OPEN COURT

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 982 OF 1997

21-11-97

BETWEEN:	THE ATTORNEY GENERAL	APPLICANT
AND:	THE HONOURABLE GRACE DONALDS	FIRST DEFENDANT
AND:	PETER O'NEIL GOODEN	SECOND DEFENDANT

Samuel Bulgin, Senior Crown Counsel for the Applicant
Delroy Murray for the Second Defendant

BEFORE ORR J

JUDGMENT

On the 17th June 1997 the second defendant Peter O'Neil Gooden appeared before the Honourable Grace Donalds the first respondent on a charge that he, Peter O'Neil Gooden on Friday the 17th January 1997 was concerned in the importation of a controlled drug into the Cayman Islands, namely cocaine being more than two ounces namely over 2 lbs, contrary to Section 4 (1) of the Misuse of Drugs Law (1995) (Revision).

It was submitted on behalf of the second defendant that the offence was one which entitled him to elect trial on indictment in the Grand Court. Counsel for the Crown submitted that the offence was triable in the Summarily and not otherwise. The learned magistrate reserved her decision and on the 18th June, 1997 she ruled that the second respondent had the right to elect trial on indictment on the charge and she ordered the holding of a preliminary enquiry upon the charge. In her ruling she placed reliance on R v. Whittaker and Watler (1986) CILR 189.

Pursuant to the grant of leave, the applicant now seeks the following

reliefs:-

"(1) Order of Certiorari to remove to the Grand Court the decision of the Honourable Magistrate to permit peter O'Neil Gooden to elect trial in the Grand Court, the proceedings whereby Peter O'Neil Gooden elected trial in the Grand Court accordingly, and the decision to order the holding of a Preliminary Enquiry in these circumstances, for the purpose of the said decisions and proceedings being quashed.

(2) Declaration that the aforesaid charge is triable summarily and not otherwise.

(3) Order of Mandamus to remit the matter to the Summary Court of the Cayman Islands with a direction that it reconsider the matter and reach a decision in accordance with the findings of the Grand Court."

The grounds on which the reliefs are sought are:-

(1) That the learned magistrate made an error in law which appears on the face of the records in the reasoning which she gave for her decision, or in the alternative, the learned magistrate exceeded her jurisdiction.

(2) The learned magistrate was further led into error of law upon the face of the record and/or exceeded her jurisdiction by placing formal and express reliance upon and acting in a misinterpretation of the decision in R. v. Whittaker and Watler (1986) CILR 189.

The relevant sections of the Misuse of Drugs (1995) (Revision) Law (hereafter "The Law") are as follows:-

Section 4 (1) states -

"Whoever, without lawful excuse or without being authorised in that behalf -
(a) imports;
(b) exports;

(c) produces;
(d) stores;
(e) sells, buys or otherwise deals in;
(f) supplies;
(g) distribute;
(h) dispenses;
(i) issues a prescription for;
(j) administers;
(k) possesses, constructively or otherwise
(l) consumes; or
(m) has in his possession, whether lawfully or not, with intent that it be supplied, whether by himself or some other person, and whether in the Islands or elsewhere to another person in contravention of this subsection,

any controlled drug, utensil or thing used in the preparation or consumption of any controlled drug, or who attempts, assists or is concerned in any such matters is guilty of an offence."

Section 17 (1) states -

"Subject to the provisions of subsections (2), (3) and (4) whoever is guilty of an offence contrary to section 4 (1) or (2) is liable on summary conviction to a fine of three thousand dollars and to imprisonment with hard labour for three years, and in the case of a third or subsequent conviction a fine of ten thousand dollars and to imprisonment with hard labour for ten years."

Section 17 (5) states -

"Notwithstanding subsection (1) whoever is guilty of an offence that -

(a) is contrary to any provision of the Law;
(b) is specified in Part B of the Second Schedule; and
(c) is in relation to a controlled drug that is a hard drug,

is, on summary conviction liable to imprisonment and a fine in accordance with the provisions of Part B of the Second Schedule."

(a) Being concerned in the importation of cocaine is an offence contrary to Section 4 of the Law.

(b) Cocaine is specified in Part B of the Second Schedule; and

(c) By Section 2 (1) "Controlled drug" means a drug listed in the First Schedule. By Section 2 (1) "hard drug" means any substance or product specified in Part 1 of the First Schedule. Cocaine is listed in Part 1 of the First Schedule under the heading "Controlled Drugs". It is therefore a controlled drug that is a hard drug.

Part B of the Second Schedule provides a maximum penalty on a first conviction for being concerned in the importation of a hard drug of 2 ounces or more of 20 years imprisonment and a fine without limit as to amount.

Mr. Bulgin submitted that Section 17 (5) of the Law confers exclusive summary jurisdiction and the Law makes no provision expressly or by necessary implication for the trial of the charge other than by summary process. In other words, the proper venue for trial is governed by Section 17 (5) of the law alone.

