IN THE CAYMAN ISLANDS COURT OF APPEAL

CICA Crim 18/2011
SCA 0043/2010
C#s 03874/2010

BEFORE:

The Rt Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Rt Hon Sir Anthony Campbell, Justice of Appeal

BETWEEN:

XAVIER QUINCY WALROND

Appellant

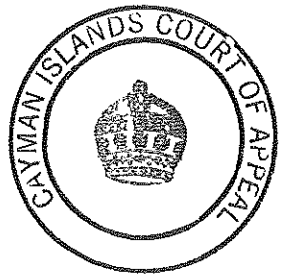
v

THE QUEEN

Respondent

Ms Lucy Organ of Samson & McGrath for the Appellant, Xavier Quincy Walrond.
Ms Tricia Hutchinson, Crown Counsel, for the Director of Public Prosecutions.

Hearing date: 18 November 2011.
Judgment delivered: 23 November 2011.



JUDGMENT

Sir John Chadwick, President:

1. On 17 November 2010, the appellant, Xavier Quincy Walrond, was convicted in the Summary Court before Chief Magistrate Ramsay-Hale on a charge of possession of with intent to supply a controlled drug (cocaine) contrary to Section 4(1)(m) of the

Misuse of Drugs Law (2000 Revision). A charge of the lesser offence of possession, *simpliciter*, was subsumed in the greater. He was also convicted of the offence of failing to provide a specimen of urine for a laboratory test contrary to section 5(2) of the Law. He was sentenced to a term of 12 years imprisonment for possession with intent to supply; and to six months imprisonment, to run concurrently, for failure to provide a specimen of urine.

2. The evidence against the appellant on the charges of possession and possession with intent was that, on 20 November 2008 at approximately 8.30 pm, he was found in the male bathroom at Globe Bar, Myles Road, George Town with another man. The appellant was standing, smoking a cigarette and drinking a beer. He was searched by a police officer pursuant to the Misuse of Drugs Law. Two items were found in his left front pants' pocket. He was arrested; and the items were exhibited. Upon laboratory analysis, it was found that one item comprised a twisted piece of clear plastic film containing a waxy off-white material identified as cocaine base of 5.40 grams (0.19 ounces) in weight; and the other comprised a knotted piece of clear plastic film containing a quantity of white powder identified as cocaine base of 6.32 grams (0.22 ounces) in weight. The aggregate weight of cocaine base was 0.41 ounces. There was no other relevant evidence before the Court. In particular the prosecution did not adduce the statement which the appellant had made to the police at the time of his arrest.

3. At trial the appellant admitted possession of just under a half ounce of cocaine; but he denied being in possession of the cocaine with intent to supply.

4. At the close of the prosecution case, it was submitted on behalf of the appellant that there was no case to answer. It was said, correctly, that the Crown's case was based entirely on the quantity of the drug (a little under half an ounce) which was found on the appellant. It was said, again correctly, that there was no evidence of any of the associated paraphernalia commonly associated with the supply of drugs, no

evidence of substantial cash, no evidence of a lifestyle suggesting drug dealing, and no evidence of how cocaine base is normally packaged for sale or of the quantities in which it is usually sold. It was said that no jury, properly directed, could infer an intention to supply; and that the Crown had failed to establish a *prima facie* case.

5. In response to the submission of no case to answer, the Crown placed reliance on the fact that the drugs of which the appellant was found to be in possession were in two separate packets. It was said that the amount was significant; and was consistent with the appellant having an intent to supply. It was said that the appellant had not suggested that he was himself a user of cocaine.

6. In reply to the Crown's submissions it was pointed out on behalf of the appellant, first that, in the circumstances that the Crown had not adduced evidence of the police interview, the Court did not know what he would say; and that, as he had failed to provide a urine specimen, there was no evidence as to whether he was, or was not, himself a user of drugs.

7. The Chief Magistrate ruled that there was a case to answer. She gave no reasons for that ruling. But it must be assumed, having regard to the provisions of section 70 of the Criminal Procedure Code (2010 Revision), that she was satisfied that the prosecution had established a *prima facie* case within the meaning of those provisions.

