

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No 19 of 2010
(Summary Court Appeal No. 11/10)
C#05122/2008

Between:

ATTORNEY GENERAL

Appellant

- and -

MARIUS VOICULESCU

Respondent

Before:

The Rt. Hon. Sir John Chadwick, President
The Hon. Mr. Justice E. Mottley, JA
The Hon. Dr. A. Conteh, JA

Appearances:

John Masters, Crown Counsel, for the Appellant
Nick Dixey of Mourant for the Respondent

Date heard: 9th August, 2010

Judgment delivered: 25th August, 2010

JUDGMENT

Sir John Chadwick P

1. This is an appeal by the Attorney General from the order of Justice Henderson dated 28 June 2010 allowing an appeal by Marius Voiculescu against his conviction in the Summary Court on 18 December 2008 for the offence of possession of ganja. The judge set aside the conviction and directed that a verdict of acquittal be entered. The appeal is brought pursuant to section 29(1) of the Court of Appeal Law (2006 Revision).



2. This is the second occasion on which the Attorney General has appealed from a decision of the Grand Court in this matter. This Court allowed an earlier appeal (Criminal Appeal No. 27 of 2009) for reasons set out in the judgment which it delivered on 18 March 2010.
3. The circumstances which led to Mr. Voiculescu's conviction in December 2008 were set out, in summary, in that earlier judgment:
 - (1) On 28 April 2008 the Defendant was at Owen Roberts International Airport with the intention of departing on a Cayman Airways flight to the United States. Upon reaching the final security check point he was stopped by a security officer for a random search. During that search a pack of cigarettes was removed from his luggage and searched by the officer. A small burnt spliff containing ganja was found to be in the cigarette pack, behind the foil. A customs officer was informed; and Mr. Voiculescu was arrested and cautioned on suspicion of possession of ganja.
 - (2) When interviewed under caution Mr. Voiculescu denied any knowledge of the burnt spliff. He stated that he had found the cigarette pack on the ground in the parking lot of the apartment complex where he lived. A urine sample was taken from him and analysed: the analysis proved negative.
 - (3) Subsequently Mr. Voiculescu, on his own initiative and at his own expense, arranged for a DNA sample found on the spliff to be taken and analysed; and for his own DNA to be analysed. There was no match.
 - (4) The Chief Magistrate found as a fact that Mr. Voiculescu was not a ganja smoker; and that he had not smoked the spliff found in the cigarette pack.
4. In those circumstances the sole issue for decision at trial was whether Mr. Voiculescu knew that the ganja spliff was in the cigarette pack. If he did know that, then - applying the observations of Lord Wilberforce in *Warner's* case [1969] 2 AC 256, 310 - he could properly be held to have had possession of a prohibited

substance as charged. The Chief Magistrate decided that issue against Mr Voiculescu; and, accordingly, convicted.

5. Mr. Voiculescu appealed to the Grand Court from that conviction. That appeal came before Justice Henderson on 24 April 2009. It was opened on behalf of the appellant in the usual way. At the conclusion of the appellant's opening, the judge – without inviting representations from either party on the course which he was about to take – expressed the view that this was one of those rare cases in which it would be appropriate, pursuant to section 177 of the Criminal Procedure Code (2006) Revision, to order a full rehearing by way of trial de novo.
6. The judge was persuaded by the Crown that, before proceeding with a full rehearing, he should hear argument on the question whether that course was open to him. He adjourned to a further hearing in August 2009 to enable submissions to be made on that point. After hearing those submissions the judge concluded that he did have power to direct a rehearing; he made that direction; and he proceeded to a rehearing. The Crown offered no evidence; and accordingly Mr. Voiculescu was acquitted.
7. The Attorney General appealed to this Court. For the reasons set out in the judgment of 18 March 2010 to which I have referred this Court was satisfied that the judge had erred in law in directing a rehearing at the conclusion of the appellant's case on 24 April 2009. This Court remitted the matter to the Grand Court for a further hearing of Mr Voiculescu's appeal from the Summary Court.
8. The further hearing of that appeal came before Justice Henderson on 29 May 2010. The judge allowed the appeal for reasons which he gave in his judgment dated 28 June 2010. He set aside the conviction. He observed, correctly, that the Crown had indicated that it did not wish to pursue a new trial under any circumstances. Accordingly, he entered a verdict of acquittal.
9. It is from that judgment that the Attorney General now appeals. An appeal under Section 29(1) of the Court of Appeal Law (2006 Revision) lies on a point of law alone. In his notice of appeal dated 30 June 2010 the Attorney General advanced

the following grounds: (i) that the judge erred in law by dealing with the appeal before him as if it were a hearing de novo; in the alternative, (ii) that the judge erred in law in holding that, notwithstanding that the appeal was not proceeding by way of a rehearing, the onus was, nevertheless, on the Crown to re-prove its case; in particular, he erred (a) in holding that he should affirm the conviction only if the evidence made him sure of the guilt of the accused and (b) in holding that he must be sure that the defendant's denial of knowledge was untrue; (iii) that the judge erred in law in taking into account irrelevant considerations which were not part of the evidence; and (iv) that the judge erred in law in setting aside the conviction when he could find no error in the Chief Magistrate's findings of fact or law.

