11-08-06

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

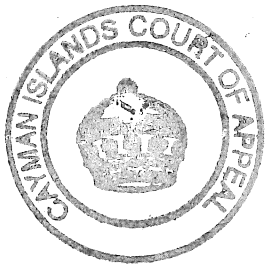
C.I.C.A. #'s 17 & 18/2005
(SCA 6/04)
C# 1786/02(1)(3) C#2577/02(3)

BETWEEN:

DONALD KNIGHT

AND

HER MAJESTY THE QUEEN



BEFORE: THE RT. HON. JUSTICE E. ZACCA, PRESIDENT
THE HON. MR. JUSTICE M. TAYLOR J.A.
THE HON. MR. JUSTICE E. MOTTLEY J.A.

Appearances: Mr. Lee Freeman of Broadhurst Barristers for Donald Knight.
Ms. Cheryll Richards, Solicitor General and Mr. Trevor Ward for the Attorney General.

HEARD: April 20, 2006 DELIVERED: 11th August, 2006

PRESIDENT:

The appellant Donald Knight was convicted in the Summary Court for the offence of being concerned in the importation of cocaine. It was alleged that one Emily Scott imported the cocaine into the Cayman Islands. Knight was sentenced to 14 years imprisonment and for the offence of interfering with a witness a further 6 months consecutive. This was after a second trial, a re-trial having been ordered after a successful appeal.

The appellant appealed his conviction and the Grand Court (Levers J.) allowed his appeal and ordered a re-trial. Levers J held that the offence of being concerned in the importation of cocaine was a Category B offence which was triable on indictment or, with the consent of the prosecution and accused, triable summarily.

It is accepted that there was no consent to the offence being tried summarily.

The offence of importation is a Category B offence and cannot be tried summarily without the consent of the prosecution and the accused.

In a further ruling Levers J. disagreed with a previous decision of the Grand Court ***A.G. v Donald and Godden (1997) C.I.L.R. R. 494*** in which it was held that the offence of being concerned in the importation of cocaine was a Category C offence and therefore triable summarily. It appears that the Donald's case was not referred to in her original reasons for her decision. It is fair to assume that this case was brought to her attention after her decision and, being contrary to her decision, it was necessary for her to consider the judgment in that case. As mentioned above the learned judge came to the conclusion that that decision was wrong.

In this further ruling Levers J. stated at page 3:

> "The substantive charge is importation and the addition of the words "being concerned in" does not nullify the need to prove the elements of the offence of importation. In my view "being concerned" is an offence of importation within the meaning of section 59(1). There is no reason in my view therefore to deal with the charge as anything other than a Category B charge of importation."

It seems therefore that Levers J. was stating that the offence of "being concerned" and importation was one and the same offence and therefore, since Importation was a Category B offence, then "being concerned" must also be a Category B offence.

We cannot accept this proposition. The offence of "being concerned" is a separate and distinct offence. In Part B of the second schedule of the Misuse of Drugs (2000 Revision) Law "Importing" is listed as a separate offence and so is "being concerned" ***R v Hughes (1985) 81 Cr. App. R 344***.

It is true that there must be evidence of an importation but it does not follow that a person charged with "being concerned", and convicted, could also be convicted for the offence of importation without there being such a charge.

The Crown has appealed the decision of Levers J and has argued that the offence of "being concerned" in the importation of cocaine is a Category C offence and therefore triable summarily.

Mr. Freeman who appears for Knight has submitted that the offence is a Category B offence and therefore triable on Indictment or with the consent of the prosecution and accused triable summarily.

The issue before this Court is whether the offence of being concerned in the importation of cocaine is a Category B or a Category C offence.

The Misuse of Drugs Law (2000 Revision) provides in s 3(1):

(1) whoever, without lawful excuse or without being authorized 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 of such matters is guilty of an offence.

This section provides for the offences. It does not state in which category they belong.

S.60(1) of the Misuse of Drugs Law (2000 Revision) sets out a number of the offences mentioned in s.3(1) which are deemed to be category B offences.

