20. 4. 2001

IN THE CAYMAN ISLANDS COURT OF APPEAL

Criminal Appeal No. 34 of 2000
(Summary Court Appeal No. 70 of 1999)

BETWEEN:

THE ATTORNEY - GENERAL

Appellant

- and -

DAVID O. STEWART

Respondent

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Rt. Honourable Mr. Justice T. Georges, Justice of Appeal
The Honourable Mr. Justice G. Collett, Justice of Appeal

The Solicitor General, Samuel Bulgin, and Cheryll Richards for the Appellant.
Jacqueline Samuels-Brown and Peter Polack instructed by Peter Polack and Company for the Respondent.

Heard: November 21st and 30th 2000 Reasons released April 20th 2001

REASONS FOR JUDGMENT

ZACCA, P.

On November 30th 2000 we allowed the appeal of the Attorney-General, restored the decision of the Maistrate and remitted the case to the Grand Court Judge. We promised to put our reasons into writing. These reasons now follow.

The appellant was convicted by the learned Magistrate on a charge of being concerned in the importation of cocaine and sentenced to 10 years imprisonment.

On appeal to the Grand Court, the appeal against conviction was quashed. The Grand Court Judge held that the failure to plead the appellant to the charge of being concerned with the importation of cocaine prior to the commencement of the trial meant that the trial was a nullity

The Attorney-General appealed the decision of the Grand Court.

What does the record of the trial before the Magistrate disclose? The Magistrate's notes record the following:

> "Regina v. David O. Stewart
>
> 2443 – 2444/98 – Being concerned with the importation of cocaine.
> 2445/98 – Importation of cocaine."

No plea is however recorded prior to the commencement of the trial when witnesses were called, examined and cross-examined. The respondent clearly intended to plead not guilty. The question is "to what offence did he intend to plead not guilty?" It must also be clear having regard to the record that both charges were before the Court.

The notice of appeal filed by the respondent on August 30th 1999 after conviction by the Magistrate indicated that the respondent was convicted on a plea of "not guilty". The original grounds of appeal to the Grand Court filed on November 25th 1999 did not include a ground of appeal to the effect that the respondent was not pleaded on the charge of being concerned with the importation of cocaine.

Supplemental grounds of appeal were filed on May 19th 2000 and these grounds included a ground that the trial was a nullity. But this is how the ground of appeal was framed:

> "That the learned Magistrate having ruled on 24 May 1999 that a prima facie case was only made out in regard to the charge of importation of cocaine she could not thereafter proceed to convict the appellant on any other charges. Accordingly the conviction on charge 2444/98 for being concerned in the importation of cocaine was unlawful and/or a nullity."

In an attempt to clarify the matter, the Grand Court Judge requested that all the records before the Magistrate be placed before him. In addition, a memorandum by the Magistrate as to her recollections was also before the Grand Court Judge.

This memorandum is set out below:

> **"MEMORANDUM**
>
> **TO:** Hon. Justice Douglas
> **FROM:** Hon. Magistrate G. Donalds
> **DATE:** 6th June, 2000
> **SUBJECT:** **DAVID STEWART – SUMMARY COURT APPEAL**
>
> 1. The memorandum from Ms. Cheryl Richards refers.
>
> 2. Mr. David Stewart was tried on the following charges:-
>
> 4453/97 – Importation of Cocaine – first mentioned on 5/11/97;-
> 2443/98 – Being concerned in the importation of cocaine;-
> 2444/98 – Being concerned in the importation of cocaine; and
> 2445/98 – Importation of Cocaine.
>
> The latter three charges having first been mentioned on 8/7/98.
>
> The trial of all of the above-mentioned four charges was commenced on the 18/11/98. The trial continued on the following dates – 6/1/99; 4/2/99; 5/2/99; 26/3/99; 23/4/99; 4/5/99; 9/7/99; 13/8/99 and was finally concluded on 27/8/99.

3. On 4th May, 1999 Mr. Murray who represented the defendant at trial apparently made a submission of no case to answer in relation to charge 4453/97 – Importation of Cocaine only. This is why the ruling on the no case submission is headed 4453/97 – Importation of Cocaine and refers exclusively to that charge without mention of the other charges which were also being tried at the same time.

At the stage of closing addresses on August 13th 1999, it became apparent to the Court that no pleas had been recorded to the charges. Out of an abundance of caution on August 13th 1999 charges 2443/98 and 2444/98 were put to defendant and pleas of not guilty recorded.

Attached hereto are copies of Exhibits 7A and 8A as used by the Court in the course of the trial. It is obvious that not only are those marked in my own handwriting but some of the grossest variations between what was heard when the tape was played and what was in the transcript were amended by me in my own handwriting when the tape was played during the trial. In relation to the specific statement referred to by defence counsel, the words "At the sleep place there. You see me" were added to my copy of the transcript.

MAGISTRATE

C.C. Ms. Cherryl Richards, Crown Counsel
Mr. Peter Polack"

In his judgment at page 26, Douglas J. states:

> "What makes this matter more confusing is that the heading of the learned Magistrate's ruling on the admissibility of the tape recording refers to two of the charges, to wit, "2453/97 – Importation of ganja, and 2443/98 – being in possession of cocaine". Nowhere is charge number 2444/98 mentioned, and that is the only charge on which the appellant was found guilty."

However the heading of the Magistrate's ruling on the admissibility of the tape recordings show:

> "Regina v. David O. Stewart
>
> 4453/97 – Importation of Cocaine.
> 2443/98 – Being concerned in the importation of cocaine."

