

20-04-01

IN THE CAYMAN ISLANDS COURT OF APPEAL

Criminal Appeals No. 32, 33 & 35 of 2000
(Summary Court Appeal No. 60 of 1999)

BETWEEN:

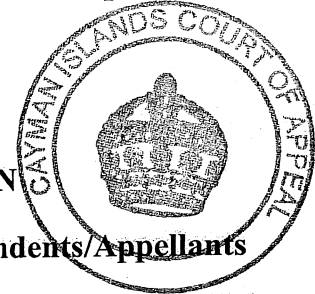
THE ATTORNEY – GENERAL

Appellant/Respondent

- and -

RANDY L. MERREN & GILROY B. MERREN

Respondents/Appellants



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

Audrey Clarke for the Attorney-General.
Norman Hill Q.C. and Linda DaCosta instructed by Myers & Alberga for the
Respondents/Appellants Randy L. Merren and Gilroy B. Merren.

Heard: April 2nd 2001

Judgment delivered April 20th 2001

JUDGMENT

TAYLOR, J.A.

Randy Merren and his brother Gilroy (known as Bryce) Merren were found by customs officers to be in possession of spearguns when their apartment was searched under warrant on May 9th 1996, and on the following day Randy claimed at the airport a box containing speargun parts brought to the Island two days earlier by his brother Bryce.

The supply and possession of spearguns on the Island had been closely controlled by a licensing regime for 10 years, and neither brother had the licence necessary for him to possess a speargun under the Marine Conservation Law. The importation of spearguns and speargun parts had been prohibited under the Customs Law effective January 30th 1996, more than three months prior to the events in issue. A total of seven charges were laid against the brothers, either together or individually, under these statutes. Four were dismissed by the Magistrate on “no case” submissions and convictions were entered on the remaining three. Appeals by the accused were allowed in the Grand Court with respect to two of the charges on which convictions had been entered, but their appeal was dismissed with respect to the third. From those decisions of the Grand Court appeals are now brought to this court.

The charges before us are:

- (i) “Being engaged in smuggling (found in possession of smuggled goods) contrary to section 53 (1) (a) of the Customs Law”, a charge on which both accused were convicted and their convictions were upheld by decision of the Grand Court, from which they now appeal (C 2226/96).
- (ii) “Possession of unlicensed spearguns contrary to section 14 of the Marine Conservation Law”, on which both were convicted and their convictions set aside by decision of the Grand Court, from which the Attorney-General now appeals (C 2227/96).
- (iii) “Being engaged in smuggling (found in possession) contrary to section 53 (1) (a) of the Customs Law”, a charge relating to the airport incident against Randy Merren only on which

he was convicted and his conviction set aside by decision of the Grand Court, from which the Attorney-General now appeals (C 2229/96).

(i) Possession of Smuggled Spearguns

The evidence in support of the first charge was that the accused had in their possession at their apartment spearguns of the same description as they were shown by invoice documents to have purchased during February and March 1996 at a dive shop in Miami, Florida.

Spearguns found in their possession were produced in evidence. One speargun in the possession of each was found by the Magistrate to be in new condition and to conform with the description of a speargun contained in the invoices recording purchases made by the accused at the Miami dive shop within the previous three months. These spearguns had no individual serial number, and thus could not be directly identified as those purchased by the accused in Miami. The learned Magistrate concluded, however, from the evidence as a whole that they were in fact the same, and that they must have been smuggled into the Island, that is to say brought in clandestinely. The Magistrate reached this conclusion by "irresistible inference", and did so despite having dismissed on "no case" motions charges that the accused themselves had smuggled them in.

The Grand Court Judge found that the invoices were properly admissible under section 23 (1) of the Criminal Evidence Law, as business records of information supplied by someone not in the country, and I agree with that conclusion. I agree also with the Grand Court Judge that the information which they contained is relevant to the question whether the spearguns found in the possession of the accused were purchased by them from the Miami dive shop and that it is not necessary that they

be identified by individual mark or number in order for the evidence to be relevant or admissible. The fact that on the "no case" motion the Magistrate dismissed charges that the accused themselves smuggled the spearguns is not in my view inconsistent with her finding that they were smuggled goods. The finding on the "no case" motion is not a finding that the accused had not smuggled them, but simply that the Crown had failed to establish that they had. Such a finding does not, in my view, conflict with a finding on the present charge that the goods were in fact smuggled by someone whether the accused or someone else.

The remaining question of consequence is whether the evidence was such that the learned Magistrate could safely conclude that the spearguns were those purchased by the accused in Florida earlier in the year. Having regard to all the evidence, including that the spearguns were "new" and answered to the description of spearguns recently purchased in Miami by the accused, and having in mind the existence of the licensing scheme preventing the acquisition of spearguns on the Islands, it seems to me that the Magistrate was entitled to come to the conclusion that she did, that is to say that the spearguns were purchased by the accused in Miami and must thereafter have been brought clandestinely into the Islands by someone at a time when their importation was prohibited by the Customs Law.

