IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal No. 2 of 2009
(Summary Court Appeal No. 34/06)
Criminal Case No: 1733/05

CAYMAN ISLANDS DIRECTOR OF PUBLIC PROSECUTION LIBRARY

8/9/09

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

DAMION MING

Appellant

Criminal Appeal No. 12 of 2009
(Summary Court Appeal No. 25/06)
Criminal case no. 1661/05

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

ERIC BUSH

Appellant

CAYMAN ISLANDS COURT OF APPEAL

BEFORE: **THE RT. HON. SIR JOHN CHADWICK, P.**
THE HON. MR. JUSTICE MOTTLEY, J.A.
THE HON. MR. JUSTICE VOS, J.A.

Appearances: Mr. Ben Tonner of Samson & McGrath for the appellants and Trevor Ward Senior Crown Counsel for the Crown.

Heard and Judgment reserved : 24th August, 2009. Judgment delivered: 8th September, 2009.

Sir John Chadwick, President:

1. These two appeals raise a single question: whether a defendant who is charged with possession of cocaine with intent to supply contrary to section 3(1)(m) of the Misuse of Drugs Law (2000 Revision) is entitled to a trial by jury under the provisions of section 60(1)

of that Law, read with section 5(1) of the Criminal Procedure Code (1995 Revision). The question is of general importance. We have heard the appeals together.

The underlying facts - Ming

2. On 10 May 2005 Damion Ming was arrested at Owen Roberts International Airport, Grand Cayman, on suspicion of being involved with the importation of cocaine. He was charged on 17 May 2005 with three offences: (i) being concerned in the possession of cocaine with intent to supply; (ii) being concerned in the possession of cocaine; and (iii) being concerned in the importation of cocaine. He elected for trial by jury and came before the Grand Court. On or about 19 May 2006, acting Justice Ramsey Hale, sitting as a judge of the Grand Court, quashed the indictment as defective, on the ground that being concerned in the importation of cocaine was only triable summarily. She remitted the case to the Summary Court. It came before her, as Chief Magistrate, for trial in that court in December 2006. Ming was convicted and sentenced, on 20 December 2006, to a term of imprisonment of five years.

3. It seems that Ming and his advisers, wrongly as it turned out, took the view that the only charge on which there had been a verdict was that of being concerned in the importation of cocaine. He appealed to the Grand Court on two grounds; the second of which was that he had wrongly been denied his right to a jury trial on that charge. On 25 February 2008 the Privy Council delivered its decision in *Knight v Attorney General* [2008] UKPC 14. On 20 March 2008, in the light of the decision in *Knight*, Ming's appeal was allowed on the second ground. The case was returned to the Summary Court and Ming again elected for trial by jury. The Crown decided to offer no evidence on the charge of being concerned in importation; contending that the original conviction stood on the other two charges which had not been the subject of any appeal. Ming sought leave to appeal out of time from the conviction on the charge of being concerned in the possession of cocaine with intent to supply; contending that he had not been aware that there had been a verdict on that charge.

4. That application came before the Chief Justice on 4 June 2008 and was adjourned to enable enquiries to be made of the Chief Magistrate as to whether Ming had been convicted on the charge of being concerned with the possession of cocaine with intent to supply. On 11 June 2008 she confirmed that he had, indeed, been convicted on that charge, as well as on the charge of being concerned in the importation of cocaine; but that there had been no verdict on

the charge of being concerned with possession *simpliciter*. On 16 December 2009 the Chief Justice gave leave to appeal out of time from the conviction on the charge of being concerned with possession with intent to supply.

5. That appeal came before Justice Quin in the Grand Court on 23 January 2009. He dismissed the appeal on the ground that he was bound to do so in the light of the decision of this Court in *R v Elon Dixon* (unreported, 12 August 2008). It is from the order of 23 January 2009 that Ming seeks to appeal to this Court. The sole ground of appeal, as stated in the formal grounds of appeal against conviction, is that "the offence of being concerned in the possession of cocaine" is a category B offence and that accordingly the appellant should have been allowed to exercise his right to trial by judge and jury in the Grand Court. But, as argued in this Court, the appeal was put, not on the ground that the offence of being concerned in the possession of cocaine – an offence of which Ming was not convicted – gave rise to the right to a jury trial, but that the offence of being concerned with the possession of cocaine with intent to supply – the offence of which Ming was convicted – gave that right. We have treated the appeal as an appeal on that ground.

The underlying facts - Bush

6. The position in relation to the other appeal is less procedurally complex. On 10 May 2006 Eric Armando Bush was charged in the Summary Court with possession of cocaine with intent to supply. The date of the offence, as specified in the charge, was 12 December 2004. He was convicted on 10 July 2006; and sentenced to eight and a half years' imprisonment. He appealed from his conviction to the Grand Court on two grounds, neither of which – on the documents which we have been shown – raised the question whether he should have been entitled to a trial by jury. The appeal came before Justice Henderson on 24 April and 15 May 2009. The judge rejected each of those grounds and dismissed the appeal. Bush has not sought to revive those grounds before this Court. His notice of appeal, filed on 15 May 2009, raises the single ground that "I was entitled to elect trial in the Grand Court but was prevented from doing so". At first sight, therefore, Bush seemed to be seeking to raise a ground of appeal in this Court which he had not raised in his appeal to the Grand Court. But his counsel asserted that that was not so: the point, it was said, had been raised before Justice Henderson who had dismissed it summarily; like Justice Quin, he seems to have taken the

view that he was bound to do so in the light of the decision of this Court in *Elon Dixon*. The Crown did not challenge that assertion. On the basis that it was common ground that the point was open to Bush in this Court, we have treated the appeal as an appeal from a decision that Bush was not entitled to a trial by jury.

