IN THE COURT OF APPEAL OF CAYMAN ISLANDS

Criminal Appeal No. 14/2010
(Summary Court Appeal No. 25/08)
C#2024/05, 2011/05, 3497/04)

Between:

Garvin Brown (Bush)

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

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

Appearances: Kirsty-Ann Gunn, Crown Counsel, for the Respondent
The appellant in person

Date heard and Judgment delivered: 9th August, 2010
Reasons released: 31st August, 2010

CAYMAN ISLANDS COURT OF APPEAL

REASONS FOR JUDGMENT

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1. The appellant, Garvin Brown (otherwise known as Garvin Bush), was convicted in the Summary Court on two counts of possession of cocaine with intent to supply, following a trial before Chief Magistrate Ramsay-Hale on 20 December 2007. He was sentenced on each of those two counts to imprisonment for terms of 12 years, to be served concurrently.

2. At the same time, he was sentenced on a number of other counts – possession and consumption of ganja and consumption of cocaine – to which he had pleaded guilty on 10 January 2006. On each of those counts he was sentenced to terms of imprisonment of six months. Those counts related to offences which had been committed in May 2005, at the

same time as the more serious offences of possession with intent to supply. The Chief Magistrate directed that the terms of imprisonment were also to be served concurrently. He was sentenced, also, to a term of imprisonment of six months in respect of one count of possession of cocaine to which he had pleaded guilty on 10 January 2006. That offence was committed in May 2004. The term of imprisonment was to be served consecutively.

3. The defendant appealed from the Summary Court to the Grand Court. His amended grounds of appeal dated 13 January 2009 took two points on the jurisdiction of the Summary Court to try the offence of possession with intent to supply. Following the decision of this Court in *R. v. Damian Ming*, delivered in September 2009, and the refusal of leave to appeal from that decision by the Privy Council, those points could not be pursued. The remaining grounds of appeal were in these terms:

> "1. that the intent to supply conviction is wrong as drugs were found on the beach;
>
> 2. and the money found was rent money which receipts were produced as proof of;
>
> 3. and no evidence was led to effect of being caught supplying;
>
> 4. and all previous convictions are for use;
>
> 5. and attendance at rehab as user;
>
> 6. and the sentence of 13 years is harsh and excessive as guilty plea for possession was entered at earliest opportunity in 2005 – which was not taken into consideration by the Judge;
>
> 7. and that the consecutive sentence of one year is out of practice and principle and should be concurrent instead as all matters were dealt with in the same court at the same time;
>
> 8. and that the sentence itself reflects the grievance of the Judge after being charged by the Judge for contempt of Court;
>
> 9. after which application was made by Defence for the Judge to step down as Trial Judge due to personal grievance against the accused;
>
> 10. and refusal of application by Mr. Nicholas [Dixey] for time to prepare for trial;

> 11. Trial Judge said on 20th December 2007 that she could not find me guilty as real supplier – but did not know what category of supplier to place me as – and then on 21st December 2007, the date of sentence, changed her ruling and said that I am a big supplier and also a big user – which is totally contrary to all evidence within the case. And as such the conviction of intent to supply is absolutely unsafe and unsatisfactory."

The reference in paragraph 7 (and, by implication in paragraph 6) of those grounds to a consecutive sentence of one year is, plainly, a mistake: the sentence to be served consecutively was of six months.

4. Following a change of legal representative, further grounds of appeal were added, in these terms:

> "1. that the Appellant was denied a fair trial before the Summary Court of Cayman Islands as a result of the Trial Magistrate's:
>
> (i) Refusal to allow the Appellant to select his own attorney.
>
> (ii) Denial of further Legal Aid to instruct a new attorney.
>
> (iii) Failure to give a proper explanation to the Appellant of the consequences to him of the case proceeding without him being represented and, in particular, the stance the Appellant was taking.
>
> (iv) Failure to allow the trial to commence afresh when an attorney had been found who was accepted by the Appellant.
>
> (v) Failure to disqualify herself prior to the commencement of the trial as a result of earlier conflict between herself and the Appellant."

