15-08-00

IN THE CAYMAN ISLANDS COURT OF APPEAL

Criminal Appeal No. 13 of 2000
Summary Court Appeal No.101 of 1999

BETWEEN:

ATTORNEY-GENERAL

Appellant

- and -

DAMIAN ELDEMIRE

Respondent

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Rt. Honourable Mr. Justice T. Georges, J.A.
The Honourable Mr. Justice I. Rowe, J.A.

Anthony Akiwumi for the Appellant.
John Furniss instructed by Keith Collins & Co. for the Respondent.

August 15th 2000

ZACCA, P.

On August 15th 2000 we dismissed this appeal brought by the Attorney-General. We promised to put our reasons in writing. This we now do.

Damian Eldemire was charged before the Magistrate for the offence of Possession of Drugs (ganja) with intent to supply. The charge was dismissed on the ground that it was not brought within the time specified by law.

The Attorney-General, not satisfied with the ruling of the Magistrate, requested her to state a case setting forth the facts and the grounds for the decision, for the opinion of the Grand Court pursuant to sections 170 and 172 of the Criminal Procedure Code (1995 Revision).

We set out here the case stated:

"1. The defendant, a serving prisoner at HMP Northward in November of 1998, was allegedly found in possession of ganja at the prison on the 15th November 1998.

On the 29th March 1999 the Government Chemist produced a Certificate of Analysis under the Misuse of Drugs Law.

The Crown stated in open court that the matter had been ruled on by the Legal Department in May 1999.

The charges were filed in the Court on the 10th September 1999.

2. It was submitted by Mr. Furniss, amicus curiae, that the matter was out of time: "Sufficient evidence to justify a prosecution" had been to hand from March, 1999 and there was no justification for the charge being laid in September. He was allegedly found in possession in November 1998. The expert who analyses the suspected drug is situate in Cayman. There had been undue delay and the matter should be struck out as being out of time.

3. The prosecutor, Miss Audrey Clarke responded that section 50 of the Misuse of Drugs Law gives the Crown 6 months to commence proceedings. She submitted that proceedings could not "be commenced" within the meaning of the Law until the Certificate of Analysis became available. Therefore, applying the clear and unambiguous meaning of the words, the matter was not out of time.

4. The Court found that the Attorney-General was required to commence proceedings either within 6 months of the time the Defendant was found in possession, that being the period predicated for summary matters, or within 3 months of receiving evidence sufficient in his opinion to justify a prosecution.

The Court was of the view that it could not be said as a matter of law that the absence of a Certificate of Analysis was a bar to commencing proceedings in drugs cases: R. v. Bryan Gayle, and rejected that assertion by Crown Counsel. Certainly the burden of proving that the thing possessed is a restricted drug is borne by the Crown. But it is also a matter that the Defendant may admit and so not put the Crown to proof.

> The Court considered that the Attorney-General may be of the view that he does not have "sufficient evidence to justify a prosecution" without the Certificate of Analysis. The Court found that the section preserved the right of the Crown to commence proceedings when the Certificate was to hand even if it were not obtained until after the expiry of the 6 months.
>
> On the construction given to the section by the Court, the Attorney-General would then have 3 months from the date on which the Certificate comes to his knowledge to commence proceedings.
>
> The Court rejected the assertion that the Crown would have a further 6 months to institute proceedings after the Certificate was received. The Prosecutor stressed the words "whichever time is the longer" in support of this proposition but those words can only be construed as preserving the right of the Attorney-General to commence proceedings within 6 months even where the evidence sufficient to justify the prosecution is available before the expiry of 6 months. If this were not so the words "or within three months from the date on which sufficient evidence … comes to his knowledge" would be otiose.
>
> The Court considered that the Attorney-General had constructive notice of sufficient evidence to justify a prosecution when the Analyst's Certificate was produced in March and actual notice when the file was submitted for ruling in May and concluded that time had run against the Crown. The charge was dismissed as being out of time.
>
> The Court observed, at the time, that the laying of a charge for possession of ganja some 10 months after it was said to have been found in possession of a serving prisoner, and some two weeks before he was to be released, was unjustifiable and oppressive."

Thereafter the matter proceeded before the Grand Court by way of appeal. After hearing submissions on behalf of the Attorney-General and the respondent, the Grand Court dismissed the appeal.

The Attorney-General now appeals to this court from the decision of the Grand Court.

The facts which are not in dispute may be stated thus: In a statement attached to an affidavit by Mr. Roberts on behalf of the Attorney-General, prison officer Desmond Loriner stated that on November 15th 1998, he was making checks on the cell block when he smelt ganja being burned in cell block 2. He went into the cell where he saw Roger Bush. The smell of ganja was even stronger

in the cell. Bush was taken to the office and there he smelt the hand of Bush and determined that the smell was that of ganja.

Having received certain information he went to cell 14 which was occupied by Damian Eldemire. He was informed that his cell was to be searched. He replied, "Sir I have a little thing keeping for someone". Having been asked if he had anything to declare he said, "yes a lil thing". He stated that it was in his locker. He opened his locker and took out a Benson and Hedges box which contained a white piece of plastic which contained 67 packets of ganja. Eldemire was then taken to the office where he declared that he was keeping it for someone.