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 s3(1) which relates to a controlled drug that is a hard drug, 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 (1995 Revision).

60(2) For the removal 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."

Section 60(1) therefore sets out the offences which may be tried on Indictment and, if so tried, the sentences which may be imposed as provided for in Part B of the second schedule.

The Criminal Procedure Code (2005 Revision) provides for the mode of trial in section 5:

> 59(1):For the purpose 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.
>
> 5(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.

The first schedule sets out a number of offences and the category in which they are placed. However at page 80 there is the following provision:

> "Classification of offences against other laws where no mode of trial prescribed" when the maximum punishment exceeds ten years imprisonment – A. When the maximum

> punishment is one year imprisonment is one year imprisonment or a lesser punishment – C. All other offences – B.

Mr. Freeman for Knight submits that no mode of trial has been prescribed for the offence of being concerned in the importation of cocaine, which carries a maximum punishment exceeding 10 years, and could therefore be a Category A offence. He submitted however, that it is a Category B offence.

In ***Attorney General v Donalds and Gordon [1997] CILR 494,*** the issue before the Grand Court was whether the offence of being concerned in the importation of a hard drug was a Category B offence.

The Court had to consider the provisions of section 59(1) and section 4(1) of the Misuse of Drugs Law (1995 Revision).

Section 60(1) and 3(1) of the Misuse of Drugs Law (2000 Revision) are in similar terms to section 59(1) and section 4(1).

It is accepted, that prior to the 1995 amendment, all drug cases were tried summarily. In his judgment at page 501 line 22, Orr J. sated:

> "I adopt the statement expressed by the author of Craies on statute Law: "the cardinal rule for the construction of Acts of Parliament is that they should be construed according to

> the intention expressed in the Acts themselves". The Misuse of Drugs Law (1995) Revision) consolidated and revised previous laws relating to the misuse of drugs. In my opinion, the words of s 59 of the law are clear and explicit. It is evident that the intention of the legislative was to alter the existing procedure for the trial of offences under s 4 (1) of the law. To this end, s 59(1) was enacted. It stipulates those offences which are triable on indictment and those triable summarily by indicating the category of the offence in accordance with s 5 of the Criminal Procedure Code. A comparison of ss 4(1) and 59(1) reveals that the offence of being concerned in the importation of a controlled drug is one of at least five offences for which the category has been unaltered by s.59(1)".

Section 60(1) therefore created certain offences under s. 4(1) which are deemed to be Category B offences. The maximum penalty for possession with intent exceeds 10 years imprisonment. If the submission of Mr. Freeman is correct, it would follow that there is no mode of trial provided for this offence and since the maximum penalty is over 10 years, it would be at least a Category B offence.

It is not submitted that the offence of possession and possessing with intent to supply are in fact Category B offences. These have always been trial summarily as has been the offence of being concerned.

In our view s. 60(1) clearly states the offences in s. 3(1) which are deemed to be Category B offences. The offences which are omitted include being concerned. This was previously tried summarily as a Category C offence and continues to be a Category C offence.

We respectfully agree with the decision in Donald's case. The offence of being concerned in the importation of cocaine is not converted into a Category B by s.5 (2) and the first schedule of the Criminal Procedure Code. The mode of trial prior to the amendments (s.59(1) and now s.60(1)) was as a Category C offence and, having not been deemed to be a Category B offence, continues to be a Category C offence.

We therefore hold that the offence of being concerned in the importation of cocaine is a Category C offence, triable summarily.

It is for these reasons we allowed the appeal of the Crown and set aside the decision of the Grand Court.

Mr. Freeman informed the Court that he did not wish to make submissions on Knight's appeal against the conviction and sentence. The appeal of Knight was abandoned.

In the circumstances the Court made an order affirming the Magistrates' decision as to conviction and sentence. Time spent in custody to be taken into account.

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ZACCA, P.

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TAYLOR, J.A.

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MOTTLEY, J.A.