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

S.C.A. NO. 50 OF 2008

MARIUS VOICULESCU

V.

REGINA

Appearances:	**Mr. Nicholas Dixey of Mourant for the Appellant**
	Mr. John Masters of the Govt. Legal Dept. for the Crown, the Respondent
Before:	**Hon. Justice Henderson**
Heard:	**April 24 & August 4, 2009**

AMENDED JUDGMENT

1. This Ruling concerns the extent of the Grand Court's jurisdiction upon a conviction appeal from the Summary Court which raises a pure question of fact.

2. The Appellant Marius Voiculescu was convicted in the Summary Court of possession of a controlled drug, namely ganja. Mr. Voiculescu was traveling with a group of teachers to the United States on April 28th, 2008. As he was about to board the airplane, he was subjected to a random search by airport security personnel. A security officer opened Mr. Voiculescu's suitcase and

found a Benson and Hedges cigarette box inside. Upon opening the cigarette box, the officer observed three cigarettes and found "an unfamiliar smell – a smell other than cigarettes – coming from the box." He examined the box further and observed "a little bulge" in the foil paper in which the cigarettes were contained. Behind the foil, he found a half-smoked ganja cigarette which, upon analysis, was found to contain 0.12 grams of ganja.

3. When the half smoked ganja cigarette was pointed out to Mr. Voiculescu, he denied knowledge of it. He said that he had found the cigarettes lying on the ground next to his car. He kept the package and had smoked several of them. This explanation was repeated under oath at trial.

4. A urine sample was taken from Mr. Voiculescu and analyzed; it demonstrated that he had not been smoking ganja in the recent past. A DNA sample was found on the ganja cigarette and analyzed; it contained the DNA of two unknown persons, but Mr. Voiculescu's DNA (which was also analyzed) was not present. Evidence of Mr. Voiculescu's good character was presented at trial. The Learned Magistrate found as a fact that he was not a ganja smoker and had not smoked the ganja cigarette in question.

5. In her reasons for conviction, the Learned Magistrate said that the security officer was "immediately suspicious because of the smell coming from the box". Her use of the words "immediate" goes somewhat beyond the evidence from the officer recorded in the Learned Magistrate's notes. She also referred to "what must have been the strong smell of the half burnt spliff" and said, as

a consequence, that she found it impossible to accept Mr. Voiculescu's alleged lack of awareness of what was in the cigarette package. There was no evidence at all about the strength of the smell. The guard referred to it as an unfamiliar smell and Mr. Voiculescu said in evidence that he did not smell anything at all.

6. The security officer who seized the ganja cigarette handed it to a Cayman Airways agent (named "Ryan") who later gave it to a customs officer for retention as an exhibit. Ryan did not give evidence.

7. At the outset of the appeal, Mr. Voiculescu argued that his conviction is unsafe because some of the critical inferences drawn by the Learned Magistrate extend beyond what could be derived fairly from the evidence. He argued that there was no evidence as to the strength of the smell, no justification for concluding that the security guard was "immediately" suspicious, and no reason to find (as the Magistrate did) that the smell had "provoked" the guard to search the box. The evidence was that Mr. Voiculescu had been selected at random to be searched.

8. In his oral submission, Mr. Masters for the Respondent laid considerable emphasis on the advantage enjoyed by the Magistrate of having seen and heard the witnesses. He relied upon *Bertolino v. R.* 1990-91 CILR 112 (Grand Court) for the proposition that "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 conclusions."

9. After a short period of consideration, I delivered an oral ruling on April 24th, 2009 in which I said that I had significant misgivings about some of the inferences drawn by the Learned Magistrate but was also mindful of her superior opportunity to assess the evidence through having seen and heard the witnesses. I concluded that: "this is one of those rare cases where it would be appropriate to order a full re-hearing." I directed that the appeal should proceed by way of *trial de novo*.

10. The Crown now contends that, in giving this direction, I have exceeded my jurisdiction. Mr. Masters argues that:

    1. A re-hearing should only be ordered upon application by one of the parties;

    2. a re-hearing cannot be directed at all once the Appellant has commenced his argument; the need for a re-hearing must be identified at the very outset of the appeal;

    3. a re-hearing must be confined to a particular issue and not extend to the whole, or substantially the whole, of the evidence placed before the Summary Court.

    No authorities were cited by either party. I have been urged to construe the statutory jurisdiction by giving the provisions their plain and ordinary meaning.

11. The appellate jurisdiction of the Grand Court in criminal cases is provided for in section 165 (1) of the *Criminal Procedure Code* (2006 Revision) (the "Code"). That section provides that an appeal may be brought by motion

"on matters of law or fact (or both)". There is no limitation upon the Court's right to consider a pure question of fact. In disposing of the appeal, the Court is empowered to "confirm, reverse, vary or modify" the decision of the Summary Court and may remit the matter to that Court for a new trial or "make such other order in the matter as it may think just": Code, section 181. A judge of the Grand Court sitting on appeal may "exercise any power which the Summary Court might have exercised": *ibid*.

