28-6-10

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

SCA No: 0011/2010
Case No: 05122/2008

MARIUS VOICULESCU

V.

REGINA

Appearances: **Mr. Nicholas Dixey of Mourant for the Appellant**

Mr. John Masters of the Government Legal Department for the Respondent

Before: **Hon. Justice Henderson**

Heard: **28th May 2010**

JUDGMENT

The Appellant Marius Voiculescu appeals from his conviction in the Summary Court on a charge of Possession of Ganja. The sole ground of appeal is that there is insufficient evidence to justify a conviction.

Facts

1. Mr. Wesley Levy testified that he was working at Aviation Security at the George Town airport on April 28, 2008. He selected Mr. Voiculescu for a

random search. After opening Mr. Voiculescu's suitcase, Mr. Levy saw a Benson & Hedges cigarette box. Upon opening the box he found three cigarettes inside. He said: "There was also an unfamiliar smell – a smell other than cigarettes – coming from the box. I checked the box a little 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 closer 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."

2. Mr. Levy called a Cayman Airways agent who in turn called Ernie Ebanks, a customs officer. Both men came to Mr. Levy's location and took possession of the cigarette box and custody of Mr. Voiculescu.

3. Mr. Levy described Mr. Voiculescu as being calm and cooperative. He was unable to recall if the cigarette package was in a pocket of the suitcase or lying in the middle of it. In cross-examination, he said: "I opened it and smelled an unfamiliar smell. I smelled something other than cigarettes. I have an idea what ganja smells like. The smell made me think it was ganja." He also said it was "not a cigarette smell" and "the smell made me look closer." Mr. Voiculescu denied knowledge of the spliff and gave Mr. Levy much the same explanation to which he later testified under oath.

4. Ernie Ebanks said that when he took possession of the cigarette box he "shook out a small portion of a cannabis cigarette." The spliff was sent for analysis. Mr. Voiculescu also gave to Mr. Ebanks an explanation which was essentially the same as that to which he testified at trial.

5. Mr. Allan Glasgow is a chemist working for the Cayman Islands Government Forensic Laboratory. He described the spliff as "hand rolled" and "partially burned". He also said that he conducted a test upon a urine sample taken from Mr. Voiculescu (with his consent) for evidence of cannabis consumption. That test can identify a person who has consumed ganja up to four weeks previously, as long as the amount consumed is above the detection threshold. The test produced no evidence that Mr. Voiculescu had been consuming cannabis.

6. Mr. Glasgow's certificate under the *Misuse of Drugs Law* states that clear plastic film was wrapped around the bottom of the cigarette package. He said that the spliff weighed 0.129 grams (0.004 ounces) but consisted of a mixture of tobacco and vegetable matter.

7. Mr. Voiculescu was the first witness in his defense. He said he is forty years of age and a Canadian citizen who has been in the Cayman Islands for seven years. He was employed as an instructor at the George Town Primary and John A. Cumber Primary schools. He has no criminal convictions in the Cayman Islands or elsewhere.

8. Mr. Voiculescu testified that he is a smoker of cigarettes and would consume approximately ten per day. On April 28, 2008 he was with a group of teachers on a trip to St. Petersburg, Florida to observe certain teaching practices there.

9. Mr. Voiculescu explained that he had acquired the cigarette package on the evening of April 26th. He and his wife were living at Caribbean Court, a condo complex. Around 11:15 PM, after returning home from dinner, Mr. Voiculescu was waiting in the parking lot of Caribbean Court for his baby sitter, whom he was intending to drive to her home. As he walked towards his car he saw a ten dollar bill and a package of cigarettes on the ground between his own car and the adjacent vehicle. He picked up the ten dollar bill and kept it. He also picked up the package of cigarettes, "looked at the filters to see if they looked clean," and kept them also. He said he was short on cigarettes at the time, having only three of his own left.

10. His regular brand of cigarette is DuMaurier; the cigarettes he found were Benson & Hedges. Mr. Voiculescu estimated that he smoked seven to nine of the Benson & Hedges cigarettes before the package was found in his possession at the airport. He did not notice anything about the package which suggested to him that further investigation or enquiry was necessary. He was at all times unaware that a half-smoked cigarette containing some ganja was wedged between the box and the foil.

11. Mr. Voiculescu said that he does not use ganja or any other illegal drugs. He said that this was not the first time that he had taken cigarettes which someone else had left behind.

12. In cross-examination, he agreed that his sense of smell was "in working order." He accepted that when he found the cigarettes he had enough money in his possession to buy more of his preferred brand. He agreed that he thought the ten dollars and the cigarettes might belong to the person who owned the adjacent car. He said, however, that "it didn't occur to me to make any enquiries." Shortly after that, Mr. Voiculescu said "it crossed my mind to make enquiries but I didn't do it because I'd lost money before." He denied that there was any "strange smell" emanating from the package. He carried the Benson & Hedges package in his pocket and put it on the dining table at home. He does not recall his wife commenting on it. Mr. Voiculescu was asked if he smelled ganja when the security guard opened his bag. He said he did not and "I didn't bring it up to my nose like he did."

