20-04-01

IN THE CAYMAN ISLANDS COURT OF APPEAL

Criminal Appeal No. 50 of 2000
(Summary Court Appeal No. 70 of 1999)

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

DAVID O. STEWART

Appellant

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

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

Heard: February 15th and 23rd 2001 Reasons released April 20th 2001

REASONS FOR JUDGMENT

ZACCA, P.

On February 23rd 2001 we dismissed this appeal and affirmed the conviction and sentence. Our reasons for doing so now follow.

On Wednesday October 26th 1997, a customs officer acting on information, approached a passenger arriving from Jamaica and requested a search. The passenger gave her name as Jean Kelly but later admitted to the name Carole Hamilton. She denied swallowing drugs and was taken to the hospital where she was X-rayed. She later admitted swallowing 50 pellets of cocaine and over a two day period passed a total of 56 pellets. Customs officer Bush was present when she passed the first twenty-one pellets.

Kevon Black who had travelled with Carole Hamilton from Jamaica admitted that he had full knowledge of Hamilton swallowing the drugs and that his role was to oversee the transaction of the drugs and for the drugs to be delivered to the appellant who was also known as "Prento". Both Hamilton and Black were arrested and charged with importation of cocaine.

He was given instructions by one Carolyn Buchanan in Jamaica to call "Prento" on his arrival in Cayman and to inform him that the girl was in Cayman and that he, "Prento", should call Carolyn. He had been given a telephone number for "Prento" by Carolyn Buchanan.

Telephone calls were made to the appellant by Black in the presence of the police and two such conversations were taped by the police. The tapes and transcripts of the conversations were tendered into evidence.

On her discharge from the hospital Carole Hamilton was taken to the Central Police Station where the fifty-six pellets were sealed in her presence. On her arrival in Cayman she was instructed to go to the Sleep Inn Hotel.

Karen Bush, a customs officer, who assisted in the investigation, gave evidence to the effect that Carole Hamilton had passed fifty-six pellets at the hospital. She identified a

package which she labelled KB1 on the outside. This package contained the fifty-six pellets.

Both Carole Hamilton and Kevon Black gave evidence. Black had previously pleaded guilty. These witnesses were therefore accomplices and their evidence required corroboration. It is conceded that in order for the conviction of the appellant to stand, it was necessary to show that the taped conversation was evidence which could corroborate the evidence of Kevon Black.

The appellant was convicted on the charge of being concerned in the importation of cocaine. His appeal to the Grand Court was dismissed.

In his defence the appellant denied any involvement in the importation of cocaine. He stated that he was a businessman and owned a car accessories business. The telephone conversations related to the purchase of car parts.

A number of grounds of appeal were filed. However counsel for the appellant directed her submissions to the following grounds set out below. It is therefore only necessary for the Court to consider those grounds. These are:

1) The learned judge erred in admitting into evidence the cocaine and the certificate.

2) The conversations in the transcripts of the telephone calls do not amount in law to corroboration.

3) The failure of the prosecution to disclose to the defence, that the witness Kevon Black had been caught smoking ganja while he was in custody may have affected the credibility of Black and therefore may have affected the outcome of the trial.

4) The Magistrate failed to warn herself that the evidence of Kevon Black required corroboration.

Admissibility of Cocaine and Certificate

Mrs. Samuels Brown for the appellant submitted that the provenance of the cocaine was not established in law. She argued that there was a discrepancy as to the weight and there was no evidence of the cocaine being sealed. Further the chain of custody was not established. Reliance was placed on the case of Dilbert v. R. [1988-89] C.I.L.R. N-9. This was a Grand Court decision presided over by Schofield and Harre J.J. This case held that "... it is essential that the prosecution adduce evidence as to how the sample was labelled by the police and that the analyst's certificate refers to the sample so labelled. It is not necessarily fatal to the reception of the results of the analysis that no evidence is given as to how the sample has been transported from the police to the analyst's laboratory".