12. The Grand Court's power to draw inferences of fact from the evidence on the record, its right to hear further evidence from either side, and its jurisdiction to decide the appeal "with reference both to matters of fact and to matters of law" is found in Code section 179, which reads:

> "On an appeal by motion, the court may draw inferences of fact from the evidence given before a Summary Court, and, subject to the due notice having been given as hereinbefore mentioned, may hear any further evidence tendered by the appellant, and may take and admit, if it thinks fit, any further evidence tendered in reply and also such other evidence as it may require, and it may decide the appeal with reference both to matters of fact and to matters of law."

13. An appellant who seeks to call fresh evidence on appeal must provide at least three clear days notice in writing to the Crown and obtain the leave of the Court for examination of the additional witnesses: Code, section 178.

14. The unfettered nature of these provisions with respect to appeals on questions of fact is further confirmed by the terms of section 185 of the Code:

> "In any case of appeal, the court may hear and determine

> the case upon the merits, notwithstanding any defect in form or otherwise in the conviction, order or judgment, and if the appellant is found guilty the conviction, order or judgment shall be confirmed and, if necessary, amended."

15. In this section, the phrase "if the appellant is found guilty" is used in reference to one possible outcome of the appeal. That is language which, in its ordinary usage, is applied to a decision upon the adequacy of the evidence.

16. Section 154 (1) of the Code provides two possible ways in which an appeal may be initiated: by motion (which is the usual case) and by way of case stated on a point of law alone (an infrequent procedure in this jurisdiction). Most appeals brought by motion are disposed of in a manner similar to that which prevails in our Court of Appeal: grounds of appeal are filed, the Magistrate's notes are typed and become the record of the trial proceeding, and the attorneys are encouraged (but not usually required) to file skeleton arguments and briefs of authorities. The oral argument is based upon the record of proceedings; fresh evidence is not introduced. This is a suitable procedure for the disposition of most appeals.

17. An integral part of this scheme is the right of the Court, expressed in section 177, to require a re-hearing:

> "On an appeal by motion, unless the Court considers the justice of the case required a re-hearing, the appellant shall begin, and unless he satisfies the Court that it is necessary to call on the respondent, the conviction, order or judgment shall be confirmed:
>
> Provided that, if the Court directs a re-hearing the respondent, if the issue is with him, shall begin and prove his case, and the

> Court may, if the justice of the case requires it, adjourn the hearing to some convenient day."

18. The Court may require a re-hearing in any case where it considers that "the justice of the case" requires it. There is no suggestion anywhere in the legislation that the Court may not act upon its own motion. There is a sound reason for that: in many of the criminal appeals from the Summary Court to the Grand Court, the appellant is acting in person and would not be aware that a re-hearing is a possibility. If the Court could not, when the justice of the case required it, initiate the re-hearing process itself, such appellants would be placed at a severe disadvantage. I am satisfied that the Legislature intended that the Court should exercise its discretion to require a re-hearing even in circumstances where neither party has requested it. If the Legislature had contemplated a re-hearing only upon application by one side or the other, it would have used language like "upon application by either of the parties to the appeal…" . The first proposition advanced by the Crown – that I should not have directed a rehearing because neither party asked for one – is rejected.

19. The Crown's second proposition – that no re-hearing can be directed at all once the appellant has commenced his argument – is equally unattractive. Given the volume of appeals coming before this Court from the Summary Court, the judge sitting on appeal will not necessarily have a full command of the facts and issues at the outset of oral argument. It may well be that the argument itself brings into focus the need for a re-hearing. I see no utility in a rule which would prevent a re-hearing unless the Court has identified a

need for it at the outset. I would not adopt such a construction of section 177 unless I was compelled to do so by clear and unambiguous language. There is nothing in the wording of section 177 which compels such a conclusion.

20. The third and final argument presented by the Crown is that a re-hearing must be confined to a particular issue and not extend to the whole, or substantially the whole, of the evidence placed before the Summary Court. It is not easy to discern what legislative intent would be well served by such a provision. Why would it be permissible, even expected, to re-try parts of the case but forbidden to re-try the entirety of it? In the United Kingdom, the appeal by way of *trial de novo* is still a common feature of the criminal justice system. In any event, the *Criminal Procedure Code* refers only to a "re-hearing," without qualification. Nowhere is there a suggestion that a partial re-hearing is permitted but a full re-hearing is not. This final objection to my jurisdiction to make the Order is rejected.

21. I would not want these reasons to be taken as an indication that the Court will direct a re-hearing of a summary conviction trial routinely or lightly. An appellant has no automatic right or entitlement to a *trial de novo* in the Grand Court. A re-hearing is and will remain an exceptional procedure, to be resorted to only where there is a particular justification for it. However, to restrict the availability of re-hearings in the manner now contended for by Crown Counsel would amount to a refusal to accept the very broad jurisdiction which the Legislature has conferred upon this Court.

22. For these reasons, the Crown's submissions on jurisdiction are rejected. The appellant is at liberty to list the re-hearing.

Dated this 6th day of August, 2009

Henderson, J.
Judge of the Grand Court