I agree with the decision of the Grand Court Judge on this charge, and would dismiss the appeal.

(ii) Possession of Unlicensed Spearguns

The second charge before us alleges “possession of unlicensed spearguns contrary to section 14 of the Marine Conservation Law”, a section which in fact prohibits possession of a speargun unless “*the person* who has a speargun in his possession” is “licensed by the Board”.

The Grand Court judge allowed the appeal of the accused against their conviction by the Magistrate on the ground that the charge as laid does not allege an offence known to the law, and that the Crown, although invited to do so, declined to amend the charge when invited to do so. The position taken by the Crown, both here and below, is that the charge sufficiently describes the offence. I am of the view that the Grand Court Judge was correct in allowing the appeal and quashing the conviction. There is in my view a significant distinction between having possession of an unlicensed speargun and having unlicensed possession of a speargun. Counsel for the accused having pointed that out, and the Crown having declined to amend the error, the accused were convicted of an offence that simply does not exist. Such a conviction cannot in the present circumstances be allowed, in my view, to stand.

I would therefore dismiss the appeal of the Attorney-General against the decision of the Grand Court on this charge.

(iii) Engaged In Smuggling Speargun Parts

The third charge before us, against Randy Merren alone, relates to the box of speargun parts brought in by his brother which he went to the airport to pick-up on May 10th 1996, the day after the

search of the Merren apartment; the charge against him is of: "Being engaged in smuggling (found in possession) contrary to section 53 (1) (a) of the Customs Law".

The evidence for the Crown is that the box had been brought to the Island by Bryce Merren as part of his baggage on or about May 8th 1996, but not picked up by him on arrival. It contained speargun parts, the importation of which was prohibited under the Customs Law, and which were not declared. Randy Merren came to the airport and claimed the box on behalf of his brother, pointing out the box to the customs officer. Because of the intervention of the customs officer he never in fact obtained physical possession of the box or its contents, but when shown the contents he said that he "took full responsibility". The customs officer thereafter seized the contraband. The learned Magistrate convicted, the Grand Court Judge allowed the appeal of the accused, and the Attorney-General now appeals that decision.

There is no doubt that the speargun parts were smuggled. If Randy Merren had possession of the box with knowledge of its contents he would, in the circumstances described by the Crown's evidence, be guilty of the offence charged. The learned Grand Court Judge referred to a number of authorities including Towers & Co. Ltd. v. Gray [1961] 2 Q.B. 351, R. v. Smith (1973), 10 C.C.C. (2d) 384, and Beaver v. The Queen (1957), 118 C.C.C. 129, and concluded that the Crown had shown neither actual nor constructive possession in the accused. The Judge found that the accused had not been shown to have had the right "to insist upon or require its delivery to him or that he had any ability or right to take it away with him nor to exercise any manner of control over it so long as it remained in the possession of the customs officers".

I am, with respect, of the view that by his request for delivery of the box the accused asserted that his brother had given him the right to possession, and that this was evidence as against the accused that he had the constructive possession which he claimed. The box was at that point in the actual possession either of the airline or of the airport authorities as bailee. The customs authorities did not at that point have possession but had, of course, a statutory right to interfere with delivery of the box for the purposes of inspection and thereafter to seize it. They did not take it into the possession of the Crown until after its contents had been seen by the accused. The statement by the accused that he "accepted responsibility" was made with knowledge of the contents, and cannot properly be said to have terminated his constructive possession. It was only after this statement was made that the customs authorities made the seizure.

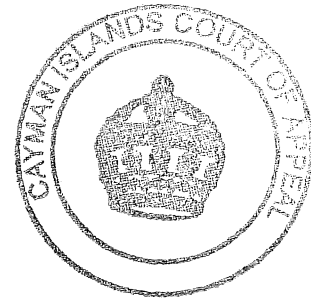
I am therefore of the view that the accused was in constructive possession of the box with knowledge of its contents, that he was accordingly properly convicted by the Magistrate, and that the appeal of the Attorney-General on this charge should accordingly be allowed.

(iv) Conclusion

I would (i) dismiss the appeal of both accused on charge C 2226/96 and affirm the convictions and fines on that charge, (ii) dismiss the appeal of the Attorney-General on charge C 2227/96 and affirm the decision of the Grand Court acquitting the accused on that charge, and (iii) allow the appeal of the Attorney-General on charge C 2229/96 and restore the decision of the Magistrate convicting the accused Randy Merren and the fine imposed by her on that charge.

Zacca, P.

I agree.



Rowe, J.A.

I agree