That case concerned a charge of consumption of cocaine and the certificate produced at the trial related to a sample of urine taken from Dilbert. The sample of urine was not exhibited at the trial. Nor was there any label produced. This case can therefore be distinguished from the case under appeal.

The label on the package containing the cocaine shows the weight of the cocaine as being 404 grams, gross. The chemist's certificate shows the weight of the drug to be 256.5 grams. The weight stated by the chemist must clearly relate to the weight of the actual cocaine. We are of the view that this difference in weight does not affect the admissibility of the cocaine.

The evidence of Carole Hamilton was that she passed fifty-six pellets. The officer took possession of the pellets and sealed them in her presence.

The cocaine pellets were identified by customs officer Karen Bush who stated that Carole Hamilton had passed fifty-six pellets at the hospital. She indicated her initials KB1 on the package. The chemist's certificate identifies Carol Hamilton as the accused and also shows the labelling KB1 and the sealing officer as Karen Bush. The chemist received a sealed package. The package and the certificate were produced in evidence and were available for examination and comparison.

The certificate was properly served upon the appellant and accepted by him prior to the trial. A notice under the Misuse of the Drugs Law (Revised) 1995 indicating that the certificate would be tendered in evidence subject to his requiring the analyst to give oral evidence. By this means he would have been able to challenge the content of the certificate as to the weight or as to integrity of the cocaine. He could therefore have impugned the validity or the correctness of the certificate.

During the trial no issue was taken as to the admissibility of the certificate or the cocaine. There was no evidence that the cocaine which was analysed had been interfered with in any way. It was never suggested that the cocaine tendered in evidence was not the pellets passed by Carol Hamilton or that those were not the pellets taken to the chemist for analysis.

In our opinion there was credible evidence on which the Magistrate could properly have admitted into evidence the cocaine and the certificate. There was no error on the part of the Magistrate in admitting the cocaine and the certificate into evidence. This ground of appeal therefore fails.

Failure of the Magistrate to warn herself on the dangers of convicting on the uncorroborated evidence of an accomplice.

In her submission Mrs. Samuels Brown submits that nowhere in the ruling of the Magistrate does she warn herself that the evidence requires corroboration and that it was

dangerous to act on the uncorroborated evidence of an accomplice. It is accepted that the Magistrate was required to warn herself that it was dangerous to convict on the uncorroborated evidence of an accomplice.

Nowhere in the Magistrate's ruling does she use the words as to the required warning.

At page 4 of the Magistrate's ruling she states:

> "... the Court does believe Mr. Kevon Black's testimony that the drugs were intended for defendant Stewart since this account was first volunteered by Mr. Kevon Black from the very afternoon of his arrest, at a time when there was no apparent connection between Mr. Stewart and the drugs imported by Ms. Carole Hamilton. This testimony of Mr. Black is corroborated by the transcript of the telephone conversations." (Emphasis added)

In the case of Bissessar v. Jordan (1965), 8 W.I.R. 315, it was held that " the dictum of the Privy Council which was restricted to cases in which there was no corroborative evidence at all and in which, therefore, the Magistrate should make it appear in his reasons that the consequent risk of convicting was clearly kept in mind".

Chief Justice Wooding in his judgment at page 317 quoted from Chiu Nang Hong v. Public Prosecutor, [1964] 1 W.L.R. 1279 as follows:

> "No particular form of words is necessary for this purpose: what is necessary is that the judge's mind upon the matter should be clearly revealed."

And at page 318 stated:

> "But where, as here, there is corroborative evidence and the magistrate or a judge sitting without a jury pronounces that he accepts it as true, the dictum in our opinion has no application whatever."

In R. v. Simpson, R. v. Powell, [1993] 3 L.R.C. 631, Downer J.A. at page 641 stated:

> "The extract from these two cases emphasises that the trial judge sitting without a jury must demonstrate in language that does not require to be construed that he has acted with the requisite caution in mind and that he has heeded his own warning. However, no particular form of words need be used. What is necessary is that the judge's mind upon the matter be clearly revealed."