8. The trial proceeded. The appellant gave evidence in his defence. He accepted that the drugs were in his possession when he arrived at the Globe Bar. He said that he had purchased them in Bodden Town on that evening, after work. He said that he had purchased them for his personal use. He had bought half an ounce because, as he said, it was cheaper to buy in that quantity than to buy in smaller quantities. In cross-examination, he reaffirmed that the drugs were for his personal use. But, as the Chief Magistrate found, "his narrative quickly unravelled with numerous inconsistencies arising with respect to the money he had that day and how he had

spent it, what he had done when he got to the Globe bar and his account of how and when he used cocaine". She found that the inconsistencies in his evidence "particularly with respect to his use of cocaine which he advances to explain his possession" undermined his credibility." She said that "In any event, the use he claims is so infrequent and casual as to make a nonsense of his reasons for being in possession of such a large amount of crack cocaine": and she concluded that "The quantity of cocaine is, by itself, inconsistent with possession for personal use. I reject his assertion that he had it for his own use and convict him of the offence in the result." As I have said, she sentenced the appellant to a term of twelve years imprisonment for the offence of possession with intent to supply.

9. The appellant appealed to the Grand Court against both conviction and sentence. His appeal came before the Chief Justice on 5 August 2011. At the outset of his judgment, delivered in writing on 3 October 2011, the Chief Justice set out the three grounds of conviction against conviction. In the present context it is necessary only to refer to the first of those grounds:

> "The submission of no case to answer made at the close of the Crown's case should have been upheld in respect of the offence of possession with intent to supply for want of evidence on the Crown's case of intent to supply. The taking of judicial notice by the Chief Magistrate of the amount of drug as consistent with possession with intent to supply was impermissible in the circumstances and, occurring after the event of the submission of no case to answer, could not redeem the Crown's case."

10. In addressing that ground, the Chief Justice observed that "the first question that arises is whether the test of prima facie case was met; that is, whether there was sufficient evidence upon which to justify calling upon the Appellant to answer the charge of possession with intent to supply". He then set out the well known statement in *R v Galbraith* [1 WLR] 1039, 1042, which (as he said) has often been followed and applied in this jurisdiction:

> "(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 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 Appellant 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." [emphasis added by the Chief Justice]

The Chief Justice went on to say this:

"The application of this test can be challenging in proceedings where, as here, the tribunal of fact is both judge and jury. It gives rise to this question: Does the decision to call upon a defendant necessarily imply that a conviction must follow if he fails to answer of fails to displace the weight of the Crown's evidence presented against him? The question is relevant her in examining the nature and effect of the Chief Magistrate's decision in calling upon the Appellant to answer."

11. The Chief Justice then set out the provisions of section 70 of the Criminal Procedure Code (2010) which, he said, "is meant to provide guidance to the Summary Court".

The section is in these terms:

"70. 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 that there is no case to answer, the Court shall acquit the accused."

He went on to observe that those provisions had proved, in practice, to be not without difficulty. He referred to the observations of Justice Henderson in *T.Webster v The Queen* [2009] CILR Note 20:

". . . despite the mandatory wording of section 70 of the Criminal Procedure Code, there is no automatic rule that a conviction must be the result when the Crown had adduced a prima facie case to which the

accused had presented no evidence. It is possible, though unlikely, that the Crown's prima facie case would not be sufficient to convince the magistrate of the accused's guilt."

The Chief Justice observed that that explanation gave practical meaning to what was, in effect, the provisional nature of a prima facie case.

12. In *The Queen v Bovell-Swanson* (CICA Crim 38/2010), delivered on 14 May 2011 this Court sought to explain that the reference to "a *prima facie* case" in section 70 of the Criminal Procedure Code was not to be understood in the sense that left it open to the magistrate, in the absence of some fresh matter which might be revealed in the conduct of the defence, to acquit the accused. The section has two limbs: the first requires that, 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, it shall, if no defence is offered, convict the accused. The second requires that, 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 not established a *prima facie* case, and the accused offers no defence or submits that there is no case to answer, the Court shall acquit the accused. The second of those limbs (at least where a submission of no case to answer is made) gives effect, in a court of summary jurisdiction, to the principle enshrined in paragraph (a) of the *Galbraith* test: if the magistrate comes to the conclusion that the prosecution evidence, taken at its highest, is such that he or she could not properly convict upon it, it is his or her duty, upon a submission being made, to stop the case. The first of those limbs, however, has no parallel with the test under paragraph (b) of *Galbraith*: in a case which falls under the first limb of section 70, the magistrate is directed to convict. The requirement is mandatory: "the court shall, if no defence is offered, convict the accused". But it is a fundamental principle in the criminal law that an accused shall not be convicted unless the court (whether judge sitting alone, or a jury) is satisfied beyond reasonable doubt – or satisfied so that it feels sure – that the accused has

committed the offence of which he is charged. Section 70 of the Criminal Procedure Code could not have been intended to impinge on that fundamental principle. If the magistrate is to convict in a case which falls under the first limb of section 70, he or she must be satisfied 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 offence. Plainly, in the context of the first limb, the phrase "a *prima facie* case" must be read with that in mind: it 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". And it must follow that the phrase must have the same meaning in the context of the second limb. If, at the close of the prosecution case, the magistrate is not satisfied beyond reasonable doubt, on the prosecution evidence, that the accused is guilty, he or she must, on a submission of no case to answer, acquit.

