

IN THE CAYMAN ISLANDS COURT OF APPEAL

*Noted
- file
23-02-01*

Criminal Appeal No. 42 of 2000
Summary Court Appeal No. 4 of 2000

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

CARLYLE RUDYARD ROBERTS

Appellant

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

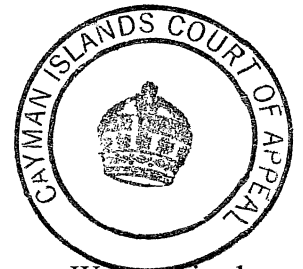
Richard Small and Peter Polack instructed by Polack & Company for the Appellant.
The Solicitor General, Samuel Bulgin, for the Respondent Crown.

November 23rd 2000

(Released February 23rd 2001)

REASONS FOR JUDGMENT

ZACCA, P.



On November 23rd 2000 we allowed the appeal, set aside the conviction and sentence. We promised to put our reasons into writing. This we now do.

The appellant was convicted in the Summary Court, having been charged with possession of cocaine with intent to supply. He was sentenced to 11 years imprisonment.

An appeal to the Grand Court against his conviction was dismissed. In view of our reasons for allowing the appeal, it is unnecessary to refer to the facts leading up to the arrest of the appellant. Suffice it to say, on May 15th 1998, the appellant's premises were searched and in his yard was found the cocaine.

At the trial, a certificate of analysis was received in evidence. This certificate stated that the result of the analysis was cocaine hydrochloride. It was apparently signed but the signature is not identifiable. The certificate also at the bottom has the following:

“Qualified Chemist*

Qualified Medical Laboratory Technician*

*delete as appropriate”

The certificate does not disclose that either of the two was deleted. At the hearing of the appeal in the Grand Court, the Crown made an application to admit the fresh evidence of Dr. David Schudel, a forensic scientist employed by the Cayman Islands Forensic Science Laboratory, to the effect that “cocaine hydrochloride” is a salt of cocaine and therefore subject to the Misuse of Drugs Law. This evidence was admitted because of the fact that the information alleged “possession of cocaine” and the certificate used the words “cocaine hydrochloride”. The Grand Court judge in admitting the evidence stated that this was a purely technical admission in evidence which could cause no prejudice to the appellant.

Several grounds of appeal were filed but it is only necessary to set out four of these grounds:

- (1) That the learned Magistrate erred in admitting the certificate of analysis – exhibit 3 – into evidence in breach of the strict requirement of section 7(3) of the Misuse of Drugs Law.
- (2) The Crown failed to establish an essential ingredient of the offence charged in that there was no evidence adduced that the substance, the subject of the charge, was cocaine. The purported certificate asserted that the substance was cocaine hydrochloride. There is no evidence that this substance was a controlled drug as defined by law.
- (3) That the learned Magistrate erred in admitting and/or relying on the certificate of analysis in breach of the requirement of section 7(2) of the Misuse of Drugs Law.
- (4) That the learned Grand Court judge erred in admitting the affidavit of Dr. David Schudel into evidence.

Grounds 1 and 3

Section 7(3) of the Misuse of Drugs Law (2000 Revision) provides:

“No certificate shall be received in evidence unless the party intending to produce it has given to the other parties three days notice of such intention and has furnished with such notice a copy of the certificate.”

The certificate was received in evidence through the witness Det. Sgt. McLaughlin. There is no evidence that a copy of the certificate was served on the appellant. Nowhere on the record of appeal is there a copy of the document which is required to be served on the appellant. This is a notice

under section 8 of the Misuse of Drugs Law. It states that the certificate will be tendered in evidence unless the analyst is required to give oral evidence.

In response to a query in writing by Mr. Polack, the appellant's attorney, the Magistrate replied:

“According to the record and my own recollection, Det. Sgt. McLaughlin was not asked if the certificate of analysis was served on the defendant. I recollect that no objection was made to the document being tendered in evidence.”

It is correct that the record does not disclose that any objection was taken at the time that the certificate was received in evidence. However when the appellant gave his evidence he stated “following my arrest and interview, I have not been served with any documents”. The appellant was not cross-examined on this statement.

Mr. Small, for the appellant, submitted that the certificate was inadmissible unless there was evidence that a notice along with a copy of the certificate had been served on the appellant. He argued that at common law the certificate would be inadmissible and it was only admissible if the statutory provisions were complied with. The burden was on the Crown to bring itself within the exception and there was no obligation on the defence to raise an objection to the admissibility of the certificate. The certificate ought not to have been admitted in evidence and no weight can be placed on it. There was therefore no evidence before the Magistrate on which the appellant could have been convicted for any offence.

