquitted and discharged."

13. **The Legal Position**

In ***Riley v Barran [1965] 8W.I.R Phillips JA*** referred to the Practice Note issued by ***Lord Parker CJ [1962] 1AII ER*** where he said:-

"Those of us who sit in the Divisional Court have the distinct impression that justices today are being persuaded all too often to uphold a submission of no case. In the re4sult, this court has had on many occasions to send the case back to the justices for the hearing to be continued with inevitable delay and increase expenditure. Without attempting to lay down any principle of law, we think that as a matter of practice justices should be guided by the following considerations. A submission that there is no case to answer may properly be made and upheld (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict"

14. The leading authority on the test to be applied by a trial judge (magistrate) in determining whether there is a case to answer is ***Galbraith [1981] 1WLR 1039.*** In the course of his judgment in that case ***Lord Lane CJ*** said at 1042:-

"How then should a judge approach a submission of "no case"?

(1). If there has been no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of

course stop the case. (2). The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury....There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

15. In Blackstone's Criminal Practice 2013 the learned authors explained the test in this way:

1, the first limb of the test set out in Galbraith [1981] 1WLR 1039, does not cause any conceptual problems. The test of there being 'no evidence that the crime alleged has been committed by the defendant ' is intended to convey the same meaning as the words of Lord Parker CJ in his *Practice Direction (submission of No Case)* ***[1962] 1WLR 227, when he told magistrates that submissions of no case to answer at summary trial, should be upheld,*** *inter alia,* ***' ' if***

there has been no evidence to prove an essential element in the alleged offence.'

Such cases may arise, for example, where an essential prosecution witness has failed to come up to proof, or where there is no direct evidence as to an element of the offence and the inferences which the prosecution ask the court to draw from the circumstantial evidence are inferences which in the judge's view, no reasonable jury could properly draw (see further. However, judges should take care to avoid taking into account defence evidence which is yet to be called and potential defences which have not yet been made out in assessing this limb of the test.

16.. With respect to the second limb the authors said

"the second limb of the *Galbraith* ***test does leave a residual role for the court as assessor of the reliability of the evidence. The court is empowered by the second limb of the*** *Galbraith* ***test to consider whether the prosecution's evidence is too inherently weak or vague for any sensible persons to rely on it. Thus, if the witness undermines his own testimony by conceding that he is uncertain about vital points, or if what he says is manifestly contrary to reason, the court is entitled to hold that no reasonable jury properly directed could rely on the witness's evidence and therefore (in the absence of any other evidence), there is no case to answer.***

17. **The Magistrate's Ruling**

In reviewing the evidence the magistrate formed the view that there was insufficient direct evidence to sustain the charges. However, she addressed the issue of circumstantial evidence in this manner

> ***"The prosecution has made circumstantial evidence. If you put the circumstantial evidence together, the prosecution is saying you will see as a matter of circumstance that there is a facilitating there is an encouragement. There is nothing on the document that allegedly had Personal Touch or allegedly had Ms. Thompson's signature. There is nothing to suggest that these are not good products. So obviously there were some acquiescence on her part of encouraging persons to ask for these products when she, according to the prosecution, from the evidence, would have known that they were not genuine.***
>
> ***Again, it was mentioned that she is a Pharmacist, and, again, that is a standard that one can take into consideration. What does it say for her when it comes to the business of Pharmaceutical? Would it be out of the ordinary to have certain acts done in relation to pharmaceutical products in her field? Would she be put on notice? As it was also suggested when counsel for the prosecution made reference to Mr. Sands evidence and alleged conversation about what he observed in her pharmacy in her presence, and I only make reference to this because there is nothing, as counsel said, at that point in time there was no evidence that what Mr. Sands made reference to were taken off the shelf, examined and found to be counterfeit, when he spoke to her she didn't even respond, If I'm not mistaken as to the evidence, but he drew her attention to certain***

things. So it seems to suggest that even in her capacity some amount of knowledge about what she is dealing with should be imputed, inferred to her and that the fact that it wasn't and these acts of conspiracy went on, then it means as if she almost facilitated, encouraged, procured, acquiesced in the promotion of the fraud, in the actual fraud, the actual agreement to commit fraud."

18. The magistrate continued

"is that sufficient? For this defendant, the court said it is not, the court is of the view it is not. <u>There is no direct evidence linking this defendant to an agreement. Yes, if you look at the circumstantial evidence and you put his little puzzle together, and you put the pieces together, you can at the best of it, say yes,</u> there is something fraudulent going on and one can impute that she is aware of it, but taken at its best, I have to deal with matters of fact married with the law, is there anything directly linking her to an agreement with the defendant or with any other person? And the court's answer to that question is, NO. I cannot find that evidence when I reviewed it, maybe if other witnesses had been called, I am just thinking out loud, to suggest that there was a direct involvement with this defendant to any other person, or to any other patient, or to any other enterprise that was a participant in this conspiracy or the abetment, then the court would have no pains at finding that she had a case to answer. <u>I am not sure if I am clear. I am trying to be as best I could, but in relation to section 203 of the Criminal Procedure Code and in relation to the evidence against this</u>

particular defendant, the court finds that she does not have a case to answer and the charges have not been made out.

Circumstantial Evidence

19. In Archibald Criminal Pleading Evidence and Practice 2003 at 10-3 the authors state:

> ***"Circumstantial evidence is receivable in criminal as well as in civil cases, and indeed, the necessity of admitting such evidence is more obvious in the former than the latter, for in criminal cases, the possibility of proving the matter charged by the direct and positive testimony of eye-witnesses or by conclusive documents is much more rare than in civil cases; and where such testimony is not available, the jury are permitted to infer from the facts proved other facts necessary to complete the elements of guilt or establish innocence."***

20. ***In Teper v R [1952] A.C 480-489*** a decision of the Privy Council, from Court of Appeal of Guyana, Lord Normand, delivering the reasons of the Board said in relation to circumstantial evidence:

> ***"Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another.....It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."***

21. In ***R v Taylor, Weaver and Donovan 21 CrimApp 20*** the Lord Chief Justice, in describing circumstantial evidence said *"It has been said that the*

evidence against the applicants is circumstantial: so it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

22. In its simplest terms a conspiracy is an agreement with two or more persons to commit a criminal act. The essence of conspiracy is the agreement.....when two or more agree to carry their criminal scheme into effect, the very plot is the criminal act itself. ***Mulcahy v R [1868] L.R 3H.L 306 at 317.***

23. In the instant case there was a sufficient nexus between the respondent, the owner of the pharmacy, and McCoy and Rx North.com from which an agreement to ship drugs to Miami could be inferred. There were several bits of evidence tending to show that the respondent was attempting to pass of counterfeit drugs as genuine. Such evidence consisted of inter alia the following:-

i. The warehouse was under the control of the Respondent and the rent for same came from her account.

ii. The Respondent was the pharmacist who owned and operated Personal Touch Pharmacy.

iii. The evidence of Dr. Marvin Smith who warned the Respondent of information being circulated that she was selling counterfeit drugs.

iv. Mr. Carol Sands, a pharmacist and the duty authorized supplier of Lipitor, who advised the Respondent that the Lipitor she had on the shelf was counterfeit.

v. The DHL airway bill with the respondent's pharmacy, as the sender of the drugs to Miami.

24. In light of the above we were satisfied that the magistrate fell into error in acceding to the no case submission. Accordingly, we allowed the appeal and made the order in para 2 hereof.

The Honourable Mr. Justice John, JA

Anita Allen

I agree

The Honourable Mrs. Justice Allen, P

The Honourable Mr. Justice Adderley,JA