IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

SCA #: 14/2018 (Case #00678/2016) (SWH) PWITS (Cocaine)
SCA #: 15/2018 (Case #00679/2016) (OLW) PWITS (Cocaine)
SCA #: 16/2018 (Case #00680/2016 (SWH + OLW) PWITS (Cocaine) + Possession of an item used in the preparation or consumption of a controlled drug

OSCAR LEE WATLER
STEPHEN WAYNE HURLSTON

v.

REGINA

Appearances:	**Mr. Norman Hill Q.C. instructed by Mr. Steve McField of ASM Chambers for the Appellants**
	Mr. Scott Wainwright of the ODPP for the Respondent/Crown
Before:	**Justice Roger Chapple (Actg.)**
Heard:	**29th May 2019**

HEADNOTE

Criminal Law – Appeals (against Convictions) from the Summary Court to the Grand Court – Possession of Cocaine with intent to supply – Points argued: *Failure to hold voir dire, rule on submissions after 'no-case' heard instead of in Verdict Judgment, direct on good character.*

JUDGMENT

ON APPEALS AGAINST CONVICTION

INTRODUCTION

1. On 30th May 2018, following a trial in the Summary Court before Magistrate Kirsty-Ann Gunn, Oscar Lee Watler and Stephen Wayne Hurlston (the Appellants) were convicted of a number of offences, as follows:

   a. Steven Hurlston:

      i. Possession with intent to supply 1.6 lbs of cocaine (jointly with Mr Watler);

      ii. Possession with intent to supply 6.01 grams of cocaine;

      iii. Possession of items used in the preparation or consumption of a controlled drug (half a razor blade, 3 small self-locking bags and a small plastic bag) (jointly with Mr Watler).

   b. Oscar Lee Watler:

      i. Possession with intent to supply 1.6 lbs of cocaine (jointly with Mr Hurlston);

      ii. Possession of items used in the preparation or consumption of a controlled drug (half a razor blade, 3 small self-locking bags and a small plastic bag) (jointly with Mr Hurlston);

      iii. Possession with intent to supply 1.8 grams of cocaine;

         - *Mr. Watler had entered a limited plea of guilty to simple possession of cocaine which was not acceptable to the prosecution. The learned Magistrate found the offence proved as charged.*

      iv. Possession of items used in the preparation or consumption of a controlled drug (a plastic wrapper, 10 small self-locking plastic bags and a digital weighing scale;

- *Mr. Watler had entered a limited plea of guilty to possession of digital scales only which was not acceptable to the prosecution. The learned Magistrate found the offence proved as charged.*

v. Consumption of ganja;

- *Prior to trial Mr. Watler pleaded guilty to this charge.*

vi. Consumption of cocaine;

- *Prior to trial Mr. Watler pleaded guilty to this charge.*

2. On 22nd August 2018, the Magistrate sentenced both defendants to a term of 12 ½ years' imprisonment upon the charge of possession with intent to supply 1.6 lbs of cocaine, passing concurrent terms in respect of all other offences.

3. Both Appellants now appeal against both their convictions and sentence.

THE EVIDENCE AT TRIAL

4. The prosecution case at trial relied, for the most-part, upon the evidence of one police officer, Police Constable #117 Ishmale[1] Leslie (PC Leslie) of the Royal Cayman Islands Police Service (RCIPS). He gave evidence that on 3rd October 2015. He was on patrol alone in the Patrick's Island area. As he drove along Reverie Road, he noticed a car parked in the bushes in an open lot and two men (the Appellants) standing at the rear of the car. PC Leslie stopped and walked over to the Appellants who moved to the front of the car. PC Leslie said that he saw Mr Hurlston throw something towards the passenger door. PC Leslie later retrieved that item – a plastic bag containing a white powder which subsequent analysis

[1] Also recorded as Ishmael

revealed to be 6.01 grams cocaine[2]. According to PC Leslie, both Appellants appeared nervous.

