

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA (Crim) No 28/2011

SCA No 5/11

C#07789/2010

BEFORE

**Rt Hon Sir John Chadwick, President
Hon Dr Abdulai Conteh, Justice of Appeal
Rt Hon Sir Anthony Campbell, Justice of Appeal**

ON APPEAL FROM THE GRAND COURT

BETWEEN

ANTHONY BERRY

Appellant

and

THE QUEEN

Respondent

Mr. J Austin-Smith appeared for the Appellant
Ms T Lobban-Jackson instructed by the Director of Public Prosecutions appeared for
the Crown

Hearing: 22 March 2012
Reasons released: 25 April 2012

JUDGMENT
Revised from transcript and Approved



Sir John Chadwick, President:

1. On 13 December 2010 Mr. Anthony Berry, who was then some 18 years of age, pleaded guilty in the summary court to the offence of consumption of ganja. The offence to which he pleaded had been committed on 18 February 2010. He was sentenced by Magistrate Nova Hall to pay a fine of \$600, with 60 days' imprisonment in default.

2. Mr. Berry appealed to the Grand Court against that sentence. His grounds of appeal, as they appear in his notice of appeal dated 19 January 2011 were (i) that the fine was excessive for a first conviction, (ii) that he had pleaded guilty, in the belief that a sentence of probation would be imposed on him and (iii) that he had been accepted to attend school overseas “but the fine is recorded as a conviction”.
3. Section 75 of the Criminal Procedure Code (2010 Revision) gave the Magistrate power, at her discretion, to decide not to record a conviction. The section is in these terms:

“The court, having heard both the prosecutor and the accused person and their witnesses, shall either convict the accused and pass sentence upon or make an order against him according to law or shall acquit him, at its discretion, or may with or without recording a conviction, if it is of the opinion that it is not expedient to inflict any punishment notwithstanding that it finds the charge against the accused is proved, make an order discharging the accused absolutely or conditionally”

That section reflects the provisions in section 41 of the Penal Code (2010 Revision). Section 41 is in these terms:

“41. (1) Where, in a trial, a court thinks that the charge is proved, but is of the opinion that, having regard to the character, antecedents, age, health or mental condition of the accused, or to the trivial nature of the offence or to the extenuating circumstances in which the offence was committed, it is inexpedient to inflict any punishment, the court may, without proceeding to conviction, make an order either-

- (a) discharging the accused absolutely; or
- (b) if the court thinks fit, discharge the accused subject to the condition that he commits no offence during such period not exceeding three years from the date of the order, as may be specified in the order.”

4. It is plain from the Magistrate's sentencing remarks that she gave consideration to the question whether or not she should exercise the powers that those sections conferred on her. That is to say , she considered whether or not this was a case in which she should not record a conviction. In the course of her remarks, she said this:

“... given the Defendant's age and his previous clean record a probation order would normally be considered as the appropriate disposition for this charge as this type of sentence would best rehabilitate a young Defendant.”

But she went on:

“The report which was prepared [the Social Inquiry Report] described the Defendant as being nonchalant towards the matters before the Court. He missed appointments which delayed the timely completion of the report and he did not articulate any remorse about the consumption of ganja. He advised his probation officer that he had ceased using the drug a few months after his arrest. Despite this assertion, he twice tested positive for ganja use, prior to the report being finalized and submitted.

The report raised the issue that the Defendant sought to go to school overseas and referred this for the Court's consideration. However the same report assessed the Defendant as being unsuitable for a community based order. As such a probation order could not be made. Further with the Defendant still testing positive for ganja just prior to sentencing despite asserting that he had ceased use of the drug several months before, I saw no efforts being made to mitigate his circumstances. When invited to make comments prior to sentencing, the Defendant stated that he had none.”

In those circumstances, the Magistrate found no basis for not recording a conviction against the defendant. She did not make an order for an absolute or conditional discharge. She imposed a noncustodial sentence in the form of a fine.

