Case No: C4/2005/01537

Neutral Citation Number: [2006] EWCA Crim 6
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT, KINGSTON-UPON-THAMES
HIS HONOUR JUDGE BINNING

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 20th January 2006

Before :

LORD JUSTICE PILL
MR JUSTICE NEWMAN
and
MR JUSTICE LLOYD JONES

- -

Between :

LINDA ROSENBERG	**Appellant**
- and -	
THE QUEEN	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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MR N VALIOS QC & MISS P ROSE for the Appellant
MR J CARMICHAEL for the Respondent

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Judgment

Lord Justice Pill:

1. On 10 February 2005 in the Crown Court at Kingston-upon-Thames before His Honour Judge Binning and a jury, Linda Rosenberg was convicted of possessing a class A drug with intent to supply (Count 1), possessing a Class A Drug with intent to supply (Counts 2 and 3) and possessing of a class A drug (Counts 4 to 6)). On Count 1, she was sentenced to four years imprisonment, on Counts 2 and 3 to six years imprisonment concurrent and on each of Counts 4 to 6 four months imprisonment concurrent. The total sentence was one of six years imprisonment. A co-accused Iola Ann Griffiths was acquitted on Counts 1 to 3.

2. Rosenberg appeals against conviction on five grounds, which can be summarised as two, by leave of the single judge. On two further grounds, she seeks leave to appeal, following refusal by the single judge. The single judge also refused leave to appeal against sentence and that application is renewed.

3. The prosecution case relied in part on CCTV footage from a camera the appellant's neighbours Mr and Mrs Brewer had on their property and directed towards hers. Following reports from Mrs Brewer, police attended the appellant's premises on 21 January 2004. They found a quantity of heroin, cocaine and crack cocaine. The appellant was also found to be in possession of about £2000.00. The prosecution relied on the video evidence which appeared to show the appellant engaged in unwrapping packets of drugs in the house, handing objects (possibly drugs) to others and being shown how to use a "crack bottle". Clingfilm and foil were found under a coffee table.

4. The co-accused was found in the house at the time of the search. Drugs were found underneath her on the sofa and hanging out of her trousers. Scientific evidence showed the appellant's fingerprints and DNA on incriminating items recovered during the search.

5. The appellant contended that the packages of drugs did not belong to her and that they had been brought in to the premises. As to the £2000, the appellant said that it was the proceeds of sales of cars. She had withdrawn the cash to pay for new windows and other building work.

6. Two interviews were conducted on the late evening following the search. Before the search, her lodger, Mr Arthur, had come into the house with a number of people, including a girl (Griffiths) carrying a plastic bag. As they arrived, she went to the lavatory and spent 10 to 15 minutes there. She did not know what the bag contained. She had never taken drugs and described herself as "anti-drugs". Shown a small plastic device with a burn on it, the appellant said she believed it to be a device for blowing paint to achieve a spray effect. It has been on her coffee table for some time. She was an artist by trade and thought it would be useful for her work. She had withdrawn from her bank a total of £6000.00 to pay for building works on her house which she claimed had been re-mortgaged (subsequently confirmed).

7. Those interviews took place in the presence of the appellant's solicitor. The appellant had been told of the allegation against her, based on what was found in the search, but she had not been told of the existence of the video.

8. Having been shown the video, she was re-interviewed. She said that wrapped in the clingfilm, which she had been handling, were cheese and pate. It was demonstrated that her visit to the lavatory had lasted only forty-five seconds but she said that she believed it had taken fifteen minutes. A bottle with foil on top of it shown in the video she thought was a normal drink bottle and did not know what was happening with it. The cutting motion observed on the video was her cutting cheese and it was a piece of cheese that she was observed handing to someone else. The video showed her to have been smoking a pipe. She said she could not remember doing so.

9. At a further interview, she said that she had not invited the other people to her home; they were not her friends. If the officers had not found the cheese, it was because it was in the refrigerator. She knew nothing about the crack pipe.

10. There was a history of serious ill-feeling between the appellant and Mr and Mrs Brewer. There had been allegations of criminal behaviour on both sides, some of which had resulted in court proceedings. The Brewers had made a police officer, Sergeant Cook, aware of the fact that they had a video camera trained on the appellant's house and that they were taping events there. Sergeant Cook warned them that this amounted to a violation of the appellant's right to privacy but nevertheless received the video tapes from them when offered.

11. In her evidence, the appellant said that she was aware that the Brewers were videoing her movements inside the house. She had reported this to the police. In her evidence, she gave explanations, consistent with her innocence of drugs offences, for what could be observed on the video. She was concerned as to whether people were bringing drugs into her house and she tried to keep an eye on the situation. This had involved conducting various experiments with what she found there and she concluded that the substances were chemicals relating to brewing "hooch". When she confronted her lodger, Mr Arthur, he confirmed that and also mentioned that medication for cancer had been left at the house. The co-accused was trying to plant drugs on her. Mr Brewer also had a motive to plant drugs. The appellant said she had lived in the house for thirty three years and had never had drugs there. She had been a Mormon since 1982 and had worked with Alcoholics Anonymous.