5. The officer moved to the rear of the car and saw a set of keys and a half razor blade (on which traces of cocaine were later found) on the trunk. On the ground near Mr Watler, the officer noticed 3 small plastic bags – one of which was found to contain a small amount of cocaine. As he reached down to pick up these bags, PC Leslie saw a yellow package, partially under the car. Inside the package were what he described as two rocks – subsequent analysis found this to be 1.6 lbs of cocaine hydrochloride. PC Leslie told both Appellants they were being arrested for possession of illegal drugs and utensils.

6. According to PC Leslie, as he was administering the caution but before he was able to compete it, Mr Watler said: "*Officer, I can't lose my job right now. I can't go to jail now. Do something for me.*" Mr Hurlston, said something similar, adding that he had worked for the Immigration Department for 7 years and had a step-daughter to support. Mr Hurlston is said to have concluded by saying, "*I found it on the beach. I should have dash it away, yo.*" Mr Watler added, "*I know you can make this go behind us. I don't even want to see you again. I feel like pinching myself to see if I am awake.*"

7. In cross examination, PC Leslie told the court that, in reply, he said this: "*If this were ganja, it would be easier for me to give you a break, but this is cocaine. It destroys lives.*" When he was able, the officer said he completed the words of the caution.

[2] SH Charge (ii)

8. When PC Leslie asked Mr Watler to empty his pockets, he removed, amongst other things, a small number of self-locking bags containing cocaine and a small digital scale. PC Leslie requested assistance, which eventually arrived. The Appellants were taken to the police station.

9. Searches of the Appellants' homes were later carried out and nothing of any evidential significance was recovered.

10. The various items seized at the scene were sent for analysis. No DNA or other scientific evidence established a link between these items and either Appellant.

11. Both Appellants were interviewed at the police station. Mr Hurlston made no comment to all questions asked of him. Mr Watler adopted a broadly similar stance although expressly denied that he produced any bags or scales from his pockets, contending that the officer had found these on the ground.

12. Submissions were made on behalf of both Appellants at the close of the prosecution case that there was no case to answer. The Magistrate rejected those submissions. It is said by Mr Hill QC, who now appears for both Appellants, although did not appear at first instance, that the Magistrate gave no reasons for her decision immediately following those submissions, although she did give full details explaining her "no case" reasoning in the course of her verdict judgment (paragraphs 20 to 48), delivered after all the evidence had been heard. The transcript obtained records the evidence given before the Summary Court but does not assist as to whether any reasons were given at the time for rejecting the "no case" submissions. The "no case submissions" are not recorded at all. Mr Wainwright, now appearing for the Respondent, did not appear below and thus could not assist.

13. The Appellants, both of good character and long-term employees of the Immigration Department, gave evidence to the Magistrate.

14. In summary, Mr Hurlston said that he had, earlier that day, accepted Mr Watler's invitation to go lobster fishing. They drove to the lot where they were later arrested. Garbage was strewn around the lot, including, he noticed, little plastic bags. PC Leslie arrived there only minutes after the Appellants. He said the officer recovered a razor blade from the ground rather than the trunk. He denied having thrown anything to the ground. He accepted that the officer had retrieved the package from underneath the car, but said that he was unaware of its presence until the officer did so. Mr Watler did produce some little packages and a digital scale from his pocket, of which Mr Hurlston had not, until that moment, been aware. Mr Hurlston recalled the officer saying, when arresting him, that "*had it been weed or even a pound of weed he could chance it and let them go*." He denied making any request of or suggestion to the officer that he turn a blind eye, saying that he did not speak to PC Leslie at all at the lot. He remained silent at interview on the advice of his attorney.

15. Mr Watler also told the court that they had driven to the lot, which backs on to a canal, to fish for lobster. He noticed items on the ground – particularly some bags, one of which contained a white substance. He picked them up to see what they were, and also the digital scale which he found under some twigs. It was then that PC Leslie approached. Mr. Watler said he was nervous and so put the items in his pocket. Like Mr Hurlston, he was not aware of the package under the car until it was retrieved by the officer.