13. Several character witnesses were called on Mr. Voiculescu's behalf. Roberto Silva, a part owner of PM Industrial Gas & Pure Air, said he has known Mr. Voiculescu for over five years and considers him to be "of excellent character, beyond any reproach." When asked about the finding

of the two items, Mr. Silva said: "I believe he made inquiries of who they belonged to. I think so, because he told me he tried to find out who they belonged (sic). He told me he had asked around the complex. I remember that it came up in a conversation that we had. He told me he had asked about the cigarettes and whom they belonged to. It was well after his arrest."

14. John Flemming, an IT Manager at Appleby's, said he has known Mr. Voiculescu for over three years and considers him to be "an honest person." He has never seen or heard anything which suggests to him that Mr. Voiculescu smokes ganja. Morjan Neceski, a Barrister and Solicitor in Canada, said that he has known Mr. Voiculescu since 1980 and has never known him to consume ganja or any other illegal drug. Brian Chapell, the Dean and Acting President of University College of the Cayman Islands, described himself as a social friend of Mr. Voiculescu since 2003. He too asserted that he has never seen any indication that Mr. Voiculescu uses ganja or any other drug. Marie Martin, Principal at the George Town Primary School, said she has known Mr. Voiculescu for seven years and has seen no evidence that he uses ganja or other drugs. She described him as honest.

15. Marie Saldeba, the Laboratory Manager at Chrissie Tomlinson Memorial Hospital, took a DNA sample from the Mr. Voiculsecu's mouth. It was sent for analysis to Brian Wraxall, the Chief Forensic Serologist at the

Serological Research Institute in Richmond, California. Mr. Wraxall analyzed the DNA in the sample from Mr. Voiculescu and compared it to a DNA sample he extracted from the cigarette paper on the spliff. His uncontradicted opinion was that the DNA obtained from the cigarette paper was contributed by at least two people but that Mr. Voiculescu could not be one of them.

Judgment under Appeal

16. In convicting, Mr. Voiculescu, the Learned Magistrate made a number of important findings of fact. She held that: "The security officer was immediately suspicious because of the smell coming from the box…" and 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." A little later she said, "Given what must have been the strong smell of the half-burnt spliff, I find it near to impossible to accept that he would not have become aware of the presence of the ganja in the box either when opening it or when lighting a cigarette, as common sense 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."

17. The Learned Magistrate accepted as a fact that Mr. Voiculescu does not smoke ganja and that he did not smoke the particular spliff found in the cigarette pack. She found that his keeping and smoking cigarettes from a

pack which he found on the ground "defies understanding." She said it contradicted the appearance of fastidiousness which he communicated through his manner, his dress and his demeanour. She also said that the pocketing of the ten dollars "seems at odds with the evidence of the Defendant's good character." She drew the inference that someone involved in the management of the condominium complex (as Mr. Voiculescu was) could "easily" have discovered to whom the money and the cigarettes belonged.

18. She noted (correctly) that Mr. Voiculescu is entitled to have his good character taken into account not only as bolstering his credibility but also as tending to show that he is unlikely to have committed the offence.

19. In the result, the Learned Magistrate found the inference that Mr. Voiculescu possessed the requisite knowledge to be "irresistible." She concluded: "The smell from the burnt spliff was, on the evidence, so strong as to render his protest of ignorance absolutely incredible. He said he examined the cigarette filters when he picked up the box that night to see if they were 'clean' and I doubt that when he examine them that he held that pack of cigarettes at arms length."

Law

20. This appeal was heard by motion in the usual manner. Neither side made any application to adduce additional evidence. Section 179 of the *Criminal Procedure Code (2006 Revision)* says:

> "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."

21. In the oft-cited case of ***Bertolino v R*** [1990-1991] CILR 112, Chief Justice Harre set out the principles to be applied on an appeal of this type. He took them from the speech of Lord Thankerton in ***Watt (or Thomas) v Thomas*** [1947] 1 All ER 587, which was quoted with approval by our Court Appeal in an earlier appeal in the case at bar: ***Attorney General v Voiculescu*** (Criminal Appeal No 27/2009), March 18, 2010. Those principles are:

"

(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."

22. Our Court of Appeal, in commenting on the second principle, said its meaning is "that if, without seeing and hearing the witnesses, the appellate court takes the view that it cannot come to any satisfactory conclusion on the printed evidence – so that it cannot be satisfied that the advantage enjoyed by the judge in having done so was not sufficient to explain or justify the trial judge's conclusion - then it has no basis on which it can properly differ from the decision on fact reached by the trial judge."