R v Elon Dixon

7. As we have said, notwithstanding the decision of the Privy Council in *Knight*, the issue now raised in these appeals has been treated in the Grand Court as determined by the decision of this Court in *Elon Dixon*. The defendant in that case was convicted in the Summary Court on 25 January 2006 of the offence of possession of cocaine with intent to supply. He was sentenced to fifteen years imprisonment. His appeal to the Grand Court was heard on 17 July 2006: the conviction was upheld but the sentence was reduced to one of ten years. By notice dated 4 June 2008 Dixon sought an extension of time to appeal from the order of 17 July 2006. His grounds were that he was never given the right to elect to be tried in the Grand Court; and that, following the decision of the Privy Council in *Knight*, his conviction was unlawful and should be quashed. On 12 August 2008 this Court refused his application for leave to appeal from his conviction out of time.

8. We have no record of the reasons which led this Court to refuse the application for an extension of time which was before it on 12 August 2008. In particular, we do not know whether the application was refused because the Court took the view that, notwithstanding the decision of the Privy Council in *Knight*, the appeal had no real prospect of success (and if so, why the Court took that view); or whether there was some other reason to refuse an extension of time in the circumstances of that case. In the absence of material which would enable us to ascertain the basis on which the Court reached its decision to refuse an extension of time on 12 August 2008, we do not think we should treat that decision as a decision on the issue which is raised before us on these appeals. It may or may not have been. The appropriate course for this Court to take on these appeals, as it seems to us, is to consider the issue on the basis that we can obtain no assistance from the decision in *Elon Dixon*. The Crown was content with – indeed, supportive of – that approach. As we have said, the point is of general importance; and it needs to be the subject of a reasoned judgment of this Court.

The current legislation

9. Section 3(1) of the Misuse of Drugs Law (2000 Revision) lists, under thirteen paragraphs (a) to (m), the circumstances in which a person commits an offence in relation to a controlled drug. Although, in the present case, the convictions were under section 3(1)(m), it is necessary, for reasons which will become apparent, to have the whole of section 3(1) in mind:

> "3(1) Whoever, without lawful excuse or without being authorised in that behalf,-
>
> (a) imports;
> (b) exports;
> (c) produces;
> (d) stores;
> (e) sells, buys or otherwise deals in;
> (f) supplies;
> (g) distributes;
> (h) dispenses;
> (i) issues a prescription for;
> (j) administers;
> (k) possesses, constructively or otherwise;
> (l) consumes; or
> (m) has in his possession, whether lawfully or not, with intent that it be supplied, whether by himself or some other person, and whether in the Islands or elsewhere to another person in contravention of this subsection,
>
> any controlled drug, pipe, utensil or thing used in the preparation or consumption of any controlled drug, or who attempts, assists or is concerned in any such matters is guilty of an offence."

10. The penalties for offences under section 3(1) are prescribed by section 16 of the Law. Again, it is necessary to have in mind much of that section:

> "16(1) Subject to subsections (2), (3) and (4), whoever is guilty of an offence contrary to section 3(1) or (2) is liable on summary conviction to a fine of three thousand dollars and to imprisonment with hard labour for three years, and, in the case of a third or subsequent conviction, to a fine of ten thousand dollars and to imprisonment with hard labour for ten years.
>
> (2) Notwithstanding subsection (1), whoever is guilty of an offence that –
> (a) is contrary to section 3(1);
> (b) is specified in Part A of the Second Schedule; and
> (c) is in relation to a controlled drug that –
> (i) is not a hard drug; and
> (ii) is less than one pound in weight,

is, on summary conviction, liable to a fine of twenty thousand dollars and to imprisonment with hard labour for seven years and in the case of a second or subsequent conviction for any such offence, to a fine of twenty thousand dollars and to imprisonment with hard labour for ten years.

(3) Notwithstanding subsection (1) whoever is guilty of an offence that –
(a) is contrary to section 3(1);
(b) is specified in Part A of the Second Schedule; and
(c) is in relation to a controlled drug that –
(i) is not a hard drug; and
(ii) is one pound or more in weight,
is, on summary conviction, liable to a fine of twenty thousand dollars and to imprisonment with hard labour for seven years and, in the case of a second or subsequent conviction for any such offence, to a fine and to imprisonment with hard labour for fifteen years.

(4) Notwithstanding subsection (1), whoever is guilty of an offence that –
(a) is contrary to section 3(1);
(b) is in relation to a controlled drug that –
(i) is a hard drug; and
(ii) is less than two ounces in weight; and
(c) consists of buying, consuming, possessing or attempting to buy, consume or possess any such drug,
is, on summary conviction, liable in the case of a first conviction for such an offence to a fine of ten thousand dollars and to imprisonment for seven years; and in the case of a second or subsequent conviction for any such offence to a fine of twenty thousand dollars and to imprisonment for fifteen years.

(5) Notwithstanding subsection (1), whoever is guilty of an offence that –
(a) is contrary to any provision of this Law;
(b) is specified in Part B of the Second Schedule; and
(c) is in relation to a controlled drug which is a hard drug,
is, on summary conviction, liable to imprisonment and a fine in accordance with Part B of the Second Schedule.

. . .".