16. Mr. Watler said he may have mentioned that he worked for the Immigration Department and may have asked PC Leslie to turn a blind eye. He did recall the officer saying that if it had been ganja, he would have let him go. He made no comment to most questions during the course of his interview, following legal advice, although denied then that he produced anything from his pocket to PC Leslie because the items did not "originate" from him.

THE APPEALS AGAINST CONVICTIONS - GROUNDS OF APPEAL AGAINST CONVICTION

17. The grounds of appeal against conviction relied upon by both Appellants are broadly similar.

18. Complaint is made firstly about the Magistrate's approach to PC Leslie's evidence as to what passed between him and the Appellants, beginning as he administered or attempted to administer the caution. Mr Hill contends that the Magistrate should have, but did not, hold a *voir dire* to determine the admissibility of PC Leslie's evidence of what was said by the Appellants, particularly the request to turn a blind eye. A *voir dire*, Mr Hill argues, should have been held to determine whether or not the statements alleged to have been made by the Appellants were admissible notwithstanding (a) the fact that they denied making the statements, (b) that a caution was not properly administered as required by the Judges Rules[3] and (c) that PC Leslie's indication that he might have been able to take a different course had it been ganja rather than cocaine could have amounted to an inducement, thereby imposing a duty on the prosecution to prove that the defendants' entreaties (and

[3] 1912, replaced by Code C of the Criminal Evidence Act 1984

particularly the admissions implied therein) had not been induced as a consequence of any threat or promise held out by a person in authority.

19. Next, it is said that the Magistrate erred in her approach to the submissions made at the close of the prosecution's case. Firstly, it is said the Magistrate should have given her reasons for finding that there was a case to answer when announcing that decision, rather than incorporating them in her verdict judgement.

20. Secondly, it is argued that in reaching her decision, she made "findings of fact prematurely before all the evidence was completed." Reliance is particularly placed on the decision of the Cayman Islands Court of Appeal (CICA) in ***R v Gibson***[4]. In the course of his oral submissions, Mr Hill submitted that the Magistrate should have applied the test and directed herself in accordance with the well-known England and Wales authority of ***R v Galbraith***[5]. Rather, it was clear from the way in which she explained her "no case" decision in her verdict judgment that the Magistrate had arrived at findings of fact prematurely, achieving, as Mr Hill put it, complete foreclosure of the balancing exercise that needs to take place only when all the evidence has been called. Returning to the same point later in his argument, Mr Hill put things rather more trenchantly: "*What you do at half time conditions what you do for the rest of the case.*" In any event, Mr Hill says, the Magistrate's conclusion that there was a case to answer was simply wrong, on the evidence, since it was unreasonable in all the circumstances to place reliance upon PC Leslie, given that it stood alone and unsupported by other evidence.

[4] [1988-9] CILR 336
[5] [1981] 1 WLR 1039

21. Thirdly, complaint is made that the Magistrate failed properly to direct herself as to, or give sufficient weight to, the good character of the Appellants.

22. Fourthly this was not a case, it was urged, in which any adverse inference could properly be drawn from the Appellants' failure to mention in interview the facts upon which they relied at trial.

23. Lastly, it was argued that the Magistrate's verdicts were, on the entirety of the evidence, unreasonable.

THE FAILURE TO HOLD A *VOIR DIRE*:

24. Several obstacles (and they are insuperable) lie in Mr Hill's path in complaining of the Magistrate's failure to hold a *voir dire*, not least of which is that the Appellants' attorneys at trial conceded that such a procedure was not necessary (page 5 of the transcript of evidence).

25. In any event the position at trial was that Mr Hurlston denied having said anything at all to PC Leslie at the lot, whilst Mr Watler conceded he may have asked PC Leslie to turn a blind eye. This was simply a disputed issue of the fact for the Magistrate to resolve, not a question of admissibility. If the magistrate could not be sure that the Appellants made a request to turn a blind eye, she would place no reliance upon it. If on the other hand these requests were made, they were, on the evidence, spontaneous and not, on any version of events, in response to any question posed by the officer.