When asked by the prison authorities why he had turned over the 67 packets of vegetable matter resembling ganja, he said, "because he had nothing to hide".

The vegetable matter was submitted to the Government Chemist for analysis. On March 29th 1999, a Certificate of Analysis by the chemist was produced under the Misuse of Drugs Law indicating ganja.

The next step was that in May 1999 the legal department received the file and it was determined that there was sufficient evidence to lay charges. However the charge was not laid until September 10th 1999.

The grounds of appeal argued before us were:

(1) The learned judge of the Grand Court erred in ruling that evidence sufficient to justify proceedings came to the actual or constructive knowledge of a competent complainant on the date of discovery of the drug, namely November 13th 1998.

(2) The learned judge of the Grand Court erred in ruling that there was sufficient evidence to justify proceedings prior to the analysis of the drug, having regard to the distinctive smell and appearance of ganja and to the improbability of a prisoner having 67 packages of anything other than ganja in his cell.

(3) The learned judge of the Grand Court erred in ruling that the time periods set out in s. 77 of the Criminal Procedure Code and s. 50 (now s. 49) of the Misuse of Drugs Law have different starting points.

The provisions of the law which are necessary to be looked at are s. 77 of the Criminal Procedure Code and s. 49 of the Misuse of Drugs Law.

Section 77 of the Criminal Procedure Code provides:

"Except for a longer time especially allowed by law, no offence which is triable summarily should be triable by a summary court unless the charge or complaint relating to it is laid within 6 months from the date on which evidence sufficient to justify proceedings came to the actual or constructive knowledge of a competent complainant."

Section 49 of the Misuse of Drugs Law provides"

"Notwithstanding the process of any law prescribing a time within which proceedings for an offence punishable on summary conviction may be commenced, any proceedings for an offence under this law, may be commenced either within the time so prescribed or within 3 months from the date on which evidence sufficient in the opinion of the Attorney-General to justify a prosecution for the offence comes to his knowledge, whichever time is the longer, and for the

purpose of this section a certificate purported to be signed by the Attorney General as to the date on which such evidence came to his knowledge shall be conclusive evidence thereof."

Mr. Akiwumi on behalf of the Attorney-General submitted that time could not begin to run from November 15th 1999 as it cannot be said that sufficient evidence came to the actual or constructive knowledge of a competent complaint on that date. Such evidence would not be sufficient to support a conviction.

He further submitted that time did not begin to run until May 1999 when the file was brought to the attention of the Attorney-General who is the only person competent to make a complaint. He argued that the 6 month period would commence from May 1999 and therefore the complaint was brought in time.

Even assuming, he argued, that time was to run from March 29th 1999, when the chemist's certificate was produced, then the complaint would still be in time as the 6 month period would commence from that date.

Mr. Akiwumi also submitted that even assuming that a police officer is a competent complainant, he did not have actual or constructive knowledge until March 29th 1999 when he received the chemist's certificate. If that were so, September 10th 1999 when the complaint was laid was within the prescribed time. As we understand Mr. Akiwumi, he is also saying that the Attorney-General had a period of 6 months from May 1999 to file the complaint.

This cannot be correct. Section 77 of the Criminal Procedure Code provides for a period of 6 months from the date on which evidence sufficient to justify proceedings came to the actual or

constructive knowledge of a competent complainant. It is clear that a police officer is a competent complainant. In fact the charge laid before the court was laid by a police officer on September 16th 1999.

It cannot be that the proceedings can be commenced within 6 months from the date on which the Attorney-General has knowledge of sufficient evidence to justify a prosecution. That period is limited to 3 months as provided for in section 49 of the Misuse of Drugs Law.

The position therefore would be, even assuming the commencement date to be May 29th 1999, the proceedings should be brought within 3 months from that date.

We therefore have three situations:

(1) If the commencement date is November 15th 1998, the proceedings have not been brought within 6 months. (s. 77 Criminal Procedure Code)

(2) If the commencement date is March 29th 1999, then the proceedings have been brought within 6 months.

(3) If the commencement date is May 1999, the proceedings were not brought within the limitation period of 3 months. (s. 49 Misuse of Drugs Law)

In our opinion, the Grand Court judge was correct in holding that on November 15th 1998 there was sufficient evidence to justify proceedings being brought against Damian Eldemire. The prison officer knew the smell of ganja and had knowledge of what ganja looked like. Further, the remarks of the prisoner inevitably lead to the conclusion that he knew that he had ganja in his possession. This would be tantamount to an admission on his part that he had ganja in his possession.

The proceedings accordingly were not brought within the 6 months as provided for in s. 77 of the Criminal Procedure Code.

Whatever date is taken, the Attorney-General cannot rely on s. 49 of the Misuse of Drugs Law. September 16th 1999 would be more than three months subsequent to any of the dates.

The Grand Court judge was therefore not in error in dismissing the appeal.

For these reasons we dismissed the appeal of the Attorney-General and affirmed the decision of the Grand Court.