IN THE CAYMAN ISLANDS COURT OF APPEAL

Criminal Appeal No. 58 of 1998
SCA No. 35 of 1998

BETWEEN:

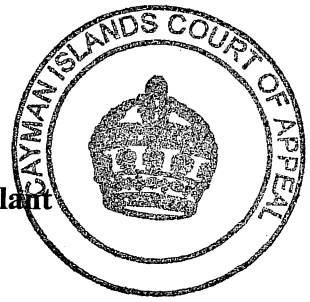
HER MAJESTY THE QUEEN

Respondent

- and -

PETER O'NEIL GOODEN

Appellant



BEFORE: The Rt. Honourable Mr. Justice Edward Zacca, President
The Rt. Honourable Mr. Justice Telford Georges, Justice of Appeal
The Honourable Mr. Justice Ira Rowe, Justice of Appeal

Mr. John Furniss instructed by Collins Broadhurst & Furniss for the Appellant.
Mr. Anthony Akiwumi for the Respondent Crown.

November 16th, 19th 1999

REASONS FOR JUDGMENT

ROWE, J.A.

One important point of law arose on the hearing of this appeal and although we unanimously agreed that the appeal should be dismissed we promised to put our reasons in writing and do so now.

The Appellant was charged in the summary court with the offences of being concerned in the importation of more that one pound of cocaine into the Cayman Islands on October 8th 1995,

contrary to section 4(1) of the Misuse of Drugs Law (1995 Revision); possession of more than one pound of cocaine with intent to supply on October 9th 1995, contrary to Section 4(M) of the same Law; and being concerned in the possession of cocaine with intent to supply between the 8th and 9th of October, 1995 contrary to section 4(M) of the same Law. After a somewhat protracted trial in the Summary Court, Her Honour Grace Donalds, in a careful judgment, convicted the Appellant of the two offences which charged him with being concerned with the importation of cocaine and left the third charge, that of possession of cocaine, on file.

At trial in the Summary Court, evidence was led by the Crown that one Jermaine Lee arrived in the Cayman Islands from Jamaica by air on Sunday October 8th 1995. On the afternoon of October 9th 1995, the Police went to the Sleep Inn Hotel in Georgetown and found Jermaine Lee in Room 135. Lee was taken to the Hospital and there he passed from his intestines 17 cellophane packets containing cocaine. Lee gave a statement to the Police in which he is alleged to have stated that by pre-arrangement, he had swallowed 86 packets containing cocaine in Jamaica, that when he arrived at the airport in Grand Cayman, he was met by a man who took him to the Sleep Inn Hotel and who visited him on several occasions on October 9th 1995. Lee identified the Appellant in his statement to the Police as the person who had taken him from the airport to the Hotel, who had given him instructions to pass the cocaine from his bowels and who had visited him on October 9th 1995 and demanded from him at gunpoint the packets of cocaine which he had then passed out.

When Lee was called as a witness at trial he went back on the statement which he had given to the Police. The prosecution obtained the Court's permission to treat Lee as a hostile witness and Lee was cross-examined. Her Honour Grace Donalds in her Judgment said that:

> "In his evidence to the Court on oath, this witness denied all references to defendant Peter Gooden, contained in the statements allegedly given to the Police. Jermaine Lee did however confirm in his evidence to the Court that he was picked up at the Airport by a man who took him to the Sleep Inn Hotel."

There was a considerable body of evidence capable of connecting the Appellant to Jermaine Lee, quite apart from anything that came from the witness Lee. The Night Manager at the Sleep Inn Hotel, whose surname was also "Gooden", testified that the Appellant who was known to him came to the hotel on the night of October 8th 1995 and booked a room in the name of "James Ebanks". Mr Gooden had arrived at the hotel in a burgundy red Toyota Corolla motor car. The Appellant did not provide a reason for using a "false name" but the Night Manager complied and registered the Appellant as "James Ebanks". The Appellant went outside the Hotel and returned. There was a man of dark complexion walking behind him and the Appellant and this man went in the direction of the room which had been booked by the Appellant. One Uriah Rose saw the Appellant at the hotel the following day. There was also a computer printout which showed that Room 135 in which Jermaine Lee was found by the police on October 9th 1995 had been rented by "James Ebanks".

On the appeal to the Grand Court, Graham J. expressed the view that the evidence of the hostile witness was utterly worthless and that he was prepared to treat the case as if Lee's evidence was never given. He proceeded to determine the case on other facts.