13. It is, we think, clear that, notwithstanding his apparent approval of the observations of Justice Henderson in *Webster*, the Chief Justice had the correct test under the second limb of section 70 well in mind. After referring to the words "subject to any fresh matter which might be revealed in the conduct of the defence", he went on to say this:

> "This expression is a further indication of the provisional nature of the finding of a prima facie case to answer, leaving room for the possible exculpatory effect that the evidence offered by a defendant might have. It recognizes 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 form the evidence of the prosecution."

It is important to emphasise, as those observations clearly acknowledge, that the legal or persuasive burden proof remains with the prosecution throughout. It is for the prosecution to satisfy the court that the accused is guilty; it is never for the accused to satisfy the court that he is not guilty. So, in a case where the accused is

charged with the offence of possession with intent to supply, it is for the prosecution to satisfy the court that the accused's possession of the drugs is not to be explained on the basis that he had them for his own use: it is not for the accused to satisfy the court of that. But, where the evidence adduced by the prosecution has satisfied the court beyond reasonable doubt that, subject to any fresh matter which might be revealed in the conduct of the defence, his possession is only consistent with an intent to supply, must in practice (if he wishes to escape conviction) put before the court evidence which (at the least) gives rise to a doubt. If he does so, then the court can no longer be satisfied, beyond reasonable doubt, of his guilt; and must acquit.

14. The Chief Justice then went on to consider the challenge made, in the first ground of appeal, to the Chief Magistrate's conclusion that the evidence of intent, on the Crown's case, was not sufficient to enable the Chief Magistrate to reach the conclusion that she did; and, in particular, the submission that "the taking of judicial notice by the Chief Magistrate of the amount of drug as consistent with possession with intent to supply was impermissible in the circumstances and, occurring after the event of the submission of no case to answer, could not redeem the Crown's case." He said this:

> "The Chief Magistrate was entitled, at the close of the Crown's case, to take the view that the quantity by itself required an explanation from the Appellant as to his intentions. Taken by itself, at nearly half an ounce of cocaine base, the quantity justified an inference, albeit a rebuttable inference on the prima facie basis, of an intention to supply."

He held that the criticism that judicial notice was impermissibly taken of the amount of drugs as consistent with possession with intent to supply was, in the circumstances of this case, misplaced. In his view, the Chief Magistrate was to be seen as having arrived at her decision "as a matter of inference, rather than as a matter of taking judicial notice of concluded facts". He pointed out that while, having regard to her long experience of such cases the Chief Magistrate was able to form the prima facie view that possession of the particular quantity of drugs was

inconsistent with personal use, she made no absolute finding that the amount of the drug in and of itself, was conclusive of the issue as to intent to supply. Rather, as he said, that issue was concluded by the absence of a credible explanation by the appellant of personal use, for a relatively large quantity of drugs. There was no arbitrary finding that the particular quantity of drugs was indicative only of an intention to supply, such as to invite the criticism that the Chief Magistrate relied on her own knowledge, by way of taking judicial notice, as the sole basis for conviction. He concluded:

> "In my view, the limited extent to which she relied upon her own knowledge of the relationship between relative quantities of illicit drugs and their general use and consumption was permissible for the purpose of calling upon the Appellant to answer. The inference that she drew – that the quantity was prima facie inconsistent with personal consumption – must surely come within the bounds of what an experienced judicial officer in this jurisdiction would be able reasonably to infer from knowledge gained over the years from very many cases involving the dealing in, use and possession of illicit drugs."

15. The Chief Justice dismissed the appeal against conviction. He allowed the appeal against sentence, reducing that to a sentence of eight years imprisonment. The appellant appeals to this Court under section 29(1) of the Court of Appeal Law (2011 Revision). The section is in these terms:

> "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." [emphasis added]

It is important to note the words which I have emphasized: an appeal to this Court from a decision of the Grand Court upholding a conviction in a criminal matter before the Summary Court will lie only on a ground which involves "a point of law alone".