23. During oral argument, Mr. Voiculescu argued that the conviction is "unsafe". I take that to be a reference to the position in the United Kingdom, where the sole basis for allowing an appeal is that the court thinks that the conviction is unsafe: *see R. v. Cooper* [1969] 1 Q.B. 267 (CA); *R. v. Graham* [1997] 1 Cr. App. R. 302 (CA); and *Archbold*, 2009 edition, at para. 7-46. On some occasions, the Court of Appeal there has articulated the question as being whether the evidence and argument have left a "lurking doubt" in the minds of the appellate judges. Significantly, a conviction may be viewed as unsafe even if no error of law or of fact can be found: see the discussion in *Archbold*, op. cit., at para. 7-47.

24. The test under our legislation is different. The word "unsafe" is not used there. The three principles set out above suggest that on an appeal from conviction on a pure question of fact this Court must concern itself with the following questions:

1) The Court should determine whether the reasons given by the magistrate are satisfactory; if they are not, the decision is "at large"

for the appellate Court. I take the word "satisfactory" to mean that the magistrate has provided a rational explanation of the reasons for convicting and drawn inferences from the evidence which are supportable, whether or not the appellate Court would have drawn those same inferences.

2) If it "unmistakably" appears that the magistrate" has not taken proper advantage" of having seen and heard the witnesses, the decision is at large for the appellate Court. The exact meaning of this is unclear but it can be assumed to be an infrequent occurrence.

3) If the magistrate has not misdirected herself, the appellate Court must consider whether any inclination it has to differ with the verdict can be explained by the fact that it has not enjoyed the advantage of seeing and hearing the witnesses. If that is a plausible explanation, the appellate Court (unlike the Court of Appeal in the United Kingdom, which may invoke the "lurking doubt" principle) may not interfere.

4) It is open to the appellate Court to find that it is "not in a position to come to any satisfactory conclusion" on the question of fact because it has not seen and heard the witnesses.

Analysis

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 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 tin foil 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 give 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 fact. It follows that the decision is at large in this Court.

27. Assuming Mr. Voiculescu had knowledge of the spliff at some material time, he must have forgotten about it by the time he was searched. I say that because the contrary hypothesis - that he was intending to smuggle it

into the United States – is farfetched at best. It is accepted that he is not a user of ganja, so he would not have been bringing it for his own enjoyment. Was he planning to sell it? Surely, 0.129 grams of ganja and tobacco mixed together has negligible value (although I acknowledge that no evidence of value was adduced). It also seems unlikely, to put it at the highest, that he would be carrying the spliff on behalf of someone else, for essentially the same reason – it was of little value and could be smoked for only a fleeting period of time. Of course, the Crown is never obliged to prove a motive, but a proven absence of motive can be persuasive.

28. Could Mr. Voiculescu have recognized the presence of the drug at an earlier time (such as when he found the package), neglected to discard the spliff, and then forgotten about it by the time he reached the airport? The evidence provides no compelling reason to come to that conclusion. The spliff was not visible even when the box was open. What was visible was only "a little bulge suggesting that something was behind there" (per Mr. Levy). Again, there was no evidence of the strength of the smell.

29. Unlike the Learned Magistrate, I am unable to view the fact that Mr. Voiculescu kept the $10 as at odds with his proven good character. The amount is too small to have such significance. Neither does the evidence of his involvement with the Strata Council go far enough to demonstrate that he could "easily" have located its owner.

30. The Learned Magistrate noted that Mr. Voiculescu appeared fastidious in his manner, dress and demeanour. She inferred that his story of finding, keeping and smoking cigarettes which he had found on the ground was implausible. There is some force in that, but the strength of the inference is offset by the fact (as he testified) that he was short of cigarettes and is a committed smoker.

31. Of concern is an inconsistency between Mr. Voiculescu and his character witness, Mr. Silva. The Defendant said in cross-examination that it occurred to him to ask around for the owner of the two items but he did not. Mr. Silva said that his friend had told him of the incident and said that he did make inquiries at the complex in an attempt to locate the owner. Mr. Silva also used the phrases "I believe" and "I think" in giving this evidence, thus suggesting a possible weakness in his recollection.

32. Since the issue for me is at large, I should affirm the conviction only if the evidence makes me sure of his guilt. To reach that conclusion, I must be sure that Mr. Voiculescu's denial of knowledge is untrue. In 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 and the less than certain inconsistency between Mssrs. Voiculescu and Silva, I find I am not sure that the Defendant had the requisite knowledge of the presence of the spliff.

Order

33. For these reasons, the conviction is set aside. Crown Counsel has very fairly said he does not wish to pursue a new trial under any circumstances, so I enter a verdict of acquittal.

Dated this 28th day of June, 2010

Henderson, J.

Henderson, J.
Judge of the Grand Court

GRAND COURT
CAYMAN ISLANDS