In that context a "hard drug" is "any substance or product specified in Part I of the First Schedule": section 2(1) of the Law. Those substances include cocaine.

11. It is important to note the following features of section 16 of the Law:

(1) Each of subsections (1) to (5) contains the phrase "on summary conviction". As we shall show when we come to examine the legislative history later in this judgment, section 16 and its statutory predecessors - and the form of wording which they adopt –

have always been treated as prescribing the mode of trial. If section 16 stood alone, all offences under section 3(1) of the Law would be triable summarily.

(2) Section 16(1) prescribes what may be described as the default penalty for offences under section 3(1): a fine of three thousand dollars and imprisonment for three years in the case of a first offence, increased to a fine of ten thousand dollars and imprisonment of ten years on a third or subsequent conviction.

(3) Sections 16(2) and (3) prescribe penalties which are greater than the default penalty where the offence falls within Part A of the Second Schedule and the drug is not a hard drug. There are nine offences specified in Part A: the first eight correspond, in terms, with the offences set out, respectively, under paragraphs (a), (b), (c), (e), (f), (g), (k) and (m) of section 3(1): the ninth corresponds with the final words of section 3(1) – "attempting, assisting or being concerned with" the first eight offences. Offences under paragraphs (d) (storing), (h) (dispensing), (i) (issuing a prescription), (j) (administering) and (l) (consuming) are not specified in Part A and are not subject to the enhanced penalties prescribed by section 16(2) and (3).

(4) The maximum term of imprisonment for offences relating to drugs which are not hard drugs (under section 16(3)) is fifteen years.

(5) Sections 16(4) and (5) prescribe penalties which are greater than the default penalty where the offence relates to a drug which a hard drug. Section 16(4) applies to what may be described as less serious offences – buying, consuming, possessing or attempting to buy, consume or possess - where the amount involved is less than two ounces. In such cases the maximum term of imprisonment on a second or subsequent offence is fifteen years.

(6) Section 16(5) applies to offences which are specified in Part B of the Second Schedule. Part B is itself divided into three categories: (i) less serious offences - that is to say, those within section 16(4) - where the amount involved is two ounces or more; (ii) more serious offences (which are specified) where the amount involved is less than two ounces; and (iii) the same more serious offences where the amount involved is two ounces or more.

(7) The maximum term of imprisonment in respect of the less serious offences within what we have termed category (i) in Part B – whether on a first or subsequent

conviction - remains fifteen years: the principle differences under sections 16(4) and (5) in relation to the less serious offences involving hard drugs is that where the amount involved is two ounces or more the fine is unlimited and the maximum term of imprisonment on a first conviction is greater.

(8) The offences within categories (ii) and (iii) in Part B of the Second Schedule are specified under fourteen heads:

Selling	Administering
Dealing in	Possessing with intent to supply
Distributing	Importing
Supplying	Exporting
Dispensing	Producing
Storing	Assisting or being concerned in
Issuing a prescription for	Attempting

The first twelve of those heads correspond, in terms (although not in the same order), with the offences set out under paragraphs (a), (b), (c), (d), (e) (to the extent of selling and dealing in, but not buying), (f), (g), (h), (i), (j), and (m) of section 3(1). The list does not include buying (an offence within paragraph (e) of paragraph 3(1)), possessing *simpliciter* (an offence under paragraph (k)) or consuming (an offence under paragraph (l)). The last two heads correspond with the final words of section 3(1).

(9) The maximum penalties for the more serious offences within category (ii) in Part B of the Second Schedule (where the amount of the hard drug involved is less than two ounces) are fifteen years on a first conviction, rising to twenty years on a second or subsequent conviction. The maximum penalties for offences within category (iii) (two ounces or more) are twenty years on a first conviction, rising to thirty years on a second or subsequent conviction. All carry a potentially unlimited fine.

12. As we have said, if section 16 of the Misuse of Drugs Law (2000 Revision) stood alone, all offences under section 3(1) – including those which, pursuant to sections 16(5), carry a maximum term of imprisonment in excess of fifteen years, would be triable summarily. But section 16 does not stand alone. It must be read with section 60 of that Law:

> "60(1) Notwithstanding any other section of this Law where a person is charged with any offence of selling, dealing in, distributing, supplying, dispensing, storing,

issuing a prescription for, administering, importing, exporting, producing or attempting, contrary to section 3(1)which relates to a controlled drug that is a hard drug, then such offence shall be deemed, for the purposes of determining the mode of trial, a category B offence in accordance with section 5 of the Criminal Procedure Code (1995 Revision).

(2) For the avoidance of doubt it is hereby declared that where a person is convicted of an offence on trial upon indictment pursuant to subsection (1) the Grand Court may impose a term of imprisonment and a fine in accordance with section 16(4) or Part B of the Second Schedule."

It is plain that the reference to "any other section of this Law" in the opening words of section 60(1) is a reference to section 16: there is no other section of the Law to which section 60(1) could relate.

13. Section 5 of the Criminal Procedure Code (1995 Revision) was in these terms (so far as material):

"5(1) For the purposes of determining the mode of trial before a court, offences shall be classified into three categories –

Category A – offences triable upon indictment and not otherwise

Category B – offences triable upon indictment which, with the consent of the prosecution and the person charged (or all of the persons charged if there be more than one), may be tried summarily; and

Category C – offences triable summarily and not otherwise.

(2) Where any law creating an offence fails to prescribe the mode of trial, the mode of trial shall be as prescribed in the First Schedule.

(3) Notwithstanding any other law but subject to section 188 the offences set out in the First Schedule shall fall into the categories there described."