5. It was on the basis of those grounds of appeal that the matter came before Justice Cooke in the Grand Court on appeal. The judge summarised the position at the beginning of his judgment:

> "The Appellant was convicted on two counts which each charged him with possession of cocaine with intent to supply. The charges arose from searches which were carried out at the house of the Appellant at 483 Further Lane, North

> Side, Grand Cayman. The first search was on the 13th May 2005. This resulted in the Appellant's arrest. He was bailed. Then on the 27th May 2005, another search was effected. These searches provided the evidence on which the Learned Chief Magistrate founded her verdicts of guilt. At the trial which effectively commenced on the 31st October 2007, there was no issue as to the Appellant's possession of cocaine. The contest was as to whether or not the Tribunal could properly infer from the totality of the evidentiary material which it accepted, that on each count it was satisfied to the requisite standard that the possession was not for the Appellant's personal use but that he had an intention 'to supply'. The searches revealed paraphernalia consistent with the activity of 'supplying'. It is unnecessary to itemise the recovered items as there is no challenge as to the correctness of the verdicts of guilt and any such criticism would be doomed to failure. He was sentenced to 12 years' imprisonment of each count. These sentences were concurrent."

The judge noted that the Appellant had been unrepresented at the trial. He was represented in the Grand Court.

6. The judge identified three matters which were raised as grounds of complaint before him. First, that the trial was unfair in that the appellant was deprived of legal representation. Second, that the Chief Magistrate did not sufficiently (if at all) assist the appellant in his unrepresented state during the trial thereby rendering the hearing unfair. Third, to which the judge referred only in passing, that the Chief Magistrate ought to have recused herself.

7. It appears from the judgment that the first of those grounds was advanced under two limbs. First, it is said that the Chief Magistrate acted in excess of jurisdiction in revoking the appellant's Legal Aid Certificate. Second, and in the alternative, that the circumstances were not such that the appellant should not have had the continued benefit of legal aid.

8. The judge rejected the complaint under the first limb on the basis that, properly analysed, the Magistrate had not revoked the appellant's Legal Aid Certificate: rather, she

had refused the appellant's request to transfer that Certificate to another advocate. He turned then to the second limb: that the refusal to transfer the Legal Aid Certificate to another advocate had wrongly deprived the appellant of the benefit of legal representation. The judge set out the history of the appellant's legal representation: commenting that, by the time of the Magistrate's refusal to transfer the Legal Aid Certificate yet again, the appellant had already had the services of three advocates, including Queen's Counsel. He reminded himself of the observations of the Court of Appeal in England and Wales in *R. v. Kirk (Morris)* (1983) 76 Crim App Rep 194, 198-199. He rejected the contentions advanced under that limb of the first ground also.

9. The judge identified the two instances which had been put before him to support the submission that the Chief Magistrate had not sufficiently assisted the appellant as an unrepresented defendant. The first was, in relation to evidence given by a police officer to the effect that, during one of the searches in May 2005, the appellant stated that he sold drugs to support his family. It was said that the Chief Magistrate had not indicated sufficiently to the appellant the significance of that piece of evidence. The judge rejected that criticism; pointing out that, when that evidence was given, the Chief Magistrate had immediately intervened to ask the appellant if he wished to object. The second was the Magistrate's failure to advise the appellant that he should call supporting evidence to substantiate his case that a not inconsiderable amount of money in small denominations recovered in the course of the searches constituted "rent money". The judge pointed out, correctly, that had the Chief Magistrate advised the appellant that he should call evidence, she would have been in error: as by so doing she would have been implying that there was a burden on him to call evidence. Accordingly, that submission failed also.

10. In relation to the Chief Magistrate's refusal to recuse herself from presiding over the trial, the judge commented merely that the application to recuse had been made "on entirely spurious grounds".

11. The judge did not address any of the other grounds of appeal raised in the various notices of appeal to which I have referred. In particular, he did not address any appeal against sentence. In the circumstances, the appellant was represented before the judge on

the appeal, we would be minded, if it were necessary, to draw the inference that those other grounds were either expressly abandoned or not advanced at the oral hearing. The Crown asserts positively that the grounds of insufficiency of evidence leading to an unsafe conviction and the appeal against sentence were abandoned by the appellant's advocate when he opened the appeal in the Grand Court.