26. A police officer is not required, as Mr Hill suggested, to prohibit a suspect from embarking upon or continuing a spontaneous admission halfway through the caution. I am altogether unable to understand how a police officer's observation - to the effect that he might have been able to take a different course had it been ganja rather than cocaine - can amount to an inducement. Rather, it is a statement that the officer was impervious to such requests, taking the view that the law must take its course. Still further, there is no suggestion from the appellants that they were prompted by anything held out to them to make admissions. It bears repeating that one Appellant denies and the other concedes that he might have made a request to turn a blind eye.

THE RULING ON THE SUBMISSIONS AT THE CLOSE OF THE PROSECUTION CASE

27. As I indicated in the course of argument, as one more familiar with trials in the Grand Court and jury trials in England and Wales, my initial reaction on reading this part of the transcript was one of surprise that the Magistrate had not explicitly directed herself in accordance with the words of ***Galbraith*** familiar to all criminal practitioners – in essence whether there was evidence upon which a reasonable tribunal of fact, properly directed, could convict. Instead, the Magistrate directed herself in the following terms whilst citing both s.70 of the ***Criminal Procedure Code (CPC)*** (2017 revision) – the revision then in force – and the case of ***Waldron v R***[6].

> *"On a no case submission I must decide whether the prosecution has presented a prima facie case, that is, if there was no other evidence, I would be sure beyond reasonable doubt of their guilt,"*

[6] [2011] 2 CILR 354

28. Having considered that section and the case of ***Waldron*** with care, it is abundantly clear, not only from what she said, but from her comprehensive review of the evidence that she was loyally following the approach laid down in ***Waldron***, the statute and authority binding upon her. Section 70 of the ***CPC*** provided as follows:

> *"If at the close of the case for the prosecution the Court considers that, subject to any fresh matter which might be revealed in the conduct of the defence, the prosecution has established a prima facie case, the court shall, if no defence is offered, convict the accused, but, if the Court considers that a prima facie case on the evidence presented has not been established and the accused offers no defence, or submits there is no case to answer, the court shall acquit the accused."*

29. In ***Waldron***, the learned Chief Justice undertook a detailed analysis of s.70 and its relationship with ***Galbraith***. In his judgement, approved by the CICA, these observations appear (pages 360 to 361):

> "*the phrase "a prima facie case" ....means a case which satisfies the court beyond reasonable doubt that, subject to some fresh matter which might have been revealed in the conduct of the defence (if a defence had been offered), the accused is guilty.*"

Of the phrase "*subject to any fresh matter which might be revealed in the conduct of the defence*", he said this:

> "*This expression is a further indication of the provisional nature of a prima facie case to answer leaving room for the possible exculpatory effect that the evidence offered by defendant might have. It recognises that, in some circumstances, the finding of a prima facie case displaces onto a defendant, not the legal or persuasive but the evidential burden of proof to answer the prima facie showing of guilt that has appeared from the evidence of the prosecution.*"

30. Mr Hill invited me to say that ***Waldron*** had been wrongly decided, that it "went too far", asking me to prefer the authority of ***Gibson***. I decline that invitation. I do not take ***Gibson*** as laying down any particular principle or authority, neither do I regard it as inconsistent with ***Waldron***, although it does offer guidance to those conducting summary trials that:

> "*In ruling against a no-case submission, a Magistrate should always refrain from expressing his views or commenting on the evidence in a way which could be interpreted as deciding issues of fact or as being prejudicial to the fair consideration of the defence.*"

31. The Magistrate clearly had this danger in mind. Under the heading "final analysis" she said this:

> "*Having now heard all of the evidence, I had to consider whether I could be sure of the defendants' guilt. This included reconsidering the prosecution evidence afresh, particularly in light of the defendants' evidence.*"

32. It is plain that the Magistrate was, at the close of the prosecution case, arriving at preliminary views on the evidence that she had by then heard, whilst keeping her mind open to evidence which may be called on behalf of the defence.