The provisions of section 5 are in the same terms in the current (2006) revision of the Criminal Procedure Code. For completeness we should add that the specific offences set out in the First Schedule to the Code do not include offences under sections 3(1) and (2) of the Misuse of Drugs Law. Nor do those offences fall within section 5(2) of the Code: as we have already explained those are offences for which the mode of trial is prescribed by section 16 of the Misuse of Drugs Law. So (but for section 60(1) of the Misuse of Drugs Law) the classification under the First Schedule – that is to say, Category A where the maximum punishment exceeds ten years' imprisonment, Category C where the maximum punishment is

one year imprisonment or a lesser punishment and Category B for all other offences – has no application to offences under sections 3(1) and (2) of that Law.

14. The effect of section 60(1) of the Misuse of Drugs Law (2000 Revision), read with section 5(1) of the Criminal Procedure Code, is that, where a person is charged with an offence contrary to section 3(1) of the Law, which relates to a drug which is a hard drug and which falls within the descriptive words

> ". . . any offence of selling, dealing in, distributing, supplying, dispensing, storing, issuing a prescription for, administering, importing, exporting, producing or attempting, . . .",

he will be entitled to be tried on indictment before a jury; and may only be tried summarily if he consents to that mode of trial. As we have said, but for section 60(1) of the Misuse of Drugs Law, all offences under section 3(1) would be triable summarily. Section 60(2) is consistent with that view. It is needed in order to avoid the lacuna that might otherwise be though to exist: in that the penalties prescribed by sections 16(4) and (5) - read with Part B of the Second Schedule – are penalties which may be imposed "on summary conviction". Section 60(2) makes it clear that the same penalties apply on conviction after a trial upon indictment.

The issue

15. With those legislative provisions in mind, it can be seen that the issue in the present case turns on a question of statutory construction: is the offence under section 3(1)(m) of the Misuse of Drugs Law (having in his possession a controlled drug with intent that it be supplied to another person) within the descriptive words in section 60(1) which we have just set out (selling, dealing in, distributing, supplying, dispensing, storing, issuing a prescription for, administering, importing, exporting, producing or attempting)?

16. The first – and, perhaps, the most obvious – point is that the descriptive words in section 60(1) of the Law include, in the same terms and in the same order, twelve of the fourteen heads under which the more serious offences are listed in categories (ii) and (iii) in Part B of the Second Schedule to the Law: "Selling; Dealing in; Distributing; Supplying; Dispensing; Storing; Issuing a prescription for; Administering; [*Possessing with intent to supply*],

Importing, Exporting, Producing, [*Assisting or being concerned in*]; Attempting". But the descriptive words in section 60(1) do not include the two heads which we have italicised – "Possessing with intent to supply" and "Assisting or being concerned in" which appear in Part B. It can be said, therefore, that when the legislature intended to include the offence of possessing with intent to supply in a list of relevant offences under section 3(1) it did so in terms; and that when it enacted section 60(1) in the terms that it did – with no express reference to the offence of possessing with intent to supply – it must be taken not to have intended to include that offence in the list of relevant offences.

17. Further, it can be said that none of the twelve heads that are included in the descriptive words in section 60(1) of the Misuse of Drugs Law are apt to describe the offence of possessing with intent to supply. Counsel for the appellants accepted in this Court – correctly in our view – that the offence of possessing with intent to supply could not be brought under any of the heads "selling, . . . , distributing, . . . , dispensing, storing, issuing a prescription for, administering, importing, exporting, producing or attempting". As we have already pointed out, those heads correspond in terms (although not in the same order), with the offences set out under paragraphs (a), (b), (c), (d), (g), (h), (i), and (j) and (as to attempting) with part of the final words of section 3(1). Nevertheless, it was submitted by counsel that the offence of possession with intent to supply could be brought within one or other of the heads "dealing" or "supplying". But, in our view, it is difficult to see how either "dealing" or "supplying" can be given the extended meaning for which counsel contends. In the context of section 60(1), "dealing" plainly does not include either buying or selling. In that context, the word is not apt to include transactions of a non-commercial nature. It is important to have in mind that possessing with intent to supply will include cases in which the intent is to supply in a domestic or social context; as well as cases where the supplier is a dealer. The offence can be committed by someone who is not a "dealer" in any ordinary meaning of that word. Further, of course, the offence of possession with intent to supply can be committed without the offender ever actually supplying to anyone – or attempting to supply or being concerned in the supply of - the substance of which he was in possession.

18. Nevertheless, while recognising the difficulties posed by the words which the legislature has used in section 60(1) of the Misuse of Drugs Law, counsel submits that effect can be given to what, as he says, must have been the clear intention of the legislature by a purposive construction. He relies first on the decision of the Privy Council in *Knight v Attorney General* [2008] UKPC 14; and second on statements made in the Legislative Assembly in 1985 when the provisions now found in section 60(1) of the Law were first introduced as section 25 of the Misuse of Drugs Law (1985 Revision). In order to address those points, it is necessary to have in mind the legislative history which has given rise to the current position.

The legislative history

19. From 1948 (if not before) until 1982, all drugs offences were tried summarily. We were referred to section 22(2) of the Dangerous Drugs Law (Cap 32) enacted on 13 April 1948; to sections 12(1) and (2) and 13 of the Misuse of Drugs Law (13 of 1973) enacted on 12 December 1973; and to the amendments to section 12 of the 1973 Law by section 7 of the Misuse of Drugs (Amendment) Law 1977. All speak of liability "on summary conviction": none make any provision for the offences which it creates to be tried on indictment.