10. In our view there is no substance in the first of the grounds relied upon by the Attorney General in his notice of appeal. It is clear that the judge had well in mind the observations of this Court in its earlier judgment. He appreciated that, in the circumstances of this case, it was not open to him to proceed by way of rehearing de novo. As he observed, at paragraph 20 of his judgment dated 28 June 2010, at the further hearing the appeal proceeded in the usual manner; and neither party made any application to adduce additional evidence.

11. The judge reminded himself of the principles set out in *Bertolino v. The Queen* [1990-1991] CILR 112. The third of those principles is in these terms:

“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”.

12. The judge directed himself that, in the light of those principles, he should address the following questions:

- (1) He should determine whether the reasons given by the Chief Magistrate were satisfactory: that is to say, had the Chief Magistrate provided a rational explanation of her reasons for convicting; and had she

drawn inferences from the evidence which were supportable (whether or not the appellate court would have drawn the same inferences).

- (2) He should determine whether the Chief Magistrate had taken proper advantage of having seen and heard the witnesses.

He directed himself, further, that:

- (3) If the Chief Magistrate's reasons were not satisfactory - in the sense that she had not provided a rational explanation of her reasons for convicting, or had drawn inferences from the evidence which were not supportable - the matter was at large before him, as the appellate court.
- (4) If it "unmistakably" appeared that the Chief Magistrate had not taken proper advantage of having seen and heard the witnesses then, again, the decision was at large before him, as the appellate court.
- (5) If the Chief Magistrate had not misdirected herself, he (as the appellate court) must consider whether any inclination he had to differ from the verdict could be explained by the fact that he had not enjoyed the advantage of seeing and hearing the witnesses: if so, he should not interfere.
- (6) It was open to him (as the appellate court) to find that he was not in a position to come to any satisfactory conclusion on questions of fact because he had not seen and heard the witnesses.

13. The judge was satisfied that the matter was "at large" on the appeal before him for the reasons which he set out at paragraphs 25 and 26 of his judgment:

"25. A central conclusion by the Learned Magistrate is the inference she drew that the smell of ganja coming from the cigarette box was a "strong" one. She used that word twice. There was, however, no evidence that the smell was strong. Mr. Levy [the security officer] described it twice as "unfamiliar" but made no mention of its strength. The Learned Magistrate also drew the inference that the smell "would have permeated the cigarettes". There was, however, a layer of tinfoil between the spliff and the cigarettes and no witness gave any evidence of a smell emanating from the latter. These inferences go beyond what the written record can support.

26. Can the Learned Magistrate's conclusion about the smell be explained by having heard and seen the witnesses given evidence? She may have examined the spliff (which was in evidence) and observed the strength of the smell herself. If that is the case, I would expect to see some mention of her observation on the record because of the central importance of her conclusion. There is none. My conclusion is that the questionable inferences are not explained by any advantage enjoyed by the Magistrate having sat as the trier of facts. It follows that the decision is at large in this court."

14. If the judge were correct to take the view that the matter was "at large" before him, then he was correct to approach the appeal on the basis that he should affirm the conviction only if the evidence made him sure of Mr. Voiculescu's guilt. If the matter were "at large", there is no substance in the second of the grounds of appeal relied upon by the Attorney General in his notice of appeal.

15. It is clear that the judge did not reach the conclusion that the matter was "at large" before him on the ground that the Chief Magistrate had failed to take proper advantage of having seen and heard the witnesses. He made no finding to that effect. Rather, he took the view that the two inferences which he identified – (i) that the smell of ganja coming from the cigarette box was a "strong" one and (ii) that the smell "would have permeated the cigarettes" – went beyond what the written record could support; and were not explained by the fact that the Chief Magistrate had enjoyed the advantage of seeing and hearing the witnesses.

16. The two inferences to which the judge referred were drawn by the Chief Magistrate in the following passage of her judgment.

"The fact is that the Defendant was in possession of the cigarette box and its contents for over a day and smoked several of the cigarettes. The smell emanating from the box due to the presence of the burnt spliff immediately alerted the security guard and provoked him to search the box. Despite the Defendants demonstration of how he extracted cigarettes from the box, I find it hard to believe that the box was always at arm's length from his nose. *Given what must have been the strong smell of a half burnt spliff*, I find it impossible to accept that he would not have become aware of the presence of ganja

in the box either when opening it or when lighting a cigarette, *as commonsense suggests that the smell would have permeated the cigarettes as well*. As the security guard said, which I readily accept, the smell was not like cigarettes at all.” [emphasis added]

And she went on to say this:

“I say the inference of knowledge is irresistible from the facts, he had the box in his possession, he smoked several cigarettes from the pack and the smell of the burnt spliff was, on the evidence, so strong as to render his protest of ignorance absolutely incredible.”

