24-07-07

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Criminal Appeal. NO. 7/2007

BETWEEN

DONOVAN BEACHER

APPELLANT

AND

HER MAJESTY THE QUEEN

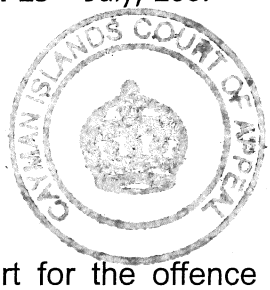
RESPONDENT

BEFORE: **The Right Hon. Mr. Justice Zacca, P.**
The Hon. Mr. Justice Taylor, J.A.
The Hon. Mr. Justice Forte, J.A.

Anthony Akiwumi of Stuarts for the Appellant.
Hon. Solicitor General, Cheryll Richards and Trevor Ward for the Respondent.

Heard: **23rd July, 2007**

Judgment given 24th July, 2007
Reasons released: 25th July, 2007



PRESIDENT

Reasons for Judgment

The appellant was convicted in the Summary Court for the offence of being concerned in the importation of 4.60 grams of cocaine. He was sentenced to fifteen years imprisonment. The offence was committed on February 15, 2002. The trial in the Summary Court commenced on July 8, 2003 and after several hearing dates the case was completed on August 18, 2003.

The appellant appealed on the ground that he was entitled to an election as to the mode of trial which was denied him in the Summary Court. Henderson J. allowed the appeal and ordered a retrial. On appeal to this court, by the

crown, the appeal was allowed on the basis that there was no election prescribed for the offence and that trial was properly conducted in the Summary Court.

As the only matter dealt with by Henderson J was the issue of election this court remitted the matter to the Grand Court to consider other grounds of appeal which had been filed but not argued.

Henderson J reheard the appeal and dismissed it, affirming the conviction. His reasons were contained in a judgment dated March 22, 2007.

From this judgment the appellant appeals against his conviction and sentence.

The case as presented by the crown was that the appellant had agreed with two men in Jamaica ("Belli and Yee") to buy cocaine from them. The cocaine was to be smuggled from Jamaica to the Cayman Islands and delivered to the appellant.

Altin Murphy, who testified on behalf of the crown, stated that he was recruited by Belli and Yee to import the cocaine into Grand Cayman. He swallowed the drugs and on his arrival in Cayman, he attracted the suspicion of Customs Officers. He was taken to the hospital and an X-ray of his abdomen showed that he had ingested drugs. Ninety one pellets of cocaine were excreted from his system.

Altin Murphy also stated that he had a brown envelope which purported to have written on it a telephone number at which to contact the appellant. Customs Officer Jackson telephoned the number but no contact was made with

the appellant. Murphy then telephoned to Jamaica and asked Belli for the correct number of the appellant which was then given to Customs Officer Jackson.

An undercover Officer, posing as Murphy, telephoned the number and the conversation was recorded. There was evidence that the voice on the other end of the line belonged to the appellant. Murphy was unknown to the appellant and an arrangement was made for the appellant to meet him at room 5B at Beach Club Hotel. The crown's case was that the context of the recorded conversation demonstrated that the appellant was intending to traffic in cocaine. The envelope with the number on it was not produced at the trial.

When the appellant arrived at room 5B it was indicated to him by the undercover officer posing as Murphy that the drugs were present in the room. On the officer disclosing his identity the appellant ran, from the room but was caught and arrested.

Mr. Akiwumi on behalf of the appellant argued the following grounds of appeal:-

(1) The appellant was denied the right to legal representation during his trial and as a result the conduct of his defence was substantially prejudiced and the trial was unfair.

(2) Inadmissible hearsay evidence was adduced by the crown from the witness Altin Murphy and relied upon by the Learned Magistrate in her judgment.

(3) Inordinate delay in the delivery of judgments of the Grand Court such as to affect the fundamental fairness of the trial and the appellant's right to a trial within a reasonable time.

(1) Denial of legal representation:

It is necessary first of all to look at the chronological assessment of the history of the legal representation accorded to the appellant at trial:

(a) The appellant first appeared in court on February 22, 2002.

(b) On March 19, 2002, Mr. Schofield, of counsel, appeared for the appellant and a trial date set for April 30, 2002.

(c) On April 30, 2002 the trial date was vacated and a new trial date was fixed for July 2, 2002.

(d) On July 2, 2002 the trial date was again vacated. August 6, 2002 was set as the new trial date.