5. It is clear, therefore, that the magistrate decided on the material before her - which included the possibility that the defendant wished to go to school overseas - that this was not a case in which she should exercise the powers conferred by s.75 of the Criminal Procedure Code or s.41 of the Penal Code and dispose of the matter without recording a conviction.
6. Mr. Berry appealed to the Grand Court. As I have said, his appeal – as stated in the notice of appeal - was said to be an appeal against sentence. The matter came before the Chief Justice on 25 November 2011.
7. As the Chief Justice explained, in dismissing that appeal, Mr Berry “sought to reverse the Magistrate's decision by which she allowed his conviction for consumption of ganja to be recorded against him”. But he pointed out that there appeared to be no error of principle in the way that the Magistrate had dealt with the matter. He referred to section.41 of the Penal Code:

“Here there were no circumstances of the kind envisaged by section 41 of the Penal Code which would have compelled the

Magistrate to not enter a conviction, thereby discharging him absolutely or subject to conditions. By her imposition of a fine . . . it is apparent that the Magistrate did not consider, in the words of section 41(1) of the Penal Code, that 'it is inexpedient to inflict any punishment' - the test laid down..."

The phrase "inexpedient to inflict any punishment" which appears in section 41 of the Penal Code appears in section 75 of the Criminal Procedure Code as "it is not expedient to inflict any punishment"; but there is no difference of substance between the two phrases.

8. At paragraph 6 of his Ruling, the Chief Justice said this:

"In this case, had I been persuaded that the appellant would, as he suggests, experience the exceptional hardship of losing his educational opportunities in the United States of America because of this conviction, I would have had a basis for interfering with the record of conviction. But that basis, from what he has said, is not presented. On the contrary, he continues on a student visa to enter and remain in the United States for the purposes of his course of education."

Accordingly, the Chief Justice concluded that the record of the conviction did not render the sentence to be manifestly hard or excessive and he had no basis for interfering with it.

9. The matter is brought to this Court on a second appeal. The powers of this Court on a second appeal are conferred, and circumscribed, by section 29 of the Court of Appeal Law:

"29. (1) Any person, including the prosecutor, aggrieved by any judgment given or made by the Grand Court in the exercise of its appellate or revisional jurisdiction, whether such judgment has been given or made upon appeal or revision from a court of summary jurisdiction or any other court, board, committee or authority exercising judicial powers, and whether or not the proceedings are civil or criminal in nature, may appeal, subject to this Law, to the Court on any ground of appeal which involves a point of law alone, or against sentence but not upon any question of fact."

10. The appeal is brought on the basis that it is an appeal against sentence. It would be impossible, in our view, to contend - and it has not been contended - that the appeal involves a point of law alone. It cannot be said that this was a case in which the Magistrate did not properly direct herself to the powers which she had under section 75 of the Criminal Procedure Code and section 41 of the Penal

Code; or that she reached a conclusion in relation to the exercise (or non-exercise) of those powers which, on the material before her, she was not entitled to reach. Rather, it is said that circumstances have changed since the matter was before the Chief Justice in November 2011; and that had the Chief Justice been aware of the changed circumstances then the indication which he gave in paragraph 6 of his judgment suggests that he would, or might, have reached a different conclusion.

11. The basis upon which it is said that circumstances have changed is that Mr Berry has now received a notification from the Consular Officer, Non-immigrant Visa Section, United States Embassy, Kingston. The only evidence of that is an undated document which is not addressed to anyone by name, and which is not signed. We were asked to receive and take account of this document on the basis that it was received by Mr. Berry after the matter had been before the Chief Justice in November 2011; but there is no evidence to support that.

12. The document begins:

“Dear Sir or Madam, We regret to inform you that you did not qualify under U.S. law to receive a nonimmigrant visa. The checked box or boxes below explain the reason(s) for the decision.”

Two of the boxes which follow have been checked or ticked.

13. The first relates to a refusal under section 214(b) of the Immigration and Nationality Act (INA). That is a temporary refusal of a visa: it appears to be in point because (it is said) the applicant had not convinced the interviewing officer that he did not plan to immigrate to the United States. It is said (in the document) that the information which the applicant had provided was not sufficient to qualify for a visa: in that he was not able to persuade the interviewing officer either that he had strong enough family, social or economic ties to his country of residence, or that he would lawfully abide by the terms of his visa, or both. It was pointed out to him, in the document, that he could reapply in relation to that ground; but with a strong recommendation that he should not do so unless there had been a significant change in his personal circumstances. So on the face of the document there is a temporary refusal, at

the least, on a ground which has nothing to do with his conviction for a substance-related offence.