Under cross-examination by counsel for the Crown, the following question is put to the respondent:-

> "Q. – You are charged with importation of a controlled drug – cocaine. I suggest in relation to that charge and two charges of being concerned in the importation of cocaine that were part of the arrangement to bring the cocaine into the Islands and the cocaine was destined for you?
>
> A. – I am telling you that I have never engaged in any cocaine arrangement, so that all these allegations are false."

The record also discloses that on August 11th 1998 several months prior to the commencement of the trial, the respondent was served with a notice under section 8 of the Misuse of Drugs Law (Revised) 1995. To this notice was attached a copy of the analyst's certificate. The notice is directed to David O. Stewart and states:

> "On the 2nd day of July 1998 (or such adjourned date as may be decided by the Court) the Magistrate Court sitting at George Town, Grand Cayman, will hear evidence relating to the following charge(s) against you:-
>
> Being concerned in the importation of cocaine contrary to section 4(1) of the Misuse of Drugs Law 13/73 (1995 Revision).
>
> Importation of Cocaine contrary to section 4(1)(a) of the Misuse of Drugs Law 13/73 (1995 Revision)."

There can be no doubt that the Respondent knew that he had been charged with the offences of being concerned with the importation of cocaine and that this charge was before the Court. Did the failure to plead the respondent to the charge prior to the start of the trial make the trial a nullity?

Section 65(1) of the Criminal Procedure Code (1995 Revision) provides:

> "If both parties appear, the court shall proceed to hear the case and the substance of the charge or complaint shall be read to the accused person by the court and he shall be asked whether he admits or denies it."

Section 67 provides:

> "If the accused person pleads not guilty, the court shall proceed to try the case as hereinafter provided."

The Magistrate should therefore in all cases, make sure that the accused is pleaded on all charges before the Court and also have the pleas recorded.

However, in DeWitt v. R. [1987] C.I.L.R. 419, this Court held that s. 62(1) of the Criminal Procedure Code (which is in like terms of s. 65(1) of the revised Code) was not mandatory in the sense that it necessarily required that there be a formal arraignment on each charge, there had nevertheless to be some evidence that a plea of not guilty was either vicariously offered or tacitly conveyed on behalf of an accused before he could be tried on that charge.

In R. v. Williams [1977] 1 All E.R. 874, Shaw L.J. at page 877 stated:

> "No qualification of or deviation from the rule that a plea of guilty must come from him who acknowledges guilt is thus permissible. A departure from the rule in a criminal trial would therefore necessarily be a vitiating factor rendering the whole procedure void and ineffectual. The Court so affirmed in R. v. Ellis ... where counsel has assumed the function of pleading guilty on behalf of his client.
>
> It does not seem to this court, at any rate at the present day, that the same fundamental objection exists where a plea of not guilty is vicariously offered or tacitly conveyed. It is difficult to conceive what possible prejudice to an accused person could derive from such a procedure."

Shaw L.J. concludes his judgment at page 880:

> "In the judgment of this Court, while the omission of a formal arraignment was unfortunate and regrettable, it did not, in the peculiar circumstances of this case, have the result of vitiating the trial as such."

In DeWitt v. R., this Court at page 425 stated:

> "In Williams' case, Shaw L.J. was distinguishing between a plea of guilty and one of not guilty. My understanding of this case is that where it concerns a plea of guilty, then there must be a formal arraignment. However, in the case of a plea of not guilty, the omission of a formal arraignment was not fatal where a plea of not guilty is vicariously offered or tacitly conveyed. This latter proposition was held to be the position in that case."

Counsel for the defence had submitted that there was no case to answer in respect of the charge of importation of cocaine. The record discloses this as the only charge on which a no case submission was being made. It is so recorded. The Magistrate ruled that there was a case to answer. It does not follow that there was no charge of being concerned before the court. On the evidence it was open to the Magistrate having heard all the evidence in the case to find the respondent guilty of being concerned rather than the full offence of importation. Counsel for the respondent recognized this in making his submissions only on the importation charge. He clearly thought on the evidence the respondent was not guilty of the full offence of importation.

We are unable to say the fact that the Magistrate ruled only on the no case submission (which was the only submission before her) with respect to the importation of cocaine, that the charge of being concerned was not before the court.

The memorandum of the Magistrate records the following:

> "At the stage of closing addresses on August 13th 1999, it became apparent to the Court that no pleas had been recorded to the charges. Out of an abundance of caution on August 13th 1999 charges 2443/98 and 2444/98 were put to defendant and pleas of not guilty recorded."

The Magistrate was not stating that in fact no pleas had been taken, but that no pleas had been recorded. It is because of this recollection that it was thought out of an abundance of caution the pleas ought to be put and recorded.

No objection was taken to the pleas being taken at this stage. There was no application either to recall any of the witnesses and the evidence they gave was relied on by the Crown for all of the offences.

The evidence given by the respondent would not have been any different whether or not the pleas had been taken prior to the commencement of the trial.

In our view, even assuming the pleas were not taken prior to the commencement of the trial, a not guilty plea was tacitly conveyed on behalf of the respondent. As stated above, the respondent was fully aware that he was also charged with the offence of being concerned with the importation of cocaine.

The late taking of the plea and the non-recording of the plea at an earlier stage could not have caused any prejudice to the respondent.

We held that in all the circumstances of the case, the Grand Court Judge was in error in holding the trial was a nullity.

We therefore allowed the appeal of the Attorney-General, restored the conviction of the Magistrate and remitted the matter to the Grand Court Judge.