(e) On August 6, 2002 the trial was adjourned to October 21, 2002.

(f) On September 12, 2002, the trial date of October 21, 2002 was vacated and a new trial date set for November 4, 2002.

(g) On October 21, 2002 Mr. Schofield was granted leave to come off the record. The matter was adjourned to November 4, 2002.

(h) On November 4, 2002, the appellant expressed the wish to retain Mr. Bert Samuels of the Jamaica Bar and the trial was set for February 25, 2003.

(i) On November 18, 2002 Mr. Collins appeared for the appellant.

(j) On January 2, 2003 Mr. Collins was granted leave to come off the record and was replaced by Mr. Dixon.

(k) On February 25, 2003 Mr. Dixon was granted leave to come off the record. Mr. Allen was placed on the record and the appellant advised that that would be the last legal aid assignment.

(l) Mr. Allen appeared thereafter and a trial date was set for June 17, 2003.

(m) On June 17, 2003, Mr. Allen informed the court that he was no longer representing the appellant.

(n) On June 18, 2003, the legal aid certificate was assigned to Mr. Aiolfi and the case set down as a priority trial for July 8, 2003.

(o) On July 8, 2003 Mr. Aiolfi informed the court that the appellant no longer desired his services. The appellant indicated that he would represent himself. The trial began.

(p) On July 10, 2003, after two days of evidence by the crown, the appellant changed his mind and advised the court that he wanted an attorney-at-law after all. He said he could not manage the case himself. The appellant informed the court that he was attempting to privately retain Ms. Sheridan Brooks-Hurst to represent him. The court ruled that the trial would proceed but granted an adjournment to July 23, 2003,

to allow the appellant to get legal representation. A mention date of July 14, 2003 was interposed.

(q) On July 14, 2003, Ms. Brooks-Hurst indicated to the court that she had no instructions in the matter. The appellant informed the court that he would be represented by counsel on July 23, 2003. The case was adjourned to July 21, 2003 for review.

(r) On July 21, 2003 Mrs. Jafa-Bodden appeared for the appellant and the case was adjourned to July 22, 2003.

(s) On July 22, 2003, Mrs. Jafa-Bodden instructed that if legal aid was assigned she could assume conduct of the trial a week later. The court ruled that having regard to the history of the matter it felt unable to extend legal aid to cover the expenses of a sixth attorney for the appellant. The court indicated that if an attorney was willing to accept the brief pro bono then it would be prepared to adjourn the matter for counsel to be fully briefed. The matter was adjourned to July 23, 2003.

(t) On July 23, 2003 it appearing that Mrs. Jafa-Bodden was not prepared to act pro bono, she was granted leave to come off the record.

The appellant's application for a further adjournment was denied.

Mr. Akiwumi submitted that the learned Grand Court Judge was in error in only looking at the chronological assessment of the number of counsel that the appellant had; and he failed to deal with the substance of the complaint which had led the appellant to dispense with the services of previous counsel. It was

indicated to the court that the appellant was of the view that he was entitled to elect trial by jury in the Grand Court. It appears that his several counsel disagreed with his view.

Ms. Richards for the crown submitted that the appellant was entirely to blame for his non representation. He had been assigned at least six lawyers; a year and a half later the trial had not yet commenced. In these circumstances it could not be said that the appellant was denied legal representation. She argued that the court granted him every indulgence possible. ***R v Mills [1997] Crim. L.R.603***

In ***Robinson v R [1985] 32 W.I.R. 331, Lord Roskill*** at page 338 stated:-

> "In their Lordships' view the judge's exercise of his discretion, which counsel for the appellant rightly conceded to exist, can only be faulted if the constitutional provisions made it necessary for the judge, whatever the circumstances, always to grant adjournment so as to ensure that no one who wishes legal representation is without such representation. Their Lordships do not for one moment underrate the crucial importance of legal representation for those who require it. But their Lordships construe the relevant provisions of the constitution in such a way as to give rise to an absolute right to legal representation which, if exercised to the full, could all too easily lead to manipulation and abuse…….
>
> If a defendant faced with a trial …. (of the date of which the appellant had had ample notice) does not take reasonable steps to ensure that he is represented at the trial, whether on legal aid or otherwise, he cannot reasonably claim that the lack of legal representation resulted from a deprivation of his constitutional right."

In our view the magistrate was entitled to refuse another adjournment to enable the appellant to once again seek further legal representation. He had

already been given several legal aid assignments but he had dismissed counsel, and he had also indicated to the court that he was able to privately retain counsel.