20. The amendments to section 12 of the 1973 Law ("the principal Law") which were made by section 7 of the 1977 Law may be seen as the genesis of the provisions now found in sections 16(3), (4) and (5) of the Misuse of Drugs Law (2000 Revision): in particular, it was the 1977 Law which first introduced into the Misuse of Drugs legislation a schedule of penalties in the present form. The maximum sentence of imprisonment under what became Part B of the Second Schedule to the principal Law was fifteen years.

21. That maximum was increased to the present levels of twenty and thirty years (depending on whether the quantity of the hard drug involved was, or was not, less than two ounces) by section 7 of the Misuse of Drugs (Amendment) Law 1982. At the same time, the legislature introduced a new section – section 25 – into the principal Law:

> "25 Notwithstanding the provisions of any other section, where a person is charged with any offence contrary to this Law and such person is liable upon conviction to be sentenced to a term of imprisonment exceeding fifteen years then such offence shall be deemed for the purpose of determining the mode of trial, a

category B offence in accordance with section 5 of the Criminal Procedure Code"

In that context the reference to the Criminal Procedure Code is to Law 13 of 1975; section 5 of which was in the same terms as the corresponding section in the 1995 and 2006 Revisions.

22. Section 3(1) of the principal Law may be seen as the statutory predecessor of section 3(1) in the current (2000) Revision. It listed, under paragraphs (a) to (l), the eleven offences which now appear (under the same paragraphs) in the current Revision. It did not include the offence which is now listed under paragraph (m) – possession with intent to supply. The concluding words of the section (in the principal Law) were:

> " . . . any controlled drug . . . etc . . . or who attempts or offers so to do or who causes, procures, solicits, entices, aids, abets, permits or suffers any other person to do so is guilty of an offence."

23. The Misuse of Drugs (Amendment) Law 1985 amended the principal Law (as it then stood, following amendment in 1977 and 1982) in three important respects (so far as material in the present context):

(1) It introduced the new offence, as paragraph (m) of section 3(1) of the principal Law, of possession with intent to supply: section 3(b) of the 1985 Law. The new paragraph (m) was in the same terms as that now found in the current (2000) Revision.

(2) It substituted for the concluding words of section 3(1) in the principal Law ". . . or offers so to do or who causes, procures, solicits, entices, aids, abets, permits or suffers any other person to do so . . ." the words ". . . assists or is concerned in any of such matters . . ." which now appear in the current Revision: section 3(c) of the 1985 Law.

(3)It replaced section 25 of the principal Law (introduced in 1982) with a new section in substantially the same terms as those now found in section 60(1) of the current Revision: section 9 of the 1985 Law. For convenience we set out those terms:

> "25. Notwithstanding the provisions of any other section of this Law where a person is charged with any offence of selling, dealing in, distributing, supplying, dispensing, storing, issuing a prescription for, administering, importing, exporting, producing or attempting, contrary to section 3(1) which relates to a controlled drug that is a hard drug, then such offence shall be deemed, for the purposes of determining the mode of trial, a category B offence in accordance with section 5 of the Criminal Procedure Code"

As important, perhaps, in the present context, is what the 1985 Law did not do:

(4)It did not add the new offence of possession with intent to supply, created by paragraph (m) of the amended section 3(1), to the list of more serious offences in Part B of the Second Schedule.

(5)It did not add an offence of "Assisting or being concerned in" to the list of more serious offences in Part B of the Second Schedule.

(6)It did not add, in terms, either (i) the new offence of possession with intent to supply or (ii) the offence of assisting or being concerned in to the list of offences described in section 25; although given that it was re-enacting that section there was an obvious opportunity to do so.

24. Within a short time after the enactment of the 1985 Law, it must have been appreciated that the effect of failing to include the new offence of possession with intent to supply in the list of more serious offences in Part B of the Second Schedule – and, perhaps, of failing, in terms, to include an offence of assisting or being concerned in – was that section 12(4) of the principal Law (as amended by the 1977 Law) did not (or might not) impose any sentence in respect of those offences. The new offence of possession with intent to supply (at the least) was left to be dealt with under the default penalty imposed by section 12(1) (the statutory predecessor of section 16(1) in the current Revision). The legislature took the opportunity to fill that lacuna when enacting the Misuse of Drugs (Amendment) Law 1986. Section 5 of that Law amends both Parts A and B of the Second Schedule to the principal Law by adding the new offence of possession with intent to supply to the lists of offences under the two Parts; by substituting for the words "or offering to do, causing, procuring, soliciting, enticing, aiding, abetting, permitting or suffering any person to do" in Part A the words "assisting or being concerned in"; and by adding those latter words to the list of offences in Part B. At the same time it enacted, as subsection (2) to section 25 (referred to, ineptly we think, as section 26), the provisions now in section 60(2) of the current Revision. But what the legislature did not do by the 1986 Law was to add the offences of possession with intent to supply and of assisting or being concerned in to the list of offences described in what had become section 25(1) of the principal Law.

25. There were further amendments to the principal Law in 1987, 1988, 1990 and 1992; but it has not been suggested that those amendments have any relevance in the present context. The law was consolidated and revised in 1995 – under which section 3 became section 4, section 12 became section 17 and section 25 became section 59 – but the provisions in those sections remained unchanged. There were further amendments in 1996, 1997 and 1999; and a further consolidation and revision in 2000 (the current Revision); but, again – other than changes to the section numbers – those provisions with which we are concerned remained unchanged.