The Solicitor General submitted that the requirement for service of the notice was a procedural one and was not mandatory and that non-compliance cannot vitiate the conviction. He further submitted

that no objection was raised at the trial and there was therefore no dispute as to the tendering of the certificate.

In Nicoletta v. R. [1990-1991] CILR 152, the trial Court admitted in evidence an analyst's certificate despite an attempt by the defendant's attorney, which was denied, to challenge the reception of the evidence on the ground of service of the notice. Although the facts differed from the present case, the principle to be gathered is that the requirement of proper proof of the giving of notice is a condition precedent to the introduction of an analyst's certificate as admissible in evidence. In Nicoletta, the Crown was alleging that there was an attempt to serve the notice but that the defendant refused to accept it. In the present case there is no evidence on the record that any such notice was even prepared or that it was served on the appellant. There is also evidence which was not challenged that he had not been served with any documents.

At page 159 of his judgment, Harre J. states:

“The last case on this issue to which I shall refer is R. v. Banks. It was a case where the Crown did not lead any evidence at the trial with regard to service of an analyst's certificate and counsel for the defence did not at any time before the close of the Crown's case make objection to the production of the certificate in evidence. In the course of his judgment Lawson J. made the following observations, referring to R. v. Mitten, which was a case called in aid by counsel for the Crown. The specimen to which he refers is a urine specimen. He said ([1922] 1 All ER at 1044):

“In our judgment the decision in Mitten's case that the trial judge has a discretion to admit an analyst's certificate, or his evidence, notwithstanding a failure to comply with the requirements of s. 2(5) as to the offer of a sample of the specimen requested, cannot be applied to a failure to comply with the requirements of s. 1(2) as to prior service of a copy of the analyst's certificate. That subsection is designed to allow evidence to be admitted which would otherwise, on the grounds of hearsay, be excluded, provided that the conditions of the proviso are satisfied. If those conditions are not adhered to, then prima facie, the analyst's certificate, as distinct from his oral evidence, is not evidence of the truth of its contents.

Furthermore, this court takes the view that there is no room in a case such as the present to apply the principle of presumed regularity. There are, of course, many cases where this presumption has been successfully relied on ... But this line of cases is distinguishable from the present one, as the court is here concerned with a statutory condition for the admission of hearsay evidence.”

As observed earlier, there was no objection taken by counsel for the appellant prior to the close of the Crown’s case. Nor was there any admission made by the appellant to the certificate being admitted into evidence.

In our opinion the requirements of the statute require strict proof of the service of the notice. If these requirements are not met, then the certificate is not admissible. As there was no proof that the requirements were met, the certificate ought not to have been admitted in evidence. The appeal against the charge of possession of cocaine must therefore succeed on this ground.

There were however other grounds of appeal which require consideration.

Ground 2

The analyst’s certificate indicated that the result of the analysis was that the substance was cocaine hydrochloride. In his judgment the Grand Court judge stated that the appellant was convicted of possession of 1043 grams of cocaine hydrochloride. The appellant was charged with the offence of being in possession of cocaine. In fact, the Magistrate convicted the appellant for possession of cocaine. At the hearing of the appeal before the Grand Court, the Crown sought to adduce fresh evidence by way of the affidavit of David Schudel to the effect that “cocaine hydrochloride” was a salt of cocaine and therefore subject to the Misuse of Drugs Law. This application was granted by

the Grand Court judge who held that this was a purely technical admission of evidence which could cause no prejudice to the appellant.

In view of our finding that the Grand Court judge was in error in admitting the fresh evidence (more will be said about this later), the issue before the Court was whether possession of cocaine hydrochloride was an offence subject to the Misuse of Drugs Law.

Mr. Small submitted that the Crown failed to prove an essential ingredient of their case, namely, that what was referred to in the certificate fell within the statutorily forbidden class of controlled drugs. He argued that the substance cocaine hydrochloride does not appear anywhere in the first schedule of Part 2 of the Misuse of Drugs Law. What does appear is the substance "cocaine". Nor was "any salt" described in the certificate.

Reference is made to the cases of R. v. Hunt [1987] 1 A.C. 352, Hydes and Ebanks v. R. [1980-1983] C.I.L.R. 335, and R. v. Stephen Hill (1993) 96 Cr. App. R. 456.

In R. v. Hunt it was held that as it was an offence to possess morphine in one form but not an offence to possess it in another form, it had been for the prosecution to prove that the morphine in the possession of the appellant had been in the prohibited form, which it had not done.

Lord Griffiths at page 377 (E) stated :

"The prosecution must prove as an essential element of the offence the possession of a prohibited substance and the burden therefore lies upon the prosecution to prove not only

that the powder contained morphine but also that it was not morphine in the form permitted by regulation 4(1) and Schedule 1 thereunder.”