However Section 59 (1) of the Law states -

> "Notwithstanding the provisions of any other section of this Law, where a person is charged with any offence of selling, dealing in, distributing, supplying, dispensing, storing, issuing a prescription for, administering, importing, exporting, producing or attempting, contrary to Section 4(1) which relates to a controlled drug that is a hard drug, then such offence shall be deemed, for the purpose of determining the mode of trial, a category B offence in accordance with Section 5 of the Criminal Procedure Code."

Section 5 (1) of the Criminal Procedure Code sates:-

> "For the purpose of determining the mode of trial before a court, offences shall be classified into three categories.
>
> Category A - offences triable upon indictment and not otherwise;
>
> Category B - offences triable upon indictment which, with the consent of the prosecution and the person charged (or all of the persons

> charged if there be more than one), may be tried summarily; and
>
> Category C - offences triable summarily and not otherwise."

The offence of being concerned in the importation of a controlled drug does not appear in Section 59(1) of the Law.

Mr. Bulgin submitted that it was clear from the language employed in Section 59(1) that the offence of being concerned had been expressly excluded from the section. Where the literal meaning of a statute produces an intelligible result, there is no ground for reading in words or changing words according to what might be the supposed situation of Parliament. He cited Regina v. Oakes (1959) Q.B. 350 per Lord Parker C.J. at 354.

> "It seems to this Court that where the literal reading of a statute, and a penal statute, produces an intelligible result clearly there is no ground for reading in words or changing words according to what may be the supposed intention of Parliament....
> Lord Coleridge in Attorney General v. Beauchamp put it quite shortly in these words:
> "Unquestionably, when out is construing a penal statute, the first thing is to construe it according to the ordinary rules of grammar, and if a construction with satisfies those rules make the enactment intelligible, and especially if it carries not the obvious intention of the legislature as gathered from a general perusal of the whole statute, that grammatical construction ought not be departed from."

A plain reading of Section 59 does not entail some absurdity, repugnancy or injustice. Here he relied on the dictum of Wills J. in Abel v. Lee (1871) C.R. L.P. 365 at 371.

> "No doubt, the general rule is that the language of an Act is to be read according to its ordinary grammatical construction unless so reading it would entail some absurdity, repugnancy or injustice."

He also relied on the maxim expresio unius est exclusio alterius. He cited from Statutory Interpretation by Francis Bennion at Section 390 where the author states:-

> "Known for short as the expresio unius principle, it is applied where a statutory proposition might have covered a number of matters but in fact mentions only some of them. Unless these are mentioned merely as examples , or ex abundanti cautela, or for some other sufficient reason, the rest are taken to be excluded from the proposition."

In R v. Whittaker v. Watler (1986 CILR 189, the first accused was charged in the Magistrate's Court with possession of and dealing in cocaine and the second accused with procuring the first accused's dealing with cocaine contrary to the Misuse of Drugs Law (Revised). The offences were allegedly committed in 1983 and the accused were convicted of these offences. The Court of Appeal allowed the appeals against conviction but ordered that they be retried. On the day on which the Court of Appeal affirmed the order for the trials, the Legislative Assembly passed the Misuse of Drugs (Amendment) Law, 1985 which inter alia repealed the offence of procuring with which the second accused was charged and replaced it with "assisting or being concerned in",... and changed the mode of trial of the offences of dealing in a hard drug and procuring such dealing from trial summarily to trial on indictment. Gordon, Ag, Magistrate as he then was, held that the charges against both accused survived the amendments in the 1985 Law.

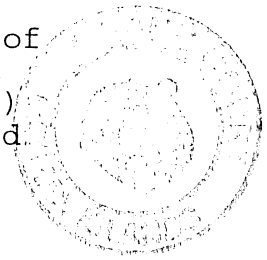
At 197 he said:-

> "In the amendment the word "procures" has been replaced by the words "assisting or being concerned in". The Court of Appeal, in its earlier judgment in this case (6), in dealing with the word "procures" said (1984-85 CILR at 385):
>
> > "... In our view "procures" is intended to carry the meaning of achieving an objective by care or effort in positive action...."

I agree with this statement of the Court. The word "procures" is not excluded from the scope of "assisting or being concerned in." The words are caught in the definition "achieving an objective by care or effort or positive action." I find that the charges against the defendants survive to be tried notwithstanding the amended provisions of S. 3 of the Misuse of Drugs Law (Revised)."

In the instant case the learned Magistrate in her Ruling stated inter alia:-

> "This Court has found no compelling reason to decline to follow or depart from the decision in **R v. Whittaker and Watler.** This decision would suggest that a charge of "being concerned in the importation of cocaine" in a similar manner to the charge of "procuring the dealing in cocaine" would be included within the wording of Section 4 (1) Misuse of Drugs law and accordingly included within the words "any offence of importing cocaine" in Section Section 59(1) of the Misuse of Drugs Law. Such a charge would therefore be deemed to be a category B offence."