12. Mr G Crew gave evidence that he had worked for the appellant and that she had never been involved in drugs. He spoke of damage to her property caused by Mr Brewer. The witness said that he had introduced the tenant, Mr Arthur, to the appellant and was aware that Arthur was involved with drugs.

13. The co-accused gave evidence that she had only been to the appellant's house on one previous occasion. On that occasion they had smoked crack upstairs but the appellant was downstairs. She said that, on 21 January 2004, the appellant was a party to a discussion as to how to assemble the crack pipe handling bottle. She took no drugs to the premises. There was a discussion about testing the drugs. She had only gone to the appellant's house because free drugs were on offer. She would have been interested in finding customers in order to obtain free drugs. The appellant had tried to persuade her to blame Mr Arthur for the offences.

14. At the trial, it was sought to exclude the video evidence. It was submitted that the surveillance on the appellant was directed by the police either directly or tacitly. There was a breach of the Regulation of Investigatory Powers Act 2000 ("the 2000

Act") which had been enacted to provide in domestic law protection of the right to respect for private life conferred by Article 8 of the European Convention on Human Rights. The police failed to inform the appellant of the surveillance being conducted on her property.

15. From contemporaneous documents, there is no doubt that in December 2003, Mr Brewer was informing Sergeant Cook of events in the appellant's property and the fact that they were being filmed. On 8 January 2004, Mr Brewer promised to deliver tapes to the police saying that he would think by now: "You have evidence a plenty in order to obtain a warrant". On 14 January 2004, Sergeant Cook thanked Mr Brewer for tapes and stated: "Our DCI has been informed and applications are now on the go". On 18 January, Sergeant Cook told Mr Brewer that plans were "afoot" and that the involvement of other individuals as well as the appellant was being looked into.

16. The defence sought to exclude the video evidence at the trial. When considering the application, the judge accepted the evidence of Sergeant Cook that he had warned the Brewers that they were breaching the appellant's Article 8 rights. The Brewers had denied that. The judge held that the police had not evaded the provisions of the 2000 Act. He did not "conclude that the police encouraged any breach by Mr Brewer of Mrs Rosenberg's human rights, as opposed to their using the fruits of Mr Brewer's enthusiasm." An application to exclude the evidence under Section 78 of the Police and Criminal Evidence Act 1984 ("the 1984 Act") was also refused. It was not dissimilar "to a passer-by peering in a window and seeing a crime", it was held. The judge also stated that it seemed to him that the video would have been admissible at the behest of the co-accused Griffiths as contradicting the appellant's assertion that it was Griffiths who took the drugs to the property.

17. On behalf of the appellant, Mr Valios QC submits that the evidence ought to have been excluded. The evidence demonstrated encouragement by the police of the Brewers' surveillance by CCTV of and into the appellant's home and the conduct should be treated as that of the police. Since no authorisation had been given for such intrusive surveillance, the 2000 Act had been circumvented by the police. Further, to admit the evidence was a breach of Section 78 and of the right to a fair trial under Article 6 of the Convention. The surveillance was contrary to and not authorised by the 2000 Act.

18. While the police were complicit in the surveillance to the extent that they knew of it and were prepared to use it in a criminal prosecution, it cannot in our judgment be regarded, for the purposes of the 2000 Act, as police surveillance. The police neither initiated it nor encouraged it. We would accept that the degree of police involvement could be a factor in deciding on admissibility under Section 78. Nor does the warning which the judge found was given to Mr Brewer about it convert it into police surveillance. The warning may have been a sensible piece of advice given the history of trouble between the appellant and the Brewers but it does not convert the police acceptance of the videos into a breach by them of Article 8, or of the Act. If a civil action were to be possible by the appellant against the Brewers for a breach of Article 8, it might be relevant but that is a concept quite distinct from the present one.

19. Moreover, in her evidence at the trial, the appellant accepted that she knew "the video was there" and knew "that Mr Brewer was looking inside my house".

20. In our judgment, there could in the circumstances be no breach of Section 26 of the 2000 Act because the surveillance was not "covert" within the meaning of Section 26 (9)(a) which provides that:

> "Surveillance is covert if, and only if, it is carried out in a manner that is calculated to ensure that persons who are subject to the surveillance are unaware that it is or may be taking place".

Mr Valios relies on the fact that the camera itself was concealed in a dome at the top of a high pole, but that the appellant knew its use was for observation of her activities is clear.

21. The camera was of the most ostentatious type and it cannot be said that the surveillance was carried out in a manner calculated to ensure that the appellant was unaware that it may have been taking place. Reliance has been placed on behalf of the appellant upon the 2000 Act rather than Article 8 itself. However, if there had been a breach of Article 8(1) in the absence of a breach of the statute, the police could in our view have relied on the proviso in Article 8(2) that the surveillance was necessary for the "prevention of crime", which in this case was serious crime.

