

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CRIMINAL SIDE**

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4
5 **SCA #: 0027/2015**
6 **CASE #: 01672/2015**

7
8 **JUDE ROLAND THEOBALDS**

9
10 **V.**

11
12 **THE QUEEN**

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15 **Appearances:** **Mr. John Furniss for the Applicant**

16
17 **Mr. Kenneth Ferguson for the**
18 **Crown/Respondent**

19
20 **Before:** **Justice Michael Mettyear (Actg.)**

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22 **Heard:** **2nd November 2015**

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25 **JUDGMENT**



26
27 ***INTRODUCTION***

28 1. On the 19th June 2015 the Applicant was convicted of a burglary and an associated
29 offence which had taken place on the 29th December 2014. It was the burglary of a
30 dwelling house. For present purposes the details of the offences do not matter, it
31 being sufficient to say that a good deal of property was taken and a great deal of
32 inconvenience and distress was caused.

33 2. The conviction took place in the Summary Court following a trial before Magistrate
34 Kirsty-Ann Gunn. The Applicant wishes to appeal the conviction. I have been told
35 that, for the appeal, no evidence will be called and the hearing will be by way of
36 submissions only.

- 1 3. The unusual feature about this proposed appeal is that the Applicant has not yet
2 been sentenced and he applies to have his conviction appeal heard before he is
3 sentenced. There would, of course, be no sentencing for the offences if the appeal
4 were to be successful. Sentencing at the Summary Court stands adjourned pending
5 the result of this hearing.
- 6 4. My experience in England and Wales is that appeals against conviction are
7 invariably heard after sentence has been imposed. I have no recollection of any
8 exception to that practice. Counsel before me confirm that the same practice is
9 followed in the Cayman Islands. Neither remembers any exception.
- 10 5. Despite this, Mr. Furniss, counsel for the Applicant, says that there are powerful
11 reasons in this case for that practice to be varied. The reasons are connected to the
12 fact that the Applicant is and was at the time of the conviction a “client” of the
13 Drug Court. It is necessary to say a few words about that Court.
- 14 6. As I understand it, a person accused of a “relevant” offence may apply to be dealt
15 with by the Drug Court. The Crown then has the primary responsibility of deciding
16 whether that defendant is a suitable candidate to be dealt with in that Court. If he is
17 accepted, he has to successfully complete four phases. The details of the contents of
18 these phases are not relevant, but the requirements are rigorous and designed to
19 divert the client from further drug taking and offending. If the client is successful,
20 he or she then “graduates”. The reward would then be that the offence for which he
21 had been sent to the Drug Court would usually be dealt with by a discharge – either
22 absolute or conditional. Often no conviction would be recorded.

23



1 7. A person subject to this regime may be expelled from it, if, for instance, he or she
2 fails to properly participate or commits a further serious offence. In such
3 circumstances that person's case would be referred to a regular sitting of the
4 Summary Court for disposal in the normal way.

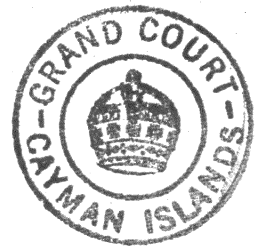
5 8. In the present case the Applicant came was admitted to the Drug Court on a date
6 unknown to Counsel, but said to be about a year ago. It is agreed that the burglary
7 on the 29th December 2014 was after the date he was so admitted.

8 9. The defendant's progress in the Drug Court was, it is claimed by Counsel, good and
9 I was told that he had just entered phase four at the time of his conviction.

10
11 10. The conviction by the learned Magistrate is likely to have serious consequences for
12 the applicant. For the moment his participation in the programme is merely
13 suspended, pending the outcome of this application. However, if things follow their
14 normal course, it seems likely that for such a serious offence the Applicant would
15 be expelled from the Drug Court and that he would then face sentence in a regular
16 sitting of the Summary Court for the burglary (of the 29th December 2014) and the
17 matter or matters, I do not know the detail, that originally put him into the Drug
18 Court.

19 11. The submission of Mr. Furniss is that it would be more appropriate and fairer to
20 resolve the question of the correctness of the conviction before imposing what
21 might be a substantial prison sentence.

