11-08-06

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

C.I.C.A. #'s 19 & 20/2005
(SCA 61/02)
(C#4435/02(2))

BETWEEN CLARISSA ZELAYA De ACOSTA

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. Trevor Ward for the Attorney General
Mr. N. Dixey of Quin & Hampson for De Acosta.

HEARD: APRIL 21st 2006 DELIVERED: 11th AUGUST, 2006

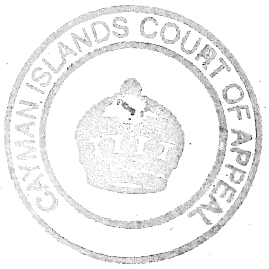
PRESIDENT:

Clarissa Zelaya De Acosta was charged with the following offences:

(1) Possession of cocaine

(2) Importation of cocaine

(3) Possession of cocaine with intent to supply



After a trial before the Magistrate she was convicted of all three offences. A sentence of 14 years imprisonment was imposed on the importation charge but no further penalty imposed on the two

possession charges as the Magistrate held that they were subsumed in the importation charge.

She appealed the conviction to the Grand Court on the ground that the offence of Importation of cocaine was a Category B offence triable on Indictment or summarily with the consent of the prosecution and the defence. It was submitted that the parties did not expressly confer jurisdiction upon the summary court and therefore the trial was a nullity. Levers J found that there was no consent to a summary trial and held that the trial was a nullity and ordered a re-trial on all the charges.

From this decision the Crown appealed and there was a cross appeal on behalf of De Acosta. As a result of the decision arrived by this Court, it is unnecessary for us to set out the facts.

For the Crown it was submitted that s. 5 of the Criminal Procedure Code does not make it mandatory that a written record should be made of the election. An affidavit by Magistrate Nova Hall who tried the case was filed on behalf of the Crown. In that affidavit she stated:

> "It is the usual procedure in the Summary Court that a plea will not be taken on a Category B offence unless and until a mode of trial has been conducted and the accused

> agrees to be tried in the Summary Court. I have no reason to believe that there would have been a departure from the procedure in the instant case".

It is accepted that no where is there a record of the defendant consenting to a summary trial. Mr. Dixey who appeared for De Acosta informed the Court that Counsel who appeared for the respondent at the trial is unable to recall whether on election took place.

Mr. Ward for the Crown submitted that no presumption can be drawn merely on the absence of such a record.

Section 60 of the Misuse of Drugs Law (2000 Revision) provides:

> 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 purpose of determining the mode of trial, a Category B offence in accordance with section 5 of the Criminal Procedure Code (1995 Revision).

Section 5(1) of the Criminal Procedure Code (1995 Revision) provides:

> "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".

The offence of importing cocaine is a Category B offence and can only be tried in the Summary Court with the express consent of the parties. The Magistrate is obliged to record the proceedings in the Court. No where in the transcript is it recorded that the parties were given an election as to the Category B offence. Mr. Ward for

the Crown concedes that he is unable to point to any specific record that an election was put.

In ***Gonzalez and Suarez v R [1984] CILR 10 Summerfield C.J.*** at page 29, line 6 said:

> "It is perfectly clear that unless the prosecution and the person(s) charged give their consent to a Category B offence being tried summarily the Magistrate has no jurisdiction to try it summarily. He must proceed by way of preliminary enquiry. In my view that consent must be express. Mere acquiescence is not enough. Acquiescence would obviously not be sufficient where an accused person is not represented. I do not see how it can be any different if he is represented. The consent must come from both the prosecution and the accused person(s). Without the consent of both the Magistrate has no jurisdiction to try a Category B offence. Those consents must be obtained before the accused is impleaded. Furthermore those consents should be recorded so that it is plain from the record that the Magistrate had jurisdiction. That is emphasized in many of the cases cited." .....
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> "Failure to take objection cannot cure the absence of jurisdiction".

On appeal to the Court of Appeal reported at [1984] C.I.L.R. 197 Kerr J.A. at page 226 stated that he concurred with Summerfield C.J. in his treatment of the absence of the requisite consents.

Where a Category B offence is charged it is the duty of the Magistrate to record whether an election has been made for the trial to proceed in the Summary Court.

We concur with the decision of Levers J that in the circumstances of this case, the trial was a nullity. The appeal of the Crown was dismissed and the order of the Grand Court affirmed. In the interest of Justice we also held that a re-trial should be ordered.

Before parting with this appeal the Court on its own motion referred Counsel to the reasons of the Magistrate at page 5 and 6 where she stated:

> "I am satisfied that the Crown has established beyond a reasonable doubt that the defendant imported the cooler which contained the cocaine into the Cayman Islands. Pursuant to section 9(1) (a) of the Misuse of Drugs Law (2000 Revision) the presumption is raised that the defendant was aware of the presence of the cocaine in the cooler. <u>There is a burden on the defendant to prove the contrary.</u>
>
> <u>It is a settled principle that the defendant's burden is lighter than the prosecution's and consequently the standard to be met by the defendant is on a balance of probabilities".</u>

This direction should no longer be given. The directions which should now be given to the jury (or a judge sitting alone), in applying the words "to prove" and "if he proves" should be that the burden of

proof remains on the prosecution throughout. If sufficient evidence is adduced on behalf of the defendant to raise the issue of knowledge, it will be for the prosecution to show beyond a reasonable doubt that the defence is not made out by the evidence: ***Regina v Lambert [2002] 2 A.C. 545,*** a House of Lords decision, per Lord Steyn at paragraph 42; Lord Hope at paragraph 94 and Lord Hutton at paragraph 192.

The directions to be given on the burden of proof as stated in Lambert's case was approved and adopted in the case of ***Darrell and Medeiros***, Criminal appeal 14 and 15 of 2005, in the Court of Appeal for Bermuda.

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ZACCA, P.

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TAYLOR, J.A.

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MOTTLEY, J.A.