33. I conclude that the Magistrate approached the no case submissions entirely appropriately and in accordance with statute and case law as it then was. That said, the law has since changed. Section 70 of the ***CPC*** has been amended by ***The Criminal Procedure Code (Amendment Law), 2018 order***. According to the preamble of the Amendment Law, it was enacted "*to amend the Criminal Procedure Code (2017 Revision) to provide for consistency between the procedures in the Summary Court and the Grand Court at the conclusion of the prosecution case.*"

34. Section 70, as amended, now provides as follows:

> *"If at the close of the case for the prosecution the Court considers that a prima facie case on the evidence has not been established, the court shall acquit the accused or in any other case, the court shall proceed to hear the case for the accused."*

35. I have considered whether, had this section then been in force, it would have made any difference to the Magistrate's conclusion. I am sure that it would not. She made clear that the case centred upon the credibility of PC Leslie and whether, at the end of the day, she could be sure that he was a witness of truth. It is then worth recalling the words of ***Galbraith*** ("limb 2"):

> *"where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of witnesses' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the fact 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."*

36. At the close of the prosecution evidence, this case fell squarely within limb 2.

37. Before leaving this topic, I should return to the Appellants' complaint that the Magistrate failed, when announcing her rejection of the no case submissions, to give her reasons there and then. Whilst I have no reason to doubt Mr Hill's instructions, there is no definitive record of what was or was not said at that stage. Whilst nothing turns on it in this case, the court takes the view, particularly given the recent amendments to s.70, and the expressed desire of the legislature to align more closely the procedures of the Summary Court and the Grand Court, that an explanation of the test being applied and the reasons for upholding or rejecting such a submission should be given when the decision is announced. Fuller reasons can then be given, if appropriate, in the verdict judgment.

GOOD CHARACTER AND ADVERSE INFERENCES

38. The Magistrate correctly directed herself as to the weight to be given to the Appellants' good character; that it was a factor to be borne in mind, both when considering the credibility of the appellants' evidence and the likelihood that they would behave in the criminal fashion alleged by the prosecution. In the case of Mr Watler, the direction as to propensity was perhaps more favourable than it should have been, given his guilty pleas. Similarly, the Magistrate directed herself properly as to the inferences to be drawn from their failure in interview to mention the facts upon which they relied at trial. She concluded, as she was entitled to do, that their silence at interview was not because they relied upon legal advice, but because they did not, at that stage, have an explanation for the circumstances in which they were arrested. That said, I note that she felt those inferences were "of little consequence, given the strength of the rest of the evidence."

39. I turn to Mr Hill's general submission that the convictions were against the weight of the evidence and are unsafe, since reliance could not properly be placed upon the evidence of PC Leslie. Mr Hill repeated the submissions made in the court below – making a number of points, such as (by way of example only), the absence of scientific or other evidence connecting the appellants with the drugs, the absence of any supporting evidence from searches of the appellants' homes, the possibility that the drugs and drug paraphernalia could have been left on the empty lot, along with the generality of the garbage strewn there, Mr Hurlston's negative drug test.

40. As previously noted, this case depended in very large measure upon the view taken by the Magistrate as to the credibility of PC Leslie. In such cases, the decision of the Privy Council, on appeal from this jurisdiction in ***R v Crawford***[7] gives clear and binding guidance as to how the appellate jurisdiction of the Grand Court and the Court of Appeal should be exercised:

> *"The Court of Appeal should not have overturned the Grand Court's decision solely on the basis that it doubted the credibility of PC Bradley's evidence. It should only have done so if it was clearly established, and not merely doubted, that the trial judge failed to assess the evidence properly. The court should have recognised, first, that it was at a real disadvantage compared with the trial judge when assessing the credibility and reliability of witnesses as it relied on transcripts and did not have the opportunity to see or hear witnesses, and, secondly, that an appellate court should only disturb the findings of the trial judge (whether sitting alone or with jury) regarding the credibility of witnesses in rare cases in which it was certain that the trial judge must have been mistaken."*

41. The Magistrate was entitled on all the evidence placed before her to conclude that she was sure that PC Leslie was a witness of truth. She assessed the evidence properly and with conspicuous care, looking for factors in the evidence that provided support for the prosecution and defence cases. Her verdict judgment contains a careful and detailed analysis of the evidence placed before her, explaining the inferences she drew. Her conclusions were, in the judgement of this court, entirely permissible and justified on the whole of the evidence. She was also entitled to conclude that from the quantities of the drugs involved, that there was an intention to supply (as to which, I have borne in mind the case of ***Waldron***, where the question of inferring an intention to supply from quantity alone was dealt with at length). It follows that the appeals against conviction are, in respect of both appellants, dismissed.