12. The Appellant has given notice of an application for leave to appeal against "conviction on sentence". That notice is dated 3rd May 2010. It is in these terms:

> "I desire to appeal to the Court of Appeal against my conviction/sentence on the grounds hereinafter set forth:
>
> 1. that the intent to supply conviction is wrong as drugs were found on the drugs (*sic*)
> 2. the money found was rent money which receipts were produced as proof of
>
> 3. no evidence was to effect of being caught supplying
>
> 4. all previous convictions are for use
>
> 5. attendance at rehab as user
>
> 6. and the sentence of 13 years is harsh and excessive as guilty plea for possession was entered at earliest opportunity in 2005 – which was not taken into consideration by the Trial Judge
>
> 7. and that the consecutive of 1 year is out of practice and principle and should be concurrent instead as all matters were dealt in the same court at the same time
>
> 8. and that the sentence itself reflects the grievance of the Judge after being charged by the Judge for contempt of court
>
> 9. after which application was made by Defence for the Judge to step down at trial due to personal grievance against the accused
>
> 10. and refusal of application by Mr. Nicholas [Dixey] for time to prepare for trial
>
> 11. the Trial Judge said on the 20th December 07 that she could not find me guilty as a real supplier – but did not know what category of supplier to place me as – and then on the 21st Dec. 07 the date of sentencing/conviction changed her ruling and said that I am a big supplier and also a big user –

> which is totally contradictory to all the evidence within the case.
>
> And as such the conviction of intent to supply is absolutely unsafe and unsatisfactory."

13. The right to appeal to this Court from a judgment of the Grand Court in the exercise of its appellate jurisdiction (in criminal as well as in civil proceedings) is conferred by section 29(1) of the Court of Appeal Law (2006 revision). An appeal lies, "subject to this law", on any ground of appeal "which involves a point of law alone, or against sentence but not upon any question of fact": The proviso "subject to this law" requires that the section be read in conjunction with section 7 of the Court of Appeal Law. That section provides that the Court shall have jurisdiction to hear and determine appeals from the Grand Court by a convicted person (a) against the conviction on any ground of appeal which involves a question of law alone: and (c) with the leave of the Court, against a sentence passed on his conviction unless the sentence is one fixed by law.

14. Section 29(1) of the Court of Appeal Law must also be read with Rule 54 of the Court of Appeal Rules (2004 revision). Sub-rule 54(2) requires that Notice of Appeal may be given in respect of the whole or any part of the judgment of the Court below; and that "every such notice shall specify the point or points of law relied upon by the appellant as his grounds of appeal". Except with leave of the Court, the appellant shall not be entitled on the hearing of an appeal to rely on any grounds of appeal not specified in the Notice of Appeal: sub-rule 54(3).

15. The first question, therefore, is whether it is open to this Court to entertain an appeal against conviction on the basis of the Notice of Appeal on which the Appellant relies. Put shortly, it is necessary to ask whether that Notice of Appeal raises any "point or points of law alone". The answer is that it does not do so. Leaving aside, for the present, points 6, 7 and 8 in the Notice of Appeal – which go to sentence rather than conviction – the other points in the Notice are directed to the state of the evidence which was before the Chief Magistrate; or (point 9) to the Chief Magistrate's refusal to recuse herself; or (point 10) to her refusal to allow an adjournment (which Mr Dixey himself had

indicated, in terms, that he did not seek) to enable an advocate newly instructed to prepare for trial.

16. None of those points can be described as a point of law alone. In those circumstances, it is not open to this Court, having regard – as it must - to the provisions of section 29(1) of the Court of Appeal Law (2006 Revision), to entertain an appeal from the Grand Court's dismissal of the appeal against conviction. I should add that the points raised by the Notice of Appeal to this Court do not include a complaint that the judge in the Grand Court failed to deal with grounds of appeal which were before him. We are content to assume that an appeal on that ground would have involved a point of law: but the point is not raised and, having regard to the course taken in the Grand Court, there are likely to be good reasons for that.

17. Leave would be required for an appeal against sentence. We refuse that leave on two grounds. First, that there is nothing to suggest that an appeal against sentence was pursued in the Grand Court (indeed, as I have said, the Crown asserts that it was expressly abandoned); and so there is no judgment of the Grand Court on an appeal against sentence from which an appeal could be brought to this Court. Second, there is no realistic prospect of persuading this Court that the sentence of 12 years for intent to supply some 5.71 ounces of cocaine hydrochloride (and a further small quantity of cocaine base) could be held to be excessive. I should add that the Chief Magistrate was plainly entitled to direct that the six month sentence for the offence of possession of cocaine committed on 29 May 2004, to which the Appellant had pleaded guilty, should be served consecutively. That offence was a distinct offence from the other offences, committed in May 2005, in respect of which she directed that the sentences should be served concurrently.

18. For those reasons, the appeal against conviction and the application for leave to appeal against sentence are dismissed.

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Chadwick P

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Mottley JA

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Conteh JA