22. Even if there was a breach of Article 8, in our judgment the judge was entitled to admit the evidence and was not required to exclude it under Article 6 or Section 78 of the 1984 Act. The consequences of a breach of Article 8 in this context were considered in *R v P* [2000] 1 AC 146. If there were to have been a breach of Article 8, importance should be attached to any such breach in determining an application to exclude evidence but the admissibility of unlawfully obtained evidence is to be determined by reference to Article 6 and Section 78 rather than Article 8. It is necessary in a democratic society for all relevant and probative evidence to be admissible to assist in the apprehension and conviction of criminals and also to ensure that their trial is fair. It remains necessary to engage in the exercise of reviewing and balancing all the circumstances of the case. In this case , they included intrusion, but intrusion which was openly practised, the complicity of the police in the surveillance, as described, and the seriousness of the crime involved. In our judgment, the judge was entitled to admit the evidence and its admission did not render the trial unfair.

23. The second submission made on behalf of the appellant is that, before interviewing the appellant, the police ought to have disclosed to her the existence of the video footage to be relied on. It is submitted that the first and second interviews should be excluded on that ground. Further, it is submitted, the appellant was at a disadvantage when interviewed after sight of the video by the fact that she had given the earlier interviews. The later interviews should also be excluded as tainted by the earlier ones. What the appellant sought to avoid were the contradictions between the evidence given at trial and the accounts given in the third and fourth interviews and the resulting comment under S34 of the Criminal Justice and Public Order Act 1994. Any advice given by the solicitor before the first and second interviews would have been given in ignorance of fundamental evidence, it is submitted. Full and proper advice could not be given in the absence of full disclosure.

24. In his ruling permitting admission of the interviews, the judge stated:

> "But counsel have not put before me any rule that shows that the prosecution have to disclose their full hand, if I can put it like that, and make clear to a defendant exactly the evidence they have. It seems she was told very clearly exactly what the interview was about and she could take her own course on that".

25. In our judgment, the judge was entitled to make the ruling he did. The appellant's house had been searched and incriminating material found. Before interview, she was told the nature of the case against her. The police were not at that stage obliged to disclose the extent of the evidence against her.

26. Comment was not made at the trial upon the difference between the first and second interviews on the one hand and the third and fourth on the other. The comment complained of is that upon the difference between the later interviews and the evidence at trial. Even if, contrary to our finding, the contents of the video should have been disclosed before the interviews, that in our judgment would not have been a sufficient ground for excluding the third and fourth interviews, given after observation of the videos and the opportunity to obtain advice. We do not accept the submission that the admission of the later interviews deprived the appellant of a fair trial.

27. Leave to appeal is sought on the basis of the trial judge's refusal to permit the defence to call the evidence of Mr C P A Norman, a clinical psychologist, who in his written report referred to her depression and anxiety. She had scored "slightly high" on the schizoid dimension. It is not suggested that she suffered from a medical condition. It is submitted that the witness could have explained to the jury why the appellant was so garrulous and why she answered questions in a roundabout way. They might have given more weight to her evidence had they heard Mr Norman.

28. The judge ruled against admissibility stating: "I am going to let the jury evaluate her evidence, which is their task. They will make of it what they will". When summing-up, the judge stated:

> "It is obvious that the mannerisms of witnesses differ and some have more obvious personalities than others. It has been obvious to us all that Mrs Rosenberg was very anxious to answer her questions fully and indeed counsel and I on a number of occasions – perhaps to characterise it as a reprimand was a little high – but certainly attempts were made, successful or otherwise, to restrain her answers at times if only to avoid a certain amount of repetition. But please don't hold the way in which she gave evidence against her. What you do, as I am sure you appreciate, is take into account what people said and how they said it. But however someone gives their evidence, with whatever emphasis, it is whether what they are saying is true or may be true from a defendant's point of view that matters. So, as I say, I am sure you won't be put off her merely by her manner. But just consider what she said and how she said it and ask yourselves, as you do in relation to any witness, is what they are saying accurate and truthful?"

29. In our judgment, the judge was entitled to exclude the evidence of the psychologist and the judge's direction was adequate and fair.

30. The issue of the appellant's credibility and reliability in this case was not beyond the normal comprehension of a jury. They were well able to assess the credibility and reliability of a witness who was garrulous. Such as assessment is not outside their range of experience. They received appropriate guidance from the judge. Moreover, there was nothing unfair about the judge's conduct of the trial when she was giving evidence.

31. For the reasons given, leave to appeal on the further grounds is refused and the appeal against conviction is dismissed.

Sentence

32. The appellant is now 61 years old. She has previous convictions,- predominantly for offences of dishonesty. She had none for drugs. The appellant has served sentences of imprisonment, including a 26 month sentence imposed in 2001.

33. Counsel refers to the appellant's age and lack of previous convictions for drug offences. There was no evidence of past dealing.

34. When refusing leave, the single judge stated: "Following a trial the sentence was not manifestly excessive". We have regard to the bracket within which sentences for offences such as these are normally placed upon conviction. We agree with the single judge's observation and the application is refused.