IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

SCA # 2/03

DUGMORE LEROY WRIGHT

V.

REGINA

Appearances:

Mr. Laurence Aiolfi for Walkers for The Appellant
Ms. Gail Johnson for the Crown, Respondent

Before: Hon. Justice Henderson

Heard: July 2, 2004

JUDGMENT

Henderson, J.

On this appeal from his conviction in the Summary Court of Possession of cocaine with intent to supply, the Appellant contends that the Learned Magistrate was wrong to find the evidence sufficient to prove guilt. No error of law is alleged. No specific error of fact or inference is said to be dispositive. The argument is that the Learned Magistrate should not have been convinced by the evidence.

Standard of Review

At the outset, I think I must say something about the standard of review in the Grand Court on an appeal of this sort.

This is an Appeal "by motion" pursued to the provisions found in Part Nine of the *Criminal Procedure Code (1995 Revision) ("the Code")*. Section 163 (1) of the Code establishes a right of appeal "on matters of law or fact (or both)". I am entitled to draw inferences of fact from the evidence. Section 177 provides that, "on an appeal by motion, the Court may draw inferences of fact from the evidence given before a Summary Court … and it may decide the appeal with reference both to matters of fact and to matters of law."

To assist the Grand Court in drawing inferences of fact, an appellant may, after notice to the respondent and with leave of the Court, examine witnesses not examined in the Court below: Code, section 176. Moreover, on an appeal by motion, the Grand Court may order a re-hearing where it "considers the justice of the case" requires that: Code, section 175.

It is clear from these provisions that a Grand Court judge sitting on an appeal by motion from the Summary Court is not restricted to a consideration of whether some specific error of law or fact is found in the judgment under appeal. Nor is the appeal confined, on matters of fact, to a determination of whether there was sufficient evidence in the Court

below to place the conviction within the ambit of reasonableness. On the contrary, a judge of this Court may draw inferences of fact from the written record of the evidence given in the Summary Court (in addition, of course, to the inferences it may draw from any fresh evidence admitted on the appeal). Having drawn its own inferences of fact from the evidence, the Grand Court must then determine whether the weight of the evidence is sufficient to uphold the conviction.

It cannot, however, be thought that (absent a re-hearing) a judge of the Grand Court is in as good a position as the judge appealed from to assess the credibility of the witnesses. It is right that a degree of deference should be accorded to the findings of the magistrate, who was able to observe the demeanour of the witnesses, as long as she has instructed herself correctly on the applicable law.

The approach this Court will take to appeals turning only on questions of fact and inference was described by Harre, J., at some length in *Bertolino v. Regina 1990-91* CILR 112 (Grand Court) as follows:

> "Before reviewing the grounds of appeal against the record of the trial will now indicate the principles which I shall follow in relation to that record. They were expressed in the House of Lords in the speech of Lord Thankerton in *Watt (or Thomas) v. Thomas* (10) ({1947}) 1 All E.R. at 587) as follows:
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> > "I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

Mr. Small referred extensively, as he had previously done in the Jamaican case of R. v. Carroll (6), to the decision of the Court of Appeal of England in M. v. Cain (4). That was a civil case in which the Master of the Rolls contrasted the role of the trial judge with that of the Court of Appeal when he said:

> "The most important task of the judge was to assess the character and credibility of the plaintiff, the defendant and the other witnesses. Insofar as he did so on the basis of seeing them and hearing them, we are in no position to say whether he was right or wrong. But what we can consider, and have to consider, is whether he indeed approached the plaintiff's allegations with the caution which he declared that he would adopt, whether and to what extent he cross-checked his assessment of their credibilities against the probabilities of their evidence…"

In Carroll the Jamaican Court of Appeal followed that approach, by expressly adhered to the well-known principle repeated by the Master of the Rolls in *M. v. Cain* that –

> "there is abundant authority for the proposition that where the crucial issues between the parties are issues of fact, and appellate court should never forget the advantage enjoyed by the trial judge in having seen and heard the witnesses giving evidence and it should hesitate long before rejecting or interfering with his conclusions (see *The S.S. Hontestroom* {1927} A.C. 37 and *Benmax v. Austin Motor Co. Ltd.* {1955} 1 All E.R. 326)."

They nevertheless subjected the findings of fact by the trial judge to searching and critical analysis and I find nothing in the more recent cases which is inconsistent with the application of the principles expressed by the House of Lords in *Watt (or Thomas) v. Thomas* (10). Nevertheless, it is incumbent on me to remember that the magistrate in this case had the advantage of seeing not only the witnesses but also the disputed items of jewellery exhibited in this case."

The Evidence

Constable Solomon testified that on March 18, 2002 he was on patrol, with two other police officers, carrying out checks at a tenement yard. At the rear of the tenement yard he saw a bathroom, and three people. The Appellant and a woman were standing in the door, and Mr. Don Nixon was standing outside. Constable Solomon described the lighting as "good".

When he was "at least 10 feet" from the three people he saw the Appellant hand something to Mr. Nixon. He drew closer, and the Appellant noticed him for the first time. The appellant then threw something on the ground behind him. Constable Solomon described this as a "brown thing." It was thrown backwards, into the bathroom. By the time the Appellant threw the brown thing, Constable Solomon was "at most five feet from him."