It cannot be said, in the circumstances of this case, that the appellant was denied legal representations. His non-representation resulted from his refusal to accept the legal representation which he was offered and his inability to retain counsel of his own choice. The absence of legal representation in this case cannot be said to give rise to a miscarriage of justice. This ground of appeal fails.

Inadmissible Hearsay Evidence

Mr. Akiwumi submitted that the statements made by the witness Altin Murphy, were inadmissible against the appellant. He argued that in the absence of a conspiracy charge, or where parties are jointly charged, such evidence was hearsay and inadmissible. Also that the crown could not lead evidence of the importation of the drugs unless there was a joint charge, reliance for this proposition being placed on the case of ***R v David John Gray and others [1995] 2 Cr. App. R. 100.***

Ms. Richards responded that the evidence was admissible and not hearsay in the context of the crown's case. The question was not whether there was a joint charge, but whether there was a joint enterprise. There was clear evidence that all were acting together in respect of one enterprise, she argued that the enterprise was still on-going when the telephone conversation was taking place; the transmission of the telephone number was to give effect to that enterprise and ensure that it reached the desired conclusion. It was submitted

that Gray's case was distinguishable from the instant case. ***Brian Jones and others [1997] 2 Cr. App. 119.***

Gray's case involved separate transactions in respect of which individual defendants were charged with a number of separate substantive offences. See ***Archbold 2006 Edition paragraphs 34-60A; 34-60B***. At paragraphs 34-62- it is stated:

> "The principle stated in paragraphs 34-60 applies when the charge is one of a crime committed in pursuance of a conspiracy, whether the indictment contains a count for conspiracy or not, and whether the co-conspirator be indicted or not, or tried or not: Phillips, Treatise on Evidence (4th ed., 1820) paragraph 96-100;
> Phipson on Evidence (15th ed.) para. 29-10; R v Jones, ante; R v Murray [1997] 2 Cr. App. R 136. The principle does not, however, extend to cases where individual defendants are charged with a number of separate substantive offences and the terms of a common enterprise are not proved or are ill defined: R v Gray [1995] 2 Cr. App. R 100. C.A. as explained in R v Murray, ante. Tripodi v R [1961] 104 C.L.R. 1."

In our view the evidence of Altin Murphy was admissible. It related to directions and instructions or arrangements. They were words spoken in pursuit of and for the purpose of advancing the common enterprise. In his interview the appellant admits that he went to the Beach Club to meet Altin Murphy.

The evidence led by the crown was clear that there was a joint enterprise between the persons in Jamaica, and the appellant. We hold that the evidence was properly admitted by the magistrate.

3. Inordinate Delay

This ground of appeal arises from the judgment of Henderson J delivered on March 22, 2007. The hearing was completed on October 6, 2006. This would be a delay of some five months. Mr. Akiwumi submitted the delay should include the period when the first appeal was heard by the Grand Court. This was in September 2005, with delivery of judgment on February 3, 2006, a delay for some five months. He argued that, taken together, the two would amount to inordinate delay.

We cannot accept this proposition. The only relevant delay relates to the delivery of the judgment of Henderson J. on March 22, 2007, a delay of some five months.

It has not been demonstrated by the appellant that, as a result of this delay, the learned judge was unable to produce a proper judgment. No errors or inaccuracies with respect to the arguments have been shown. There was nothing to suggest that he misinformed himself or that he did not take into account matters which he ought to have.

Boodhoo v Attorney General of Trinidad and Tobago [2004] 1 W.L.R. 1689 was a case where there was a delay of some 13 months in delivering judgment on an appeal.

A distinction had to be made between the delay in the pronouncement of a judgment and delay in affording a litigant a hearing within a reasonable time. There is also a distinction to be made between pronouncement of a judgment after the hearing of an appeal.