26. At the risk of repetition, it may be helpful if we summarise what we see as the material features, in the present context, of the legislative history which we have described:

(1) Until 1982, all drugs offences were tried summarily. The maximum sentence of imprisonment was fifteen years.

(2) In 1982 the maximum sentence was increased to the present levels of twenty and thirty years for the more serious offences involving hard drugs. Those offences were specified in Part B of the Second Schedule to the principal Law. At the same time, the legislature introduced a provision (as section 25 of the principal Law) which enabled those liable to be sentenced to a term of imprisonment exceeding fifteen years to elect for trial on indictment.

(3) In 1985 the legislature introduced a new offence of possession with intent to supply. The new offence was not added to the list of the more serious offences in Part B of the Second Schedule.

(4) Also in 1985, the concluding words of section 3(1) in the principal Law were replaced by the words "assists or is concerned in any of such matters . . .". That amendment was not reflected in a corresponding amendment to the list of the more serious offences in Part B of the Second Schedule.

(5) At the same time section 25 of the principal Law was replaced by what is now section 60(1) of the current Revision. The new provision conferred the right to elect for trial on indictment on those charged with offences which were described in terms identical to those in the list of more serious offences in Part B of the Second Schedule. As we have said, that list did not include the new offence of possession with intent to supply; and it did not reflect the change which had been made to the concluding words of section 3(1) in the principal Law.

(6) In 1986, the new offence of possession with intent to supply was added to the list of more serious offences in Part B of the second Schedule; and, further, the words "assisting or being concerned in" were added to that list. But no corresponding change was made to the list of offences described in section 25(1) of the principal Law.

It is, we think, beyond doubt that, for the period of some eleven months between the 1985 Law and the 1986 Law, the maximum term of imprisonment to which a person charged with the new offence of possession with intent to supply was liable was ten years (the default penalty for which section 12(1) of the principal Law then provided); and that, during that period, a person charged with that offence was not entitled to elect for trial on indictment.

Knight v Attorney General

27. The appellant, Donald King Knight, had been charged with three offences under section 3(1) of the Misuse of Drugs Law (2000 Revision): (i) being concerned in the importation of cocaine; (ii) being concerned in the possession of cocaine; and (iii) being concerned in the possession of cocaine with intent to supply. On 11 March 2004 he was convicted in the Summary Court on the first and third of those charges. Knight appealed to the Grand Court on the ground that being concerned with the importation of cocaine was to be treated as a Category B offence, pursuant to section 60(1) of the Law; and that, accordingly, he had been entitled to be tried by a jury. That appeal was allowed by Justice Levers. The Crown appealed to this Court. This Court allowed that appeal on 11 August 2006. It held that the offence of "being concerned in importing" a hard drug was distinct from the offence of "importing" a hard drug; that the latter offence fell within section 60(1) of the Law, but the former did not; and that as the defendant was charged with the former offence, and not the latter, he was not to be treated as charged with a Category B offence and so was not entitled to a jury trial.

28. Knight appealed to the Privy Council with special leave. The only question before the Privy Council was whether a person charged with being concerned in the importation of a hard drug is a person "Charged with any offence of . . . importing . . . contrary to section 3(1)": paragraph [9] of the judgment of the Board, delivered by Lord Rodger of Earlsferry. The issue which arises in the present case – whether a person charged with the offence of possession with intent to supply was within section 60(1) of the Law - had not been raised on any appeal in that case.

29. After referring to the legislative history which had led to the changes made in the 1985 Law – which showed that, from 1982, a person charged with offering to import a controlled drug, or with causing, procuring soliciting, enticing, aiding, abetting, permitting or suffering any other person to do so, would have been liable to maximum sentence of imprisonment in excess of fifteen years and so would have been deemed under section 25 of the 1973 Law (as it then was) to be treated as charged with a Category B offence – the Board observed (at paragraph [17]) that "But for the inclusion of one word in the section 60(1), their Lordships would have regarded it as beyond argument that a person who was charged with 'being concerned in importing' a hard drug is a person who is charged with 'any offence of . . . importing' that drug for the purposes of section 60(1)".

30. It was the inclusion of the word "attempting" in the list of offences described in section 60(1) which raised a doubt. The point was explained at paragraphs [17] and [18]:

> "17. . . . The word refers back to the words "or who attempts" in the coda to section 3(1): a person who attempts, assists or is concerned in any of the matters in subparagraphs (a) to (m) is guilty of an offence. While the drafting of section 60(1) is not particularly felicitous, the legislature must mean that a person who attempts, for example, to import a controlled drug is guilty of an offence. So, section 60(1) has the effect that a person who is charged with 'attempting' to import a hard drug is entitled to a jury trial.
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> 18. On the other hand –and really on the basis that *expressio unius est exclusio alterius* – it is argued that, since the draftsman felt the need to mention the defendant who is charged with attempting to import, so that he would be included within the scope of section 60(1), the draftsman must have intended that the subsection should not apply to the other persons in the coda to section 3(1) whom he does not mention – including a person 'who assists [or] is concerned in' importing a hard drug. . . ."

31. Lord Rodger went on to say that the Board would not infer - from the inclusion in section 60(1) of 'attempting' and the omission of any reference to assisting or being concerned in importing – that the draftsman intended that section 60(1) should not apply to the other persons not mentioned. But neither would the Board hold that the draftsman simply made a mistake when he singled out "attempting" for inclusion in the subsection. At paragraphs [19]

to [22] he explained why the inclusion of "attempting" and the omission of "assisting or being concerned in" should not be seen as a draftsman's error.