In Bates v. James (1964), 7 W.I.R. 203, Wooding C.J. at page 207 stated:

> "Our function, therefore, in this court is to consider whether there was clear evidence of corroboration which in fact the magistrate believed. If we find that he believed evidence which would fall within the scope of corroborative evidence, then, whether or not he specifically directed himself to consider the point, the fact that he believed evidence which would be corroborative evidence would suffice."

It is conceded that if the evidence contained in the taped conversations does not amount to corroboration of Kevon Black's evidence, then the appellant would be entitled to a not guilty verdict. Further if there was no corroboration it would have been the duty of the Magistrate to warn herself that it would be unsafe to convict on the uncorroborated evidence of an accomplice. Kevon Black was clearly an accomplice.

Assuming for the purpose of this ground of appeal that the evidence of the taped conversation is corroborative of the evidence of Kevon Black, does the failure of the Magistrate to state clearly that she warned herself of the danger of convicting on the uncorroborated evidence of the accomplice vitiate the verdict.

The Magistrate found that the evidence of the taped conversation amounted to corroboration of Kevon Black's evidence. This would indicate that she understood that there was a need to search for and to find if there was such corroboration. She clearly was of the view that Kevon Black's evidence required corroboration. She would not have come to this conclusion unless she had in mind the warning which she was required to give herself. We are of the opinion that the Magistrate's mind upon the matter was clearly revealed.

In the circumstances of this case, where there was corroboration, we hold that the failure to use words to the effect that it was dangerous to convict on the uncorroborated evidence of an accomplice, would not in any way vitiate the conviction.

The question of whether the taped conversations amounted to corroboration is dealt with below as a separate ground of appeal.

Taped conversation as corroboration.

Mrs. Samuels-Brown submits that there is nothing in the telephone conversations to indicate that the appellant was concerning himself with the importation of cocaine.

The Magistrate found the appellant's explanation of the conversations as implausible. It is necessary to look at the words used in the telephone conversation to arrive at a conclusion as to whether the appellant was involved in the importation of the cocaine and

whether there was sufficient evidence to hold that it amounted to corroboration of Kevon Black's evidence.

The conversation is conducted in what would be regarded in Jamaica as broken English. It is to be observed that the Magistrate, counsel for the Crown and the defence, the witnesses Carole Hamilton, Kevon Black, and the appellant were all Jamaicans.

The problem is not whether the words in the conversation can be read and understood, but whether the interpretation of the words is such as to indicate that the appellant was involved in the importation of the cocaine and whether it could be said that he clearly was aware that Kevin Black was making reference to the cocaine.

Counsel for the Crown, Miss Richards, submitted that there was a clear indication that the conversation related to the cocaine which had arrived in Cayman from Jamaica and which was destined for the appellant.

She submitted that the reference to the car was a reference to the cocaine. "The car da ya you kno" and "Yea the car deh" meant that the car was in Grand Cayman and that the word "car" was used as a code to indicate that the cocaine had arrived in Grand Cayman. In order to buttress this interpretation, Miss Richards pointed to the following conversation:

"K.B. But ah, a half a car, star. You see me? And, you a hear me

P. Eeh he.

K.B. She park it aa, ah ah (stutters) at the Sleep place there. You see me.

P. Alright, yah hear me?

This part of the conversation is, according to counsel for the Crown, significant because of the evidence of Carole Hamilton. She stated that in Jamaica she was given 100 pellets to swallow but she was only able to swallow 56. This would be approximately about one half of the 100. The reference therefore to "half a car" was clearly informing the appellant that only one half of the cocaine had arrived.

"P. Alright, me a go, me a go, put on, me whe deal with it and put on the wheel dem pon it."

