The Hon. C J Sir Denis Malone

IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CRIMINAL APPEAL. CICA CRIM #12 OF 1991

BEFORE: THE RT. HON. MR. JUSTICE P. TELFORD GEORGES P.C., J.A.
THE HONOURABLE MR. JUSTICE JAMES S. KERR J.A.
THE HONOURABLE MR. JUSTICE KENNETH C. HENRY J.A.

JACK ONEIL McLEAN v. REGINA

Appeal against conviction and sentence

30th July and 1st August, 1991

Mr. Graham Hampson of Bruce Campbell & Co for the Appellant
Mr. Ivor Archie for the Respondent

GEORGES J.A.

The appellant, Jack O. McLean, was charged with possession of cocaine contrary to section 3(1) K of the Misuse of Drugs Law 13 of 1973 (the Law), being concerned in the possession of cocaine contrary to section 3 (1) of the Law and failing to give a specimen of urine for laboratory test contrary to section 4 (2) of the Law. Also appearing before the Magistrate to answer a charge along with the appellant was Mitchell Herbert Foster. He was the person with whom the appellant was alleged to have been concerned in the possession of cocaine contrary to section 3 (1) of the Law.

The appellant and Foster were both convicted. The appellant was sentenced to 2 years imprisonment on the possession charge, 9 months imprisonment concurrent on the charge of being concerned in the possession of cocaine and 6 months consecutive on the charge of failing to give a urine specimen.

Both Foster and the appellant appealed to the Grand Court. Foster's appeal was allowed. The judge concluded that once Foster's appeal on the charge of being concerned in the possession of cocaine had been allowed the appellant's conviction on that count

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should also be allowed. He dismissed the appellant's appeal against the other two convictions and varied the sentences by making the six month term on the charge of failing to supply a urine specimen concurrent with the two year sentence for possession of cocaine. In the result the term which the appellant was to serve was reduced by six months to 2 years.

The appellant now appeals to this court.

The events leading to the charges arose from a visit by Detective Constable Myers, an officer of the Drug Squad, to Cayman Brac at the end of July 1990 to carry out undercover work with a view to detecting suspected distributors of drugs. He was posing as a person anxious to purchase cocaine but unable to make the necessary contact.

By August 2, 1990 his cover had been blown and his investigations had to be openly done. As a result he had led a party of policemen to the appellant's residence on that day. On arrival he observed a man, who later proved to be the appellant, standing at the kitchen sink. Before he could get out of the car the man had moved rapidly from the sink to another section of the apartment. Myers went to the front door while other officers surrounded the apartment. Myers knocked on the door. The appellant looked out. Myers announced it was the police. The appellant opened the door. Myers entered, asked for permission to search the premises and was allowed to do so. In the period between the appellant leaving the kitchen sink and his looking out after the knock Myers heard the sound of a toilet being flushed.

In the course of the search Myers recovered traces of a white substance resembling cocaine on part of a pipeline running from the bedroom to the bathroom. He also recovered traces of a similar white powder on the floor of the bathroom. He collected scrapings of this powder which he sealed and labelled.

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He arrested the appellant and cautioned him that he was under suspicion for possession of cocaine. The appellant responded that the white substance found was definitely not cocaine.

At the station he interviewed the appellant under caution. In the course of the interview he requested from the appellant a sample of urine. The appellant refused to provide the sample. D. C. Myers formally charged him with the offence of failing to supply the specimen of urine.

In cross-examination, D.C. Myers stated that he carried out a field test on the scrapings he had taken. This proved negative for cocaine. It is not clear at what stage this field test was carried out - whether before or after the request for the sample was made. D. C. Myers stated that he attached no importance to the test because the test he had used "wasn't an appropriate test". He had carried it out merely to see what reaction he would get. In any event scientific tests carried out subsequently established that the scrapings contained no cocaine.

Against that background Mr. Hampson submitted that at the time the request for the specimen was made the circumstances did not give rise to reasonable suspicion that an offence against the Law had been committed. Unless there were grounds for such suspicion the request for the sample was not justified and could be refused.

In deciding whether or not there were reasonable grounds for suspicion the facts must be evaluated at the time the request was made.

D. C. Myers had received information from sources considered reliable which had led him to conclude that the appellant's house should be kept under observation. He had carried out observations for 2 days and had noted nothing suspicious. He had noted as he approached the house to carry out a search that the appellant had

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moved from the kitchen to the toilet before coming to the door and had flushed the toilet. He had seen a white powder which resembled cocaine. Even if the field test had proved negative that would not of itself have been adequate to dispel all suspicion.

On these facts we are satisfied as were the trial magistrate and the judge of the Grand Court that there were reasonable grounds for suspicion of an offence against the Law justifying a request for a sample of urine.

The appeal in relation to that charge must be dismissed.

The evidence of D. C. Myers was that after the appellant had been bailed on August 2 he told D. C. Myers that he would like to speak to him alone. They moved to the Inspector's office and the appellant stated that he wished to help the police recover off the streets the substance for which he was being blamed. He said he would try to find out the persons who had possession of it. He made arrangements to meet D. C. Myers on Saturday August 4.

Meanwhile D. C. Myers continued his investigations and as a result began carrying out observation of the home of Stillman Scott on the morning of August 4. He concealed himself in some bushes nearby for the purpose of these observations. He had earlier that morning seen the appellant who stated that he had seen what was left of the cocaine, knew who had it and was encouraging that person to put it where the police could find out. The appellant would not reveal the name of that person. They arranged to meet again later that day.

About 10.00 a.m. on August 4, 1990 while carrying out his observations from his place of concealment he saw the appellant ride into Stillman Scott's premises carrying a brown object in his hand. He went to a fire heap a little way from the home of Stillman Scott, threw the object on the heap and set fire to it. Somewhat surprisingly, as the judge of the Grand Court commented, D. C. Myers did not check

to see what was the object thrown on the heap but left his place of concealment to report to his Inspector.

Later that day D. C. Myers met the appellant about 2.00 p.m. The appellant said he still did not know exactly where the cocaine would be and again he refused to reveal names.

D. C. Myers returned to his observation post. He saw the appellant come into the yard. There was a group of young men there. He spoke to one of them - the former co-accused Foster. D. C. Myers could not hear what was said but he saw the appellant point to the rubbish heap where he had earlier thrown the object. Foster walked to the heap, picked up something and walked back to the appellant. The appellant and Foster then left going up the road. The appellant was riding and Foster was on foot with the object in his hand.

D. C. Myers ran from his observation post to the Inspector who was waiting in a car. They drove up the road. He saw Foster throw the object he had in his hand into some bushes on the side of the road. The car drove past Foster and the appellant, then turned around. Foster had by then turned back and was going in the direction of Stillman Scott's house. The appellant continued as he had been going. D. C. Myers followed Foster while the Inspector remained in the area where the object had been thrown. D. C. Myers brought Foster back to that area, recovered the object a partially burnt plastic bag which appeared to contain traces of cocaine. Foