

15/6/05

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2
3 CRIMINAL APPEAL NO: 10 of 2004

4
5 BETWEEN:

6 HORACE REID

7 Appellant

8 AND:

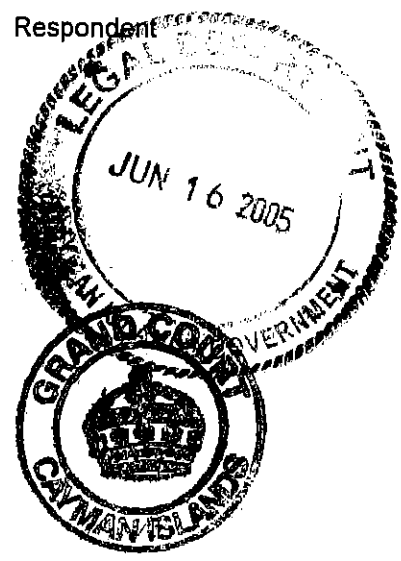
9 THE QUEEN

10 Respondent

11
12 BEFORE: The Honourable Madam Justice Levers

13
14 Appearances:

15 Mr. Nicholas Dixey of Quin & Hampson for the Appellant
16 Ms. Marlene Smith for the Crown



17
RULING

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19 Levers J.

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22 The Appellant appeals against his conviction on the 2 April 2004 in
23 the Summary Court on a charge of possession with intent to supply,
24 contrary to section 4 (1) (m) of the Misuse of Drugs Law (2000
25 Revision), the particulars being that Horace Reid on Friday 16 May
26 2003 in the vicinity of Huldah Avenue, George Town, had in his
27 possession whether lawfully or not with intent to supply whether by
28 himself or another person a controlled drug namely cocaine being
29 more than two ounces.

1 Fundamental to this appeal is the procedure that was followed by the
2 Court, which resulted in this conviction. The facts are of little
3 relevance in this particular appeal.

4

5 **Background**

6

7 The Appellant had pleaded not guilty to three charges, involving
8 Dangerous Drugs namely cocaine.

9

- 10 1. Charge 3425/2003, Possession with intent, in the vicinity
11 of Huldah Avenue, jointly charged with Winston White.
- 12
- 13 2. Charge 3531/2003, Possession with intent, at 59
14 Winfern Close, jointly charged with Winston White and
15 Elon Dixon.
- 16
- 17 3. Charge 3426/2003, Conspiracy to supply, jointly charged
18 with Winston White and Elon Dixon.
- 19

20 The trial commenced on the 26 November 2003, and the first two
21 witnesses for the prosecution were called and cross-examined.

22

23 On 27 November 2003, upon an application by Crown Counsel Mr.
24 Scott Wilson after the two prosecution witnesses had been cross-
25 examined, the Learned Magistrate permitted the withdrawal of the

1 charges 3425/2003 and 3426/2003. The remaining charge was
2 3531/2003, which was the Possession with intent at #59 Winfern
3 Close in which Horace Reid was jointly charged with Winston White
4 and Elon Dixon. At the close of the prosecution's case, Winston
5 White, the co-accused was acquitted upon a submission of no case
6 by his counsel.

7

8 The Defence case opened on the 29 January 2004, the Appellant
9 gave evidence in his defence. After the evidence had been
10 completed and closing submissions were being made, Crown
11 Counsel intervened, and explained that the wrong charge had been
12 withdrawn at the start of the case in error. Application was made to
13 substitute the withdrawn charge pursuant to section 73 of the
14 Criminal Procedure Code. The Appellant's counsel formerly opposed
15 the application, and the learned Magistrate after hearing submissions
16 from both sides ruled in favour of the application, and granted the
17 amendment on the 27 February 2005. The Appellant pleaded not
18 guilty to the reinstated charge and two police witnesses were recalled
19 to be cross-examined.

20

1 On 2 April 2004, the Learned Magistrate acquitted the Appellant of
2 charge 3531/2003 that is the drugs in the house. However, the
3 Learned Magistrate convicted the Appellant of charge 3425/2003,
4 (this is the charge that had been withdrawn during the prosecution
5 case, and reinstated after the completion of the case for the defence).

6

7 Mr. Nicholas Dixey for the Appellant now argues that section 73 of
8 the Criminal Procedure Code does not give the Learned Magistrate
9 jurisdiction to substitute a withdrawn charge, and that such
10 substitution coming as it did after the end of the case caused injustice
11 to the accused.

12

13 He argues that it is not for the Appellant to establish prejudice rather
14 it is for the prosecution to refute it. He submits that given that the
15 restoration of the charge was made during closing speeches, the
16 Crown could not hope to discharge this burden. His entire argument
17 is put in this way:

18

19 "That the procedure followed in reinstating a
20 withdrawn charge in the middle of closing speeches,
21 and then convicting the Appellant of that charge, is
22 procedurally irregular, and to uphold such
23 manoeuvring would be to seriously compromise the

1 integrity of the criminal court, and would bring the
2 Jurisdiction into justifiable disrepute."
3

4 This case requires a careful reading of section 73 and section 82 of
5 the Criminal Procedure Code.
6

7 Section 73 of the Criminal Procedure Codes reads:

8 (1) Where, at any stage of a trial it appears to the court
9 that the charge is defective, either in substance or in
10 form, the court may make such order for the alteration
11 or addition of a charge, as the court thinks necessary
12 to meet the circumstances of the case:

13
14 Provided that where a charge is altered, added or
15 substituted as aforesaid, the court shall thereupon call
16 upon the accused person to plead to the altered or
17 new charge:

18
19 Provided further that in such case the accused person
20 shall be entitled, if he so wishes, to have the
21 witnesses (or any of them) recalled to give evidence
22 afresh or to be further cross-examined by the defence,
23 and, in such last mentioned event, the prosecution
24 shall have the right to re-examine any such witness on
25 matters arising out of such further cross-examination.

26
27 (2) Variance between a charge and the evidence adduced
28 in support of it with respect to the day upon which the
29 alleged offence was committed is not ordinarily
30 material and the charge need not be amended for such
31 variance if it is proved that the proceedings were in fact
32 instituted within the time, if any, limited by law for the

1 institution thereof and the actual date is not material on
2 any other ground.

3
4 (3) Where an alteration, addition or substitution of a
5 charge is made under subsection (1) or there is a
6 variance between the evidence and the charge as
7 described in subsection (2), the court shall, if it is of the
8 opinion that the accused has been thereby misled or
9 deceived or may be prejudiced in the conduct of his
10 defence, adjourn the trial for such period as may be
11 reasonably necessary in the interest of justice.

12
13 The first and most important aspect of the administration of justice
14 which includes the administration of the criminal law is that it should
15 appear that the prisoner is having a fair trial and he should not be left
16 with any sense of injustice on the grounds that his case has not been
17 fairly tried. This principal need not be limited to submissions to the
18 jury, but it should be extended to every aspect of the trial.

19
20 Bearing that fundamental proposition in mind, one should examine
21 section 73 (1) of the Criminal Procedure Code (2003 Revision)
22 carefully:

23
24 (1) Where, at any stage of a trial it appears to the
25 court that the charge is defective, either in substance or in
26 form, the court may make such order for the alteration or

1 addition of a charge, as the court thinks necessary to meet
2 the circumstances of the case:

3 Provided that where a charge is altered, added or
4 substituted as aforesaid, the court shall thereupon call upon
5 the accused person to plead to the altered or new charge:

6 Provided further that in such case the accused person
7 shall be entitled, if he so wishes, to have the witnesses (or
8 any of them) recalled to give evidence afresh or to be further
9 cross-examined by the defence, and, in such last mentioned
10 event, the prosecution shall have the right to re-examine any
11 such witness on matters arising out of such further cross-
12 examination.

13
14 It is an accepted principal that any alteration in matters of description
15 and probably in many other formal respects may be made in order to
16 meet the evidence in the case, so long as the amendment causes no
17 injustice to the accused person. Where the indictment is defective in
18 mere description of the thing obtained, the substance of the charge
19 remains the same an amendment could cure the defect. It is usual
20 not to have a complaint about that sort of amendment being
21 permitted. However, in this case it is not a question of a charge being
22 defective but the charge being withdrawn. Regrettably, the
23 Magistrate notes are either incomplete or defective in this regard.
24 When the charge was withdrawn, under section 82 of the Criminal
25 Procedure Code, the Magistrate should have done one of two things:
26 She should have made an order acquitting the accused or an order

1 discharging the accused. Had this happened a reinstatement of the
2 charge could not have been considered in the Summary Court. The
3 ruling should have been entered in the court register or the file. Had
4 the Magistrate acted properly in either acquitting the accused or
5 discharging the accused when the charges were withdrawn, the
6 Crown could not have asked for this charge to be resurrected at the
7 end of the case.

8

9 Crown Counsel relies on the case of **R v Jokel and Ram**, 56 Cr. App.
10 R. 348 and submits that the ratio of that case is clear that an
11 amendment of any kind, including the addition or substitution of a
12 count may be made at any stage of the trial provided, that having
13 regard to the circumstances of the case and the power of the court to
14 direct a separate trial of any accused or to postpone the trial, the
15 amendment can be made without injustice. It would appear that she
16 has not read the judgment of Ashford J at page 452 and I quote:

17

18 "This Court shares the view expressed in some of the
19 earlier cases that an amendment of an indictment
20 during the course of a trial is likely to prejudice an
21 accused person. The longer the interval between
22 arraignment and amendment, the more likely is it that
23 injustice will be caused, and in every case in which
24 amendment is sought, it is essential to consider with

1 great care whether the accused person will be
2 prejudiced thereby."
3

4 Although in this case Counsel was given the opportunity to cross
5 examine the two witness, it is my view and I am persuaded by the
6 case of **Lewis v Regina**, [2003] CILR at page 175 that the
7 amendment coming as late as it did, after the close of the entire case,
8 it must be inevitable that the accused suffered prejudice. Indeed,
9 section 74 of the Criminal Procedure Code provides that when all the
10 evidence has been heard, the only course opened to the Court is to
11 convict and pass sentence or to acquit. Crown Counsel submits that
12 a failure to comply with section 82 is not such a failure as to void the
13 amendment and is a procedural step only. With all due respect to
14 Crown Counsel that to my mind is not the question. The question is
15 whether an amendment coming at so late a stage runs the risk of an
16 injustice being done (see **R v Gregory** [1972] 2 All ER at page 861).
17 As was said in **R v Piggott** [1999] 2 Cr. App. R. at page 320:

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19 "In the circumstances we are of the view that to allow
20 amendments at the stage where they were allowed in
21 this case, after the trial lasting some 10 days and
22 which could only be proceeded with by ordering a
23 retrial which would traverse the same ground as the
24 first trial but on counts which the appellants were
25 entitled to think had been withdrawn did cause an

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injustice to the defendants. In those circumstances we are of the view that the amendments to the indictment should not have been allowed."

5 For these reasons, I am of the opinion that the amendments should
6 not have been allowed after it had been withdrawn and the appeal is
7 allowed.

8

9 Dated this ⁵ day of June, 2005

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12 Judge of the Grand Court.

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