Solomon asked the Appellant what it was that he had thrown behind him; the Appellant denied throwing anything at all. A search revealed a brown wrapper containing individually wrapped balls of cocaine on the floor of the bathroom. Upon being interviewed by the police, the Appellant denied throwing anything and denied any knowledge of the cocaine.

One of the other two officers – Constable Cotterell – also gave evidence. He said the woman was standing in the entrance to the bathroom and the two men were standing "in the bathroom. He also said Constable Solomon "was in front of me"; a reasonable

inference is that Solomon had the better view. Cotterell did not see anyone throw anything and did not see any "apparent transactions." There was some degree of contradiction between the evidence of Solomon and Cotterell, but none as to the existence of a line of sight through the doorway into the bathroom.

The Appellant elected not to give evidence at his trial.

The Appellant called Don Nixon as a witness. Mr. Nixon said he was standing by the front door of the bathroom while the appellant and the woman were inside, thus confirming the evidence of Constable Solomon on the locations. Mr. Nixon said the cocaine was in his possession when the police arrived and he threw it onto the floor. He denied that the Appellant handed anything to him.

In cross-examination, Mr. Nixon readily admitted being a regular user of crack cocaine: "I love it."

He also said he told constable Solomon the cocaine was his; he denied telling the police that it belonged to the Appellant. In cross-examination, Mr. Nixon was confronted with a written and signed statement he gave to the police asserting the exact opposite – that the cocaine was not Nixon's at all, but belonged to the Appellant.

If the evidence of Mr. Nixon is believed, the Appellant must be acquitted. If the evidence of Mr. Nixon, although not necessarily believed, is sufficient to leave the trier of fact with

a reasonable doubt, then the Appellant must be acquitted. Even if the evidence of Mr. Nixon is disbelieved, the Appellant must be acquitted if the case for the Crown, standing by itself, is not sufficient to make the trier of fact sure of his guilt.

In my view, the Learned Magistrate was entirely justified in disbelieving the evidence of Mr. Nixon. It is clear from his evidence that he is a heavy user of crack cocaine who lives a criminal lifestyle. He gave the police a signed statement which flatly contradicts his evidence under oath. Statements made by Mr. Nixon to the police in his interview are not evidence against the Appellant, but are admissible on the question of Mr. Nixon's credibility to the extent that they are inconsistent with his sworn testimony. Unlike the Learned Magistrate, I have not had the opportunity of observing Mr. Nixon's demeanour while testifying. Based upon my reading of the record, I see no reason to doubt the accuracy of the Learned Magistrate's conclusion that Mr. Nixon is lying.

There is little in the written record of the cross-examination of Constable Solomon which would bring his credibility into question. He admitted not telling the Appellant during the interview that Solomon had seen him throw something away; thus, the Appellant was denied a chance to respond to that allegation in the interview. He was pressed as to his reasons, and said only, "must have felt what we had was sufficient." I am unable to attribute to this the significance contended for by the Appellant. The interview contains flat denials by the Appellant that the items found on the bathroom floor were his, and that he was in the act of giving or selling cocaine to Mr. Nixon. I fail to see how the

Appellant has been prejudiced by having been deprived of the occasion to deny, during a police interview, that he threw anything on the bathroom floor.

The cross-examination included a number of suggestions to Constable Solomon that he was, in effect, lying in order to obtain a conviction. These were denied. The Learned Magistrate found Constable Solomon to be a witness of truth. She was able to observe his demeanour while testifying. I see no reason to come to any different conclusion.

Finally, I must consider whether the contradictions between the evidence of Constable Solomon and Constable Cotterell are so significant as to cause me to doubt the accuracy of Solomon's evidence. The Learned Magistrate says that there were contradictions between the two as to the length of time that Constable Solomon observed the Appellant and the distance at which he observed him. She considered that these were not sufficient to cause her to doubt Constable Solomon's evidence as a whole.

As to the first of these, the length of time during which Constable Solomon observed the Appellant, I do not see any real contradiction at all. Constable Solomon said in cross-examination that, when he first saw the Appellant, he was standing" for a couple of seconds." He then moved forward. The other two officers, who were behind him, did not move forward immediately. Cotterell said the police "came upon them suddenly from around the corner" and "didn't stop on the corner." Any differences between the two officers on this point are probably attributable to the way in which they expressed themselves. I do not think that the fact the officers were "standing" "for a couple of

seconds" is necessarily inconsistent with an assertion that they came upon the men "suddenly" and did not stop on the corner.

As to the second alleged contradiction, the distance at which Constable Solomon observed the Appellant, I can see no real indication in Constable Cotterell's evidence of what this distance was. Constable Solomon says he was "at least ten feet" from the Appellant when he saw the Appellant hand something to Mr. Nixon, and "at most five feet: from him when he threw the brown thing on the floor. Constable Cotterell did not see either of those actions. The Learned Magistrate's notes do not show that he was asked how far Constable Solomon was from the Appellant at any particular moment.

In conclusion, I share the view of the Learned Magistrate that such contradictions as many exist between the evidence of Cotterell and Solomon are not sufficient to call the veracity of the latter into question.

Order

For these reasons, the appeal from conviction is dismissed and the conviction is affirmed.

The Appellant is at liberty to relist the sentence appeal.

Dated this 20th day of August, 2004

Henderson, J.
Judge of the Grand Court