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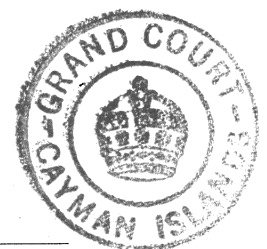
1 12. As I have already said: None of us directly involved in the case is aware of any
2 precedent for the course proposed. That does not mean that the proposal is wrong or
3 without merit. On the contrary there is much to commend it. It does mean however
4 that I would need some persuading that a power to proceed in the way proposed
5 existed but has laid dormant.

6
7 13. Initially, Mr. Furniss referred to s.41(1) of the Penal Code which reads:

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9 “41. (1) *Where, in a trial, a court thinks that the charge is proved, but*
10 *is of the opinion that, having regard to the character,*
11 *antecedents, age, health or mental condition of the accused, or*
12 *to the trivial nature of the offence or to the extenuating*
13 *circumstances in which the offence was committed, it is*
14 *inexpedient to inflict any punishment, the court may, without*
15 *proceeding to conviction, make an order either -*
16 (a) *discharging the accused absolutely; or*
17 (b) *if the court thinks fit, discharge the accused*
18 *subject to the condition that he commits no*
19 *offence during such period not exceeding three*
20 *years from the date of the order, as may be*
21 *specified in the order.”*
22

23 14. This provision, Mr. Furniss suggested, meant that whenever a Court concluded that
24 a charge is proved but does not go on to immediately pass sentence, no conviction
25 has occurred. That is, in my judgment, plainly wrong. Section 41 is designed for a
26 very particular set of circumstances, which, I imagine, comparatively rarely occur.
27 The side note makes it clear that the provision deals with “*Discharge of an offender*
28 *without punishment*”. Here the Applicant was never discharged, nor was it the
29 intention of the learned Magistrate to do so. Section 41 simply does not apply. In
30 any event it is difficult to see how the Applicant could appeal conviction if no
31 conviction had taken place.

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1 15. Secondly, Mr. Furniss relied on s.165(1) of the Criminal Procedure Code (CPC)
2 (2013 Revision) which reads;

3
4 *"165. (1) Save as hereafter in this Code provided, any person who is*
5 *dissatisfied with any judgment, sentence or order of the*
6 *Summary Court in any criminal cause or matter to which he is*
7 *a party may appeal to the Grand Court against such judgment,*
8 *sentence or order either by motion on matters of law or fact (or*
9 *both) or by way of case stated on a point of law only as*
10 *hereafter provided:*

11 *Provided that in no case shall the complainant appeal*
12 *from a decision dismissing a complaint except by way*
13 *of a stated case on a point of law."*

14
15 16. Mr. Furniss claims that the words "...*dissatisfied with any judgment, sentence or*
16 *order...*" means that any of those three elements can be the subject of an appeal. In
17 that, he is clearly right. He goes on to suggest that the order in which more than one
18 element can be appealed is not specified and therefore the court can use its inherent
19 discretion to do what is fair. He didn't put it in exactly those terms, but I hope I
20 repeat the gist of what he was saying. This I do not accept.

21
22 17. Section 166 of the CPC reads:

23
24 *"166. (1) When any person is convicted by a Summary Court, the*
25 *magistrate shall inform him, at the time when the sentence is*
26 *passed, of his right of appeal and the steps which must be taken*
27 *by a party wishing to appeal and a note shall be made at the*
28 *time by the magistrate that such information has been given by*
29 *him to such person and such note shall be conclusive as to this*
30 *section having been complied with.*

31 (2) *Upon being so informed, the convicted person may then and*
32 *there give oral notice of his intention to appeal, and such*
33 *notice shall be recorded by the magistrate and by the*
34 *prosecutor."*



1 18. The only sensible reading of the section is that the CPC contemplates that appeals
2 from the Summary Court should start by notice being given after sentence. It
3 follows that it also contemplates any appeal taking place after sentence.

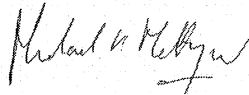
4 19. No other arguments having been put forward, I am not persuaded that the Grand
5 Court has power to entertain this appeal before sentence. I therefore direct that the
6 case be remitted to the learned Stipendiary for sentence.

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9 **Dated this the 10th November 2015**

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13 **Mr. Justice Michael Mettyear (Actg.)
Acting Judge of the Grand Court**