Mr. Bulgin submitted that this authority determined issues relating to the offences of dealing in cocaine and the procurement of such dealing in the context of procedures resulting from the Misuse of Drugs (Amendment) Law 1985. Although the offence of dealing in a hard drug is now clearly and explicitly included within the scope of Section 59 of the Law there is no corresponding inclusion in the Section for the offence of being concerned in the importation of a hard drug. Therefore the authority has no bearing upon the instant case.

Mr. Murray submitted that **R v. Whitaker and Watler** established that in 1985 the offences under Section 4 (1) of the Law fell within Category B as designated by the Criminal Procedure Code. This category gives an accused person the right to elect trial by jury. If the interpretation of Section 57(1) propounded by the Crown is correct, then that right has now been removed. One of the aids in the interpretation of penal statutes is that the legislature does not

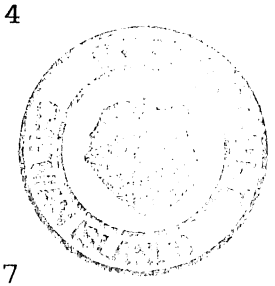
intend any alteration in the existing law where such an alteration affects vested or accrued rights unless it is expressly stated. He cited Bowen LJ in Re Cuno (1889) 43 Ch. 12 at 19.

> "In the construction of statutes you must not construe the words so as to take away rights which have already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature."

There was nothing in the Misuse of Drugs Act which stated that the right to elect trial by jury had been taken away.

The Revision Act of 1995 cannot oust the jurisdiction of a Superior Court unless expressly stated. He cited Craies supra at 123 which states:-

> "Similarly as to ousting the jurisdiction of a superior court". The general rule undoubtedly is, said Tindal C.J. in Albon v. Pyke (1842) 4 M&G. 421, 424, that the jurisdiction of superior courts is not taken away except by express words or necessary implication. In 1950 the Court of Appeal said "The jurisdiction of the Kings Court must not be taken to be excluded unless there is clear language which is alleged to have that effect "Goldshack v. Shore (1950) 1 ALL.E.R. 276, 277 per Evershed M.R."



The Law should state expressly that certain offences are no longer in Category B but now in Category C.

If Section 59(1) is given a literal meaning it would lead to an injustice and absurdity in that a person charged with a substantial offence under the section has a right to elect trial by jury whereas a person charged with an inchoate offence does not have this right but both are liable to the same penalty.

He cited Grey v. Pearson (1857) 6. H.L. Cas. 61. At 106 Lord Wensleydale said:-

> "In construing Wills and indeed Statutes, and all written instruments and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the fundamental and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther."

In the instant case see 59(1) should be read as if it included all the offences enumerated in Section 4(2) in order to avoid absurdity and injustice.

The maxim expressio unius est exclusio alterius, was not applicable to this case.

He also cited **Coquhoun v.Brooks** L.J. said (21 Q.B.D. at p 65).

> "The maxim "expressio unious, exclusio alterious" has been pressed upon us. I agree with what is said in the Court below by Wills J. about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is the result of inadvertence or accident, and the maxim ought not to be applied, where its application, having regard to the subject matter to which is to be applied leads to inconsistency or injustice."

He submitted that the omission in Section 59(1) was due to inadvertence paragraph or accident. Mr. Bulgin in reply submitted that the omission from Section 59 was deliberate. The result of Mr. Murray's submission is that all offences under Section 4(1) would have the right of election for trial by jury. In this event there would be no necessity for Section 59. Mr. Murray was asking the Court to re-write Section 59.

I adopt the statement expressed by the learned author of Craies onStatute Law 6th Edition at p. 66.

> "The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the

Acts themselves."

The Misuse of Drugs Law (1995) (Revision) consolidated and revised previous laws relating to the Misuse of Drugs.

In my opinion the words of Section 59 of the law are clear and explicit. It is evident that the intention of the legislature was to alter the existing procedure for the trial of offences under Section 4 (1) of the Law. To this end section 59(1) was enacted. It stipulates those offences which are triable on indictment and those triable summarily by indicating the category of the offence in accordance with Section 5 of the Criminal Procedure Code. A comparison of Sections 4(1) and 59(1) reveals that the offence of being concerned in the importation of a controlled drug is one of at least five (5) offences for which the category has been altered by Section 59(1). It is possible, as Mr. Murray did, to criticise the allocation of certain offences to a certain category but the dictum of Tindel C.J. in **Warburton v. Loveland** (1832) 2D.CL. (HL) 480 at 489 is apposite:-

> "Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the Statute speak the intention of the Legislature."

I agree with Mr. Bulgin that the learned Magistrate misinterpreted the decision in **R v. Whittaker and Watler** and thus fell into error. As indicated supra, that case dealt with the survival of certain offences after the repeal and replacement of certain offences. The situation here is entirely different. Neither Section 4(1) nor Section 59(1) have been repealed and replaced by the Misuse of Drugs Law (1995) (Revision). The sole issue is the interpretation of Section 59(1) in the light of the provisions of Section 4(1).

For the foregoings reasons I grant the reliefs as prayed.

C. Orr
Judge(Actg)

21st November 1997