17. The evidence of the security officer, Mr. Levy, as recorded by the Chief Magistrate in her notes of evidence, was that he was doing a random search at the rear of the building at the airport; that he called over Mr. Voiculescu with his suitcase to be searched; and that after opening the suitcase he saw a Benson & Hedges cigarette box:

“A. I opened the box and found three cigarettes inside the box. There was also an unfamiliar smell – a smell other than cigarettes – coming from the box.

I checked the box a little bit more and there was a foil paper which contained the cigarettes and behind the foil paper there was a little bulge suggesting that something was behind there.

On close examination I found what appeared to be a half smoked spliff. I pointed it out to the gentleman who said he wasn’t aware of it being in the cigarette box”.

18. In cross-examination Mr. Levy said this:

“A. It was a Benson & Hedges box with three cigarettes inside. I opened it. It smelled an unfamiliar smell.

I smelled something other than cigarettes. I have an idea what ganja smelled like, the smell made me think it was ganja.

Q. So it was an unfamiliar smell or a familiar smell?

A. It was not a cigarettes smell the smell made me look closer.”

19. Mr. Voiculescu gave evidence in his defence. In cross-examination he said:

“I didn’t smell anything at all. Everybody has a different sense of smell. I didn’t bring it up to my nose like he did.”

20. On that evidence the Magistrate was clearly entitled to find, as she did, that the smell emanating from the box due to the presence of the burnt spliff immediately alerted the security guard and provoked him to search the box. The smell was enough to alert the security guard and provoke him to search the cigarette pack; but the evidence went no further than that. The evidence did not enable her to find, as a fact, that the smell was “strong” in some objective or measurable sense: it did not enable her to find, as a fact, that it was so strong that Mr Voiculescu must have been aware of it. Nor did the evidence enable her to find, as a fact, that the presence of the ganja in the box – separated as it was from the cigarettes by foil – would have led the smell to permeate the cigarettes.
21. The Chief Magistrate said that she found it hard to believe “that the box was always at arms’ length from his [Mr Voiculescu’s] nose”; and that she doubted that “when he examined them that he held that pack of cigarettes at arms’ length”. But there was no evidence on which she could disbelieve Mr Voiculescu’s statement that he had not brought the packet up to his nose as the security officer had done.
22. In those circumstances, we are satisfied that the judge was entitled to take the view that the inferences drawn by the Chief Magistrate – which, on analysis, were essential to support her finding of guilt – were not supported by the recorded evidence. He was also entitled to take the view that, in the absence of supporting evidence in the record, the inferences could not be explained by some advantage derived from seeing and hearing the witnesses; or, we would add, from seeing and smelling the burnt spliff itself. There is nothing to suggest that the Chief Magistrate did take the opportunity to smell the spliff for herself. We should make it clear that, in making that observation, we intend no criticism.
23. The judge was entitled to hold that Chief Magistrate’s reasons for drawing those inferences did not withstand critical analysis. It follows that the judge was entitled – indeed, bound - to ask himself whether, on the evidence that was recorded, he felt sure that Mr. Voiculescu had knowledge of the presence of the

ganja spliff in the cigarette pack at the airport. As he had reminded himself, in the course of his judgment, section 179 of the Criminal Procedure Code (2006 Revision) provides that:

“On an appeal by motion, the court may draw inferences of fact from the evidence before a summary court . . . and it may decide the appeal with reference both to matters of fact and to matters of law.”

24. His answer to that question was that he did not feel sure that Mr. Voiculescu had the requisite knowledge. Approaching the appeal before him on the basis that issues of fact were at large, the judge took account of the following factors:

- (1) That, if it were assumed that Mr. Voiculescu had had knowledge of the spliff at some material time, it was impossible to avoid the conclusion that he must have forgotten about the spliff at the time when he was searched. It was, the judge thought, unbelievable that Mr. Voiculescu (who was not himself a ganja smoker) should have attempted, knowingly, to smuggle a half smoked spliff of ganja from Grand Cayman into the United States. Such conduct would be inexplicable.
- (2) That there was nothing to suggest that, if Mr. Voiculescu had recognised the presence of ganja at an earlier time, he would have neglected to discard the spliff; and then forgotten about it by the time he reached the airport.
- (3) That there was strong evidence of Mr. Voiculescu’s good character.
- (4) That he placed less emphasis than the Chief Magistrate had done on the inherent implausibility of a person, who appeared fastidious in his manner, dress and demeanor, finding, keeping and smoking cigarettes which had been found on the ground in a parking lot.

The judge did not take into account irrelevant considerations which were not part of the evidence. There is no substance in the third of the grounds relied upon in the Attorney General’s notice of appeal.

25. The judge summarised his conclusion in these words:

“In the light of the proven absence of any motive and the fact that the presence of the spliff in the package was not obvious and taking account of the evidence of good character . . . I find I am not sure that the Defendant had the requisite knowledge of the presence of the spliff.”

26. In those circumstances, he was bound to allow the appeal; and, the Crown indicating that it would not pursue a rehearing, was bound to direct an acquittal. There is no substance in the fourth of the grounds in the Attorney General’s notice of appeal.

27. For those reasons we dismiss this appeal.

Chadwick P

Mottley JA

Conteh JA