32. We do not think it necessary to set out those paragraphs *in extenso* in this judgment. Put shortly, the Board took the view that it was to be expected that, for the purpose of mode of trial, a defendant charged with assisting or being concerned in importing a hard drug would be treated in the same way as a defendant who was charged with importing the same hard drug. That was the position under section 25 of the principal Law when introduced in 1982; and there was no reason to think that the legislature had intended to adopt a different policy when section was altered in 1985. But a defendant charged with attempting to import a hard drug is not in the same position as a defendant charged with importing the same drug: attempts to commit a crime were often punished less severely than the completed crime. So it was understandable that the legislature might have felt it necessary to include the word "attempting" in the new section 25 - to make it clear that a defendant charged with attempting to import was to be treated, for the purposes of mode of trial, in the same way as a defendant charged with the completed offence - but might not have felt it necessary to include the words "assisting or being concerned in"- because "they would really just describe ways of committing an offence of importing a hard drug, which was already on the list". It was on that basis that the Board concluded "both that the wording of section 60(1) is not defective and that there is no basis for applying the *expressio unius* rule of construction.

33. It is accepted on behalf of the appellants – correctly, in our view – that the reasoning in paragraphs [19] to [22] of the judgment in *Knight* provides no assistance in relation to the question which we have to consider in the present appeal.

34. Some reliance was placed, however, on the observations in paragraph [25] of that judgment:

> "25. Although the appellant's argument was confined to the offence of being concerned in the importation of a hard drug, in the course of his submissions on behalf of the Crown, Mr Perry pointed out that, if the Board were to uphold the appellant's contention that the offence of being concerned in the importation of a hard drug were deemed to be a category B offence, then it would be anomalous if the offences of being in possession of a hard drug with intent to supply, or of being concerned in the possession of a hard drug with intent to supply, were not also to be regarded as category B offences. He submitted that they could properly be regarded as falling within the scope of 'dealing' in section 60(1). The Board sees the force of that submission, but the point was not really argued at the hearing. For that reason, the Board prefers to express no concluded view on it."

35. We accept, of course, that *Knight* is authority for the proposition that a defendant charged with the offence of being concerned in the possession of hard drug with intent to supply (the offence with which Ming was charged) must be treated, for the purposes of mode of trial, in the same way as a defendant charged with the offence of possession of a hard drug with intent to supply (the offence with which Bush was charged). That proposition has not been in dispute in this appeal. But we do not accept that *Knight* is authority for the proposition that those offences can properly be regarded as falling within the scope of "dealing" in section 60(1) of the Misuse of Drugs Law (2000 Revision). As we have pointed out earlier in this judgment, there are formidable difficulties in holding that a person who is in possession of cocaine with intent to supply in a domestic or social context is a dealer. The Privy Council did not need to address those difficulties. The Board did not purport to resolve them. It was careful to make it plain that it had not done so.

36. At paragraph [24] of the judgment in *Knight* – in response to the suggestion made on behalf of the Crown that, in the circumstances of that case, the appellant had suffered no real injustice by being deprived of the chance to opt for a jury trial – Lord Rodger observed:

> "24. . . . The Board cannot . . . regard the right to jury trial as anything other than a most important right. Dismissing the appeal would be tantamount to downgrading that right, and to undermining the policy which the legislature, with the support of the Chief Justice, deliberately confirmed in 1985 in the face of suggestions that it might be removed. . . ."

We now turn to examine what was said by the government spokesmen in the Legislative Assembly during the debate on the Bill which became the 1985 Law.

The statements made in the Legislative Assembly in 1985

37. The passages relied upon are in the speech of the Hon Michael J Bradley QC, then Second Official Member responsible for Legal Administration, during the debate on 28 May 1985. He explained, first (in a passage at pages 19 and 20 of the report of proceedings to which Lord Rodger referred at paragraph [20] in *Knight*), that the purpose in replacing the concluding words of section 3(1) in the principal Law ". . . or offers so to do or who causes, procures, solicits, entices, aids, abets, permits or suffers any other person to do so . . ." with the words "assists or is concerned in any of such matters . . ." was to bring the Cayman Islands Law up to date by adopting the "shorter, simpler and clearer" words which had been used in the comparable United Kingdom legislation for the past fourteen years. He then went on to deal with the presumptions as to possession which are now contained in section 9 of the current Revision; and with the provisions as to the forfeiture of acquired assets which are now found in section 30. The final matter which he addressed was the substitution of what is now section 60(1) for the existing section 25 in the principal Law. He explained the difficulties to which the existing section 25 had given rise in practice: those difficulties – to which Lord Rodger referred at paragraph [12] in *Knight* – stemmed from the need (under the existing section) to know whether the defendant had a previous conviction when determining the mode of trial. And he went on (at page 24 in the report of proceedings):

> "It was because . . . of these technical and procedural difficulties that at first it was thought, following representations from our judiciary, that the simplest method of dealing with this insuperable procedural problem was to make all offences contained in the Misuse of Drugs Law triable only by the magistrate which . . . was the position from 1972 until 1982 when this amendment and this new Section 25 was brought into the Law. It was for that purpose that this Bill originally sought to remove and repeal Section 25.
>
> However, on reflection and after consultation I circulated to Members with the consent of my colleagues what I propose to move in its place. That is . . . in the one case of an offence of buying or consuming where the penalty for a second or subsequent conviction could be a maximum of twenty years, to reduce that to the level of fifteen years and make it a summary trial, but for the other and more serious offences of selling, dealing, distributing, supplying, dispensing and storing hard drugs, that rather than reduce the maximum penalties for second and

> subsequent convictions, to extend to persons charged with those offences even though they are first offenders and previously had not the right to jury trial, such a right. So that in all cases that a person charged with the offence of in relation to hard drugs of selling or dealing or distributing, the pushers, that they should have the right to elect trial by jury if they so wish."