For the Appellant, Mr. Furniss filed and argued a number of grounds to try to persuade the Court that there was insufficient evidence to show that the Appellant ever went to Room 135 at the Sleep Inn Hotel on October 8th 1995 or that the hand-written or computer-generated documents produced from the hotel assisted the Crown in identifying the Appellant as the man who had taken Lee to

that hotel. Mr. Furniss said further, that as there was no positive identification of Lee as the man who was seen with the Appellant at the hotel on the night of October 8th 1998 or that independent evidence showed that the Appellant went to Room 135 on October 9th 1995, there was insufficient evidence to connect the Appellant with Lee. In dealing with these submissions, we need do no more than say, that we agree entirely with the judgments of the Courts below on those aspects of the case. We accept the submissions of the Crown, that the factors of recognition/identification of the Appellant by the Night Manager of the Sleep Inn Hotel; the registration of the Appellant using the alias "James Ebanks"; the connection of Lee to Room 135 which was the room assigned to "James Ebanks/Peter Gooden"; the recognition of the Appellant's car by the Hotel Night Manager; the demeanour of Peter Gooden on arrest when he physically chewed up and destroyed "answer phone tape"; the presence of a mobile phone in the Appellant's car; and the presence of weighing scales in the Appellant's car, provided evidence which satisfies this Court that the Appellant's convictions were safe and satisfactory.

The ground of appeal on which Mr. Furniss placed greatest reliance was his first ground on which he submitted that the evidence of Lee should have been totally rejected by the Court and not considered in any way. Although he admitted in his stated ground of appeal that Graham, J. said that he had "not read the evidence of Lee at all", Mr. Furniss complained that the Magistrate had used Lee's evidence, hostile and unreliable as it was, to find that the "same person who picked him up from the airport, checked him into the Sleep Inn" and Mr. Furniss submitted that the Magistrate failed to take into consideration that Lee also said it was not Gooden, the Appellant, who had brought him from the airport and checked him in. He concluded that Lee's evidence does not therefore assist the Crown in relation to the question of "participation in importation" by the Appellant.

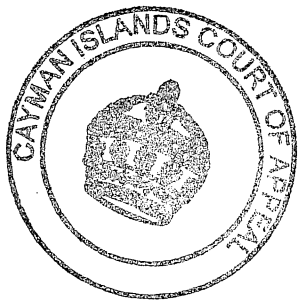
Mr. Akiwumi relied upon the decision of the House of Lords in Regina v. Governor of Pentonville Prison, ex parte Alves [1992] 3 W.L.R. 844, in which the House decided that the credibility of evidence given by a witness inconsistent with a statement previously made by him was a matter for the jury to consider, subject to a proper warning by the judge as to the weight to be attached to the evidence. Lord Goff of Chieveley, in his speech, reviewed the English and Commonwealth cases on the manner in which Court should evaluate evidence on a no case submission and then turned to expressly deal with the issue of inconsistent statements by a witness. Lord Goff referred to the dictum of Lord Parker, C. J. who in delivering the judgment of the Court of Criminal Appeal in R. v. Golder, [1960] 1 W.L.R. 1169,1172-73, said:

> "In the judgment of this court, when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements whether sworn or unsworn, do not constitute evidence upon which they can act."

Then he continued:

> "This statement was subsequently applied in Reg. v. Oliva [1965] 1 W.L.R. 1028, 1036-1037, and was relied on by Mr. Newman in the course of his submissions on behalf of the applicant as applicable by analogy in the present case. In my opinion, however, too much can be read into it. It would, I consider, be wrong to read it as requiring that in every case where a witness is shown to have made a previous statement inconsistent with his evidence at the trial, the jury should be directed that such evidence should be regarded as unreliable: see Driscoll v. The Queen (1977) 51 A.L.J.R. 731, 740, per Gibbs J., with whom Barwick C.J. agreed, at p. 734. Thus in Reg. v. Pestano [1981] Crim. L.R. 397, it was held by the Court of Appeal that the credibility of evidence given by a witness inconsistent with a statement previously made by him was a matter for the jury to consider, subject to a proper warning by the judge as to the weight to be attached to the evidence. In any event, as appears from the context of both Golder and Oliva, the burden of Lord Parker C.J.'s statement is to be found in the second part of it, under which the jury is to be directed that the witness's previous statement will not as such be evidence in the case on which the jury can act."

In our opinion, and based on the decisions referred to above, a Court cannot act upon facts stated in an extra-judicial statement made by a witness which are inconsistent with the evidence given in Court by that witness. What was said in such extra-judicial statements can only become evidence on which a conviction can be based if such statements are admitted in Court by the maker of the statements or are not challenged in any way by the alleged maker of the statements in the subsequent court proceedings. We are further of the opinion that when a witness is treated as hostile in the course of criminal proceedings, the tribunal of fact is the forum to determine the weight of any evidence actually given in Court and is not required in every such case to totally disregard as worthless and unreliable everything said by that hostile witness in the Court. It was therefore open to the learned Magistrate in this case to accept the evidence of Lee that it was the same man who picked him up at the airport who took him to the Sleep Inn Hotel where he was found on October 9th 1995



Zacca, P.

Georges, J.A.

Rowe, J.A.