In Boodhoo case, Lord Carswell in making reference to the judgment of the Court of Appeal in Trinidad and Tobago, at paragraphs 11, 12, and 13, said :-

> "11. The Court of Appeal held that in principle an excessive delay in giving judgment could infringe the section 4(b) rights of a litigant. De la Bastide CJ went on to say, at p 12:
>
> > "For there to be an infringement of this right , the delay in delivering judgment must, in my view, be of such an order as would really make a mockery of a person's right to have a determination of a matter by the competent court or tribunal."
>
> It is hardly necessary to say that different considerations apply to cases of delay in giving judgment from those concerned in cases of delay in affording a hearing. In the latter type of case the evidence which is to be adduced may no longer be reliable or the testimony of essential witnesses may not be obtainable. In the former, of which Goose v Wilson Sandford & Co The Times, 19 February 1998 provides an example, delay may have so adversely affected the quality of the decision that it cannot be allowed to stand. It may be established that the judge's ability to deal properly with the issues has been compromised by the passage of time, for example if his recollection of important matters is no longer sufficiently clear or notes have been mislaid. These are, however, extreme cases, ordinarily associated with inordinately long periods of delay. In his judgment in the present case de la Bastide CJ referred to the setting of target times, observing, at pp 13-14:
>
> > "I have in the past suggested that in the context of our conditions six months should be regarded as the maximum time which parties should reasonably be expected to wait for a judgment from the High Court or Court of Appeal. I do not think, however, that because the delay in giving judgment has gone past that

> marker it should immediately and automatically be regarded as an infringement of the litigant's constitutional rights. I think it is necessary to set the bar a good deal higher before that stage is reached, bearing in mind that our Constitution does not provide any right to trial within a reasonable time either in criminal or in civil cases. I have already suggested that it is only when the delay becomes so gross as to make a mockery of a party's right to the Court's adjudication, that the infringement is established. When that occurs is, I think, better left to be established on a case by case basis"

Their Lordships are in basic agreement with these views and with the approach which the Court of Appeal adopted to this issue, subject to the formulation which follows.

12. In their Lordship's opinion delay in producing a judgment would be capable of depriving an individual of his right to the protection of the law, as provided for in section 4(b) of the Constitution of Trinidad and Tobago, but only in circumstances where by reason thereof the judge could no longer produce a proper judgment or the parties were unable to obtain from the decision the benefit which they should. For example, on an application to prevent the threatened abduction of a child, any delay in giving judgment might deprive both the applicant and the child of the benefit which the legal remedy was there to provide. Their Lordships do not think it profitable to attempt to define more precisely the circumstances in which this may occur or to specify periods of delay which may bring about such a result, since cases vary infinitely and each has to be considered on its merits, applying this principle.

13. In the present case Gopeesingh JA died almost 14 months after judgment was reserved. It cannot be said that the appellants would have been deprived of the benefit of the appeal if judgment had been given on the day the judge

> died or after a rehearing of the appeal. Nor can it be said that the court would be unable to produce a proper judgment. It being an appeal, the judge's decision did not depend on oral evidence or the recollection of witnesse's testimony, and there was no suggestion that any documentation had been lost or mislaid. Mr. Knox for the appellants submitted that a delay of 12 months was unacceptable, basing himself on such cases as Cobham v Frett [2001] 1 WLR 1775, 1783. He argued that that must be the top limit, after which any further delay must inevitably give rise to a breach of constitutional rights. Their Lordships are unable to accept that submission. Mr. Knox had to accept that if the judge had died within a shorter time, perhaps under six months, without having given judgment, it would constitute a hazard of life and would not amount to a breach of constitutional rights. He also accepted that if a judgment had been produced after 14 months, it would not have been defective. Their Lordships consider that no finite period can be prescribed and that the only applicable principle is that which their Lordships have enunciated."

The judgment delivered by Henderson J. related to a hearing on appeal and not after a trial. It cannot be said that, in the circumstances of this case, there was inordinate delay in pronouncing judgment. There has been no prejudice to the appellant. This ground of appeal also fails.

In our view the evidence presented by the crown was very strong and the magistrate cannot be faulted in coming to a conclusion that the appellant was guilty of the charge of being concerned in the importation of cocaine.

Mr. Akiwumi also submitted that the sentence imposed by the magistrate was manifestly excessive.

This was a case of cocaine weighing 460.26 grams. The sentence imposed was within the guidelines proposed by the Chief Justice in 2002. We are unable to say that the sentence was manifestly excessive. This court will not interfere with the sentence imposed by the magistrate.

It was for these reasons we dismissed the appeals against conviction and sentence. We affirmed the conviction and sentence.

Despite the fact that the delay in the completion of the trial was due mainly to the appellant, the court ordered that time spent in custody from February 2002 was to be taken into account.

Before parting with this appeal, we would wish to commend the magistrate on her well reasoned judgment. She dealt fully with the facts and the law in a commendable and fair way.

E. Zacca, P.

M.R. Taylor, J.A.

I. Forte, J.A.