It seems to us that it was that passage that Lord Rodger may be taken to have had in mind when he referred (at paragraph [24] of the judgment in *Knight*) to "the policy which the legislature . . . deliberately confirmed in 1985 in the face of suggestions that it [the right to jury trial] might be removed. . . ."

38. The Bill which was before the Legislative Assembly in May1985 introduced the new offence of possession with intent to supply. There is a brief mention of that new offence in the speech of the Hon Benson O Ebanks, then the Member for Health, Education and Social Services, who moved the Second Reading. But, other than that, the new offence does not seem to have been the subject of debate. It receives no mention in the speech of the Hon Michael J Bradley QC, to which we have referred. It is impossible to be confident that, when he referred to the "more serious offences of selling, dealing, distributing, supplying, dispensing and storing hard drugs", he had the new offence in mind. The probability, as it seems to us, is that he did not. He went on to make the point in these terms: "So that in all cases that a person charged with the offence of in relation to hard drugs of selling or dealing or distributing, the pushers, that they should have the right to elect trial by jury if they so wish." It is difficult to think that he could have intended to include within the description "pushers" all those charged with the offence of possession with intent to supply: an offence which, as we have already observed, will include possession with intent to supply in a domestic or social context. Further, of course, the new offence of possession with intent to supply was not included in the list of more serious offences which appeared in Part B of the Second Schedule, or in the corresponding list of offences in the new section 25; both of which the Member must be assumed to have had in mind when he said what he did.

39. There is nothing in the debate in the Legislative Assembly which throws any light on why the new offence of possession with intent to supply was not included in Part B of the Second Schedule. But, as we have pointed out, the fact that it was not had the consequence that, when the 1985 Law was enacted, the maximum term of imprisonment to which a defendant

convicted of that offence could be sentenced was ten years. So, in the context of a debate as to whether defendants charged with more serious offences – attracting a maximum term of imprisonment in excess of fifteen years – should continue to enjoy the right to elect for jury trial, the new offence would not be under consideration.

40. In those circumstances, we find it impossible to hold that there is any clear policy – emerging from the debate in the Legislative Assembly in May 1985 – which supports the view that "dealing" in the new section 25 of the principal Law was intended to include the new offence of possession with intent to supply.

41. What may be said is that, when – in 1986 - the legislature decided to include the offence of possession with intent to supply in the list of more serious offences in Part B of the Second Schedule, it might have been expected to amend section 25 of the principal Law to reflect that change. But, for whatever reason, it did not do so. It may be that the legislature took the view that to do so would give a right to jury trial to those whose only intention was to supply in a domestic or social context; and that that would be undesirable. They were not "pushers": their offences were not likely to attract sentences in excess of fifteen years; and they were not defendants who had ever been intended to fall within the policy. It may have been thought too difficult to distinguish between them and those who were within the policy. We do not know; and it is not for us to speculate. As we have said, for whatever reason, the amendment was not made. Absent that amendment, we are not persuaded that there is any proper basis on which section 25 of the principal Law (now section 60(1) of the current Revision) can be given a meaning after the 1986 Law which differs from the meaning which it bore immediately before the 1986 Law.

Conclusion

42. It is, of course, tempting to hold that the present position is the product of cumulative drafting errors in the legislation: first, in failing, in 1985, to include the new offence in Part B of the Second Schedule to the principal Law (and to include it in the new section section 25); second in failing, when, in 1986, Part B of the Second Schedule was amended to include the offence of possession with intent, to make a corresponding amendment to section 25 as it then was. It is tempting to correct those perceived errors by giving a wide construction to the

word "dealing" in the legislation as it now stands. But we are in no doubt that we should resist the temptation to do either of those things.

43. As we have said, to hold that the present position has arisen as a result of error would be unjustifiable speculation: it is impossible to be sure that the legislature did not intend the result that, on a proper construction, it has achieved by the legislation which it has enacted. *A fortiori*, in circumstances where the practice of trying defendants charged with the offence of possession with intent to supply only in the Summary Court seems to have persisted over many years; and, despite a number of opportunities to do so in the various amending laws enacted since 1986, the legislature seems to have been content that that practice should continue. There is really no basis for an argument that the Court must now give effect "to what the legislature must have intended". We are not persuaded that to dismiss this appeal "would be tantamount to . . . undermining the policy which the legislature . . . deliberately confirmed in 1985".

44. Further, we do not think it is the proper role of the Court to give effect "to what the legislature must have intended" when, on a proper construction, that intention cannot be discerned in the words which it has used in the laws which it has enacted. The role of the Court is to interpret the legislation that has been enacted; not to give effect to its own (or anyone else's) view of what might have been enacted if the draftsman had been more skilful. The temptation to legislate under the guise of interpretation must be resisted. If there have been mistakes – so that the legislation does not truly reflect legislative policy - it is for the legislature to correct those mistakes.

45. We dismiss these appeals.

Chadwick, P.

Mottley, J.A.

Vos, J.A.