16. The question whether a ground of appeal fell within the meaning of the phrase "a question of law alone" was considered by the Privy Council, in the context of section 17(2) of the Court of Appeal Act 1964 of Bermuda, in *Justis Smith v The Queen* (Privy Council Appeal No 44 of 1999). As the Judicial Committee pointed out, section 17(2) of the Bermuda Act must be read with section 17(1)(a) which allowed an appeal as of right on any ground involving "a question of law alone". In substance there is no distinction to be drawn between section 17 of the Bermuda Act and section 29(1) of the Court of Appeal Law. The Judicial Committee accepted that "a question of law alone" excluded questions of fact and questions of mixed law and fact: the section would cover only "a pure question of law". It went on to observe that:

> ". . . most no case submissions will simply involve an assessment of the strength of the evidence led by the prosecution. A certain amount of weighing of evidence is unavoidable at this stage because the trial judge has to form a view whether the evidence could potentially produce conviction beyond reasonable doubt: *Zuckerman, The Principles of Criminal Evidence,* 1989 at 54. The present case is in this category. It is clear that the judge accepted an argument that the circumstantial evidence was an insufficient basis for a jury to convict the appellant. It was no doubt a surprising view for the judge to have taken but it was nevertheless a view as to the quality of the evidence against the appellant. It was a decision arrived at on matters of fact and degree, namely the inferences that could be drawn from the evidence before the jury. The argument, the decision of the judge and the ground of appeal did not involve a question of law alone."

In our view, those observations apply with, at least, equal force in a case where the decision as to whether or not there is a case to answer – or a "*prima facie* case" in the sense in which that phrase is to be understood in the context of section 70 of the Criminal Procedure Code - is taken by a magistrate who is judge of both law and fact.

17. The grounds of appeal, are stated in the Appellant's Notice filed on 5 October 2011, in these terms:

"The Appellant appeals against his conviction on the grounds that the quantity of drug in this case was not enough alone to allow the Chief Magistrate to properly draw the inference that drugs were in the Appellant's possession with intent to supply. The Learned Magistrate was not entitled at the close of the Crown's case to take the view that quantity of drugs alone required an explanation from the Appellant as to his intention. The Learned Magistrate was not entitled to rely upon her own experience in drawing this inference, she was not entitled to take judicial notice of the amount. There were no surrounding circumstances which could have assisted her with this inference. The Learned Chief Justice was wrong to take account of the Appellant's evidence when considering this issue regarding the submission of no case to answer."

On analysis, it can be seen that that statement contains five grounds:

(1) That the quantity of the drug in this case was not enough alone to allow the Chief Magistrate to draw the inference that drugs were in the appellant's possession with intent to supply.

(2) That the Chief Magistrate was not entitled, at the close of the Crown's case to take the view that the quantity of drugs alone required an explanation from the appellant as to his intention.

(3) That the Chief Magistrate was not entitled to rely on her own experience in drawing the inference which she did.

(4) That the Chief Magistrate "was not entitled to take judicial notice of the amount".

(5) That the Chief Justice was wrong to take account of the appellant's evidence when considering the issue of no case to answer.

When opening the appeal on behalf of her client, counsel made it clear that the only challenge was to the decision of the Chief Magistrate to refuse to stop the case and acquit the appellant at the close of the prosecution's case and the submission of no case to answer.

18. As I have said, the Chief Justice rejected the submission that this was a case in which the Chief Magistrate relied on judicial notice. We share that view: on a proper understanding of her reasons, she drew her own, rebuttable, inference from the quantity of drugs found in the appellant's possession. Nor can this be said that the Chief Justice took the appellant's evidence into account when deciding to uphold the Chief Magistrate's conclusion that a *prima facie* case had been

established. He went no further than to point out that, the Chief Magistrate being satisfied on the Crown's evidence alone that a *prima facie* case had been established, the appellant's evidence had not persuaded her that there was, in fact, a doubt on the question whether he had possession of the drugs for his own use.

19. In those circumstances the grounds of appeal reduce to this: that the Chief Magistrate was not entitled to take the view, at the close of the prosecution case and from the evidence of the Crown alone, that she was satisfied beyond reasonable doubt (subject to any further matters which might be revealed if the appellant adduced evidence) that he was in possession of the drugs with an intent to supply. That could be said to raises two questions of law – although neither are in fact raised by the grounds of appeal: (i) whether it can ever be inferred from evidence as to the quantity of the drugs alone that possession is consistent only with an intent to supply; and (ii) whether, if so, the quantity in this case was such that no magistrate, properly directing herself, could draw that inference.

20. The answer to the first of those questions is plainly "Yes". It is impossible to hold that there could never be a case where the quantity of drugs (however large) did not compel the inference that possession was consistent only with an intent to supply. In response to the second question, we would be content to assume that there could be cases in which the quantity of drugs was so small that no magistrate, without other evidence pointing to an intention to supply, could not rationally reach the conclusion that he or she was satisfied beyond reasonable doubt that possession was consistent only with an intent to supply. But it has not been suggested that this is such a case.

21. For those reasons we dismiss this appeal.

Chadwick P

Mottley JA

Campbell JA