14. The other box checked or ticked is in these terms:

“Under section 212(a)(2)(A)(i)(II) of the INA, you are permanently ineligible for a nonimmigrant visa due to a controlled substance-related offense.”

It is said on behalf of Mr. Berry that the effect of that refusal is that, for so long as his conviction on 13 December 2010 stands, he has no prospect of obtaining a nonimmigrant visa to enter the United States of America and pursue the course of study on which he has, in fact, been engaged for at least part of the past year; or any other course of study.

15. It may be said at once that, whether or not the conviction on 13 December 2010 remains recorded, it is undeniable that Mr. Berry has, in fact, pleaded guilty to a controlled substance-related offence. Recording, or not recording, a conviction in respect of the offence with which he was charged and on which he was brought before the summary court cannot alter that fact.

16. The basis on which this Court is invited to direct that the sentence imposed by the Magistrate be set aside – and that, in place of a recorded conviction and a fine, Mr Berry is given an absolute or conditional discharge is – as it seems to us really this: that if there were no recorded conviction, Mr. Berry would be able to say to the United States Immigration Authorities that he had not been convicted of a controlled substance-related offence: that is to say, he would be able to complete a form in which he could properly tick a box “No” in answer to a question “Have you been convicted of a substance related offence?” What he could not do would be to tick a box “No” in answer to a question “Have you been found by any court to have committed a substance-related offence?” It is, we think, for that purpose alone that this Court is invited to allow an appeal against a sentence which, it is accepted, was properly imposed at the time and properly upheld on appeal; and to set aside the fine and direct that no conviction be entered in response to the charge on which Mr. Berry was brought before the summary court.

17. There is a procedural difficulty which Mr Berry would need to surmount before this Court could accede to that invitation. In the first place, it is not at all clear that this can truly be said to be an appeal against sentence. The complaint is not so much as to the sentence that was passed but as to the fact that any sentence was passed at all: it being said that Mr. Berry should have had an absolute discharge or, perhaps, a conditional discharge. But, the summary court could have given Mr Berry an absolute or conditional discharge under section 75 without directing that the conviction should not be recorded. Section 75 of the Civil Procedure Code contains the phrase "may with or without recording a conviction": the summary court could have directed that the conviction be recorded notwithstanding that it made an order for an absolute or conditional discharge. So the real challenge is to the exercise of the Magistrate's discretion when deciding that this was not a case in which a conviction should not be recorded. As I have said, a challenge to that decision does not fit easily within the description of an appeal against sentence.
18. But, assuming this appeal can be presented as an appeal against sentence, the question for the Court is whether the Magistrate or the Chief Justice can be said to have erred in reaching the conclusions which they did, respectively, reach when the matter was before them. The answer to that question is plainly "No". Neither the Magistrate nor the Chief Justice can be said to have erred on the material before them. Nor, as it seems to us, can it be said that it was not plainly in mind that the problem which has now arisen might very well arise: namely, that Mr Berry would or might have trouble in entering and remaining in the United States because he had been convicted of a drug-related offence.
19. This Court is now asked to interfere with decisions properly made at the time on the basis that that problem is now said to have become actual rather than potential. We are invited to interfere on the basis that, if we were now to direct that the conviction be struck off the record, the attitude of the United States authorities - knowing what they do know already - would change. There is no basis for making that assumption. The United States authorities will have been told that Mr. Berry has been convicted of a controlled substance-related offence; and they will have been that information before them when they issued the

document that they have issued. This Court cannot tell the United States authorities that Mr. Berry has not committed a controlled substance-related offence in the circumstances that he has pleaded guilty to such an offence. What this Court is asked to do, in effect, is to provide Mr. Berry with a document which he could take to the United States authorities in order to persuade them that he can be treated as if he had not committed the offence to which he has pleaded guilty.

20. We see no basis upon which we should accede to that invitation. The facts are the facts and Mr. Berry must live with them. Accordingly, this appeal is dismissed.