The submission of Miss Richards is that if this conversation was really about a car, how could the appellant be stating that he would put the wheel on half a car.

"K.B. You waan call me?

P. Yea, ahm.

K.B. How you would a call me?

P. A it me say now. Me, me have the number you know.

K.B. Hello

P. Me have the number, me have the number you know."

This would indicate that the appellant had the telephone number of the witness Kevon Black.

"K.B. Ah, ah your place me deh bout you know.

P. Aah?

K.B. Ah your place me deh you know.

P. Den nuh that me ask you if you da ya."

Here the appellant is asking if the witness is in Cayman and the witness stated that he was in Cayman.

"P. Alright, den you nuh, you nuh, den you nuh link me, man.

K.B. Link you with the car? But ah nuh me and her drive you know.

P. Ooh.

K. B. You see me?

P. Then you link me by you self man.

K.B. Alright.

P. Me a go wait till you come.

K.B. Alright.

P. Seen?

K.B. Alright.

P. What time? Ge me, just, just, you have fe dweet now because me have some little ting to attend to.

K.B. But me would have to reach her and then reach you?

P. No man you nuh just, me say just link me by you self.

K.B. Ooh you want me link you off the air.

P. Yea man."

This was a reference to Carole Hamilton but the appellant is stating that he wished to link with the witness without the third person.

In the second conversation the following appears:

"P. Me say you come a check me.

K.B. No, no. Me, me tink you say fe go link her with the something, the car.

P. No man, me say, me say you fe come check me.

K.B. Caw, she all a blow bubble with the car enou star.

P. You, come check me no man.

...

P. You nuh have fe drive the car. Just leff the car and come check me.

K.B. Leff the car and come check you?

P. Yea, me, me a wait fe you."

When Black refers to the lady blowing bubble with the car, is this a reference to the pellets still being in the body of Carole Hamilton? Why is the appellant telling Kevon Black not to bring the car, if the conversation related to car parts?

It is to be observed that there is no identification of the persons holding the conversation. The parties appear to know each other. The appellant had the telephone number of the witness. The appellant shows no lack of knowledge as to what the conversation is about. The appellant does not express any misunderstanding of the conversation.

In our opinion a reasonable inference could be drawn from the conversations that the discussion was about the cocaine which Carole Hamilton had brought to Cayman and that this was a pre-arranged plan.

Black's evidence was that he knew about the drugs and that he contacted the appellant about the drugs.

The Magistrate did not accept the explanation of the appellant as to the meaning of the conversation and stated that his explanation was implausible. It was open to her to come to that conclusion.

The Magistrate analysed the taped transcripts and the explanation of the appellant. It was open to her to find that the taped conversations corroborated the evidence of Kevon Black. We are unable to say that the conversations do not show an involvement of the appellant in the importation of the cocaine into Cayman. The Magistrate was not in error in holding that the telephone conversations amounted to corroboration of Kevon Black's evidence. This ground of appeal also fails.

Failure to Disclose

Counsel for the appellant submitted that the failure of the prison authorities to disclose the fact that the witness Kevon Black was charged with consuming ganja at the prison and dealt with administratively by the prison authorities was an irregularity.

It was accepted that the prosecution was unaware of this incident until brought to its notice by counsel for the appellant after the trial.

It cannot be said that the prison authority was a part of the prosecution. In what way could this have affected the trial if this was known to the defence? By his own admission Kevon Black was involved in serious drugs. His credit was already tarnished and the Magistrate was mindful that his evidence required corroboration.

In our view there was no failure to disclose which would amount to an irregularity. The learned Grand Court Judge was not in error in holding that it would have been of little value.

Once the evidence of the taped conversations had been accepted as corroboration of the evidence of Kevon Black, knowledge of consumption of ganja whilst in custody at the prison could not have affected the verdict of the Magistrate.

The ground is without merit.

It was for these reasons we dismissed this appeal and affirmed the conviction and sentence of the Magistrate.