Again, at page 378(B), Lord Griffiths states:

“Finally, my Lords, as this question of construction is obviously one of real difficulty I have regard to the fact that offences involving the misuse of hard drugs are among the most serious in the criminal calendar and, subject to certain special defences, the burden whereof is specifically placed upon the defendant, they are absolute. In these circumstances, it seems to me right to resolve any ambiguity in favour of the defendant and to place the burden of proving the nature of the substance involved in so serious an offence upon the prosecution.”

Lord MacKay of Clashfern concluded, at page 378(H):

“I consider that this case emphasises the need for absolute clarity in the terms of the analyst’s certificate founded on by the prosecution in cases of this sort, and, in my opinion, it would be wise, where there is any possibility of one of the descriptions in the relevant Schedule applying to the substance which is the subject of the certificate that the analyst should state expressly whether the substance falls within that description as well as stating whether or not it is a controlled drug within the meaning of the Act of 1971.”

In the case of R. v. Stephen Hill it was held that whilst scientific evidence was not in every case required to identify a drug, the prosecution must establish the identity of the drug that was the subject matter of the charge with sufficient certainty to achieve the standard of proof required in a criminal case. In that case R. v. Hunt was applied.

In the case of Hyde and Ebanks v. R., the appellants were charged with unlawful possession of cocaine contrary to s. 3(1)(i)(b) of the Misuse of Drugs Law, 1973. At the trial, a substance in the appellants’ possession was identified as cocaine hydrochloride by a certificate of a qualified chemist.

The certificate did not state whether or not the substance was a controlled drug within the first schedule of the Law. The Crown did not adduce any further evidence in relation to the substance nor did the Magistrate consider the fact that the substance identified was different from that specified in the charge, i.e., cocaine. It was held that the Court could not take judicial notice of the fact that cocaine hydrochloride was a salt of cocaine and was therefore a controlled drug within the meaning of paragraph 4 of the First Schedule to the Misuse of Drugs Law, 1973. The Crown had therefore failed to establish that the substance in the appellants' possession was a controlled drug. The appeal was therefore allowed.

At page 339, Summerfield C.J. states:

“That the substance identified as a controlled drug had to be proved at the trial. It is clear that the learned trial magistrate did not advert his mind to the fact that the substance identified was different from the one specified in the charge, i.e., a controlled drug specified in para. 1 of the First Schedule. One cannot speculate on whether or not he would have found beyond a reasonable doubt, on the material before him, that it was a controlled drug had he done so. No doubt the charge would also have had to have been amended to meet the situation.

If in fact cocaine hydrochloride is a controlled drug within any of the categories specified in the First Schedule it is unfortunate that this case should turn on the failure to identify its nature under any of those categories. It would have been simple enough for the qualified chemist to have made that identification in his certificate. As it is, the appeal must succeed on the ground that the prosecution failed to establish that the substance concerned was a controlled drug.”

The Solicitor General submitted that the present case can be distinguished from R. v. Hunt. He also asked the Court to rule that the case of Hydes and Ebanks was wrongly decided.

We hold that the prosecution failed to establish that cocaine hydrochloride was a controlled drug. Whilst the decision of Summerfield C.J. is not binding on this Court, we are not prepared to say that

it was wrongly decided. We are also guided by the decision in R. v. Hunt. It is clear that the Crown realised their difficulty and sought to overcome this by seeking to adduce the evidence of David Schudel.

We therefore found that the Magistrate was in error in convicting the appellant for the offence of being in possession of cocaine. There was no evidence before her that cocaine hydrochloride was either cocaine or a salt of cocaine. The burden was on the Crown to prove this. The result is that even if the certificate was admissible in evidence the appeal would be allowed on this ground.

Admission of Fresh Evidence

The Solicitor General submitted that s. 177 of the Criminal Procedure Code permitted the reception of fresh evidence. Section 177 provides:

“On an appeal by motion, the court may draw inferences of fact from the evidence given before a Summary Court, and, subject to the due notice having been given as hereinbefore mentioned, may hear any further evidence tendered by the appellant, and may take and admit, if it thinks fit, any further evidence tendered in reply and also such other evidence as it may require, and it may decide the appeal with reference both to matters of fact and to matters of law.” (emphasis added)

The learned Grand Court judge was in error in holding that he could admit the fresh evidence on the ground that it was a “technical admission”, nor could it have been admitted under s. 177 of the Criminal Procedure Code.

This evidence went to the heart of the prosecution’s proof. It was not a mere “technical admission”. This was allowing the Crown to lead vital evidence which was not led before the Magistrate.

Without this evidence the Magistrate could not convict the appellant. It was giving the Crown a second chance to prove their case. In any event, this evidence would have been available at the hearing before the Magistrate.

We therefore held that the Grand Court judge was in error in admitting the evidence of David Schudel.