[7] [2015] CILR 128

THE APPEALS AGAINST SENTENCE

42. At the outset of this appeal, the leave of the court was sought to adduce further evidence. An affidavit sworn by Mr Watler on 21st February 2019 detailing the medical and other problems he has experienced following a kidney transplant in 2008 was submitted.

43. The Magistrate was made aware of Mr Watler's medical history but it was not "*suggested that incarceration would be detrimental to his health and therefore provides only minimal mitigation*" (sentencing remarks, paragraph 16).

44. Mr Watler's affidavit now suggests the opposite: "*The medication, the food in the prison and the environment of the prison are damaging to my kidney function... Dr Nelson sent a letter to the prison instructing the prison to be careful to keep me in an infection free environment. However, that is impossible as the prison is crowded and I am in a cell with 4 other inmates.*"

45. Dr Nelson's letter is exhibited to the affidavit as are extracts from Mr Watler's medical records. He explains that he has been admitted to hospital on several occasions since his conviction and concludes in this way: *"I am afraid that this prison environment may cause me to lose my only transplanted kidney.*" Clearly these are matters which the interests of justice and humanity demand should be investigated further. They may have a bearing upon his appeal against sentence. It was for that reason that I gave leave for the affidavit evidence to be admitted.

46. As matters presently stand, there is altogether insufficient evidence or information for me to take his appeal against sentence further at this stage. First and foremost, I have no evidence from those charged with Mr Watler's safe custody and wellbeing

at HMP Northwood. A court is, as a matter of general principle, entitled to assume that the Prison Service is able to provide the necessary care for all those sentenced by the courts, including those having special needs, whether by reason of medical conditions or otherwise – unless it is informed to the contrary.

47. The first step is for the Director of Prisons at HMPS Northwood to be sent copies of Mr Watler's affidavit and exhibits and asked for his comments. Depending upon his response, it may be necessary for further evidence and opinion to be obtained. Even if this court had the resources to conduct these enquiries, it would, I am sure, be wrong as a matter of principle for the court to become involved in those mechanics. It must be a matter for the Respondent to take this further in order to assist the court. I will discuss what needs to be done and give any necessary directions at the conclusion of this judgment.

48. I have given leave for the affidavit to be admitted as a whole since it would be artificial to do otherwise. However it also seeks to rely upon Mr Watler's medical condition to provide additional grounds of appeal against conviction.

49. Mr Watler now avers that he wanted to plead guilty to possession of all the cocaine charged in this case, defending the allegations of having an intent to supply on the basis that all the cocaine was for his personal use, to alleviate the deep depression he suffers as a result of the "kidney rejection medications" he is obliged to take, the difficulty he has sleeping and the anxiety he feels about his condition.

50. Had this new evidence appeared in a separate affidavit, I would have refused to admit it, on general principles. This material was available at the trial. Mr Watler, made a decision as to the basis upon which he sought to defend the allegations made against him. He cannot now properly seek to overturn his convictions by

arguing that there was another defence (wholly inconsistent with the evidence he gave on oath at trial to the effect that he had never knowingly consumed cocaine) which he now thinks might have had a better chance of success. Mr Hill sought to argue that 1.6 lbs of cocaine could reasonably be for the personal use of an addict – an argument with scant prospect of success, in the opinion of this court.

51. For the reasons given above, Mr Watler's appeal against sentence is adjourned. It makes obvious sense for Mr Hurlstone's appeal against sentence to be heard with that of his co-appellant.

52. I will now hear argument as to the way forward and the evidence required to resume these appeals.

Dated this the 26th June 2019

Justice Roger Chapple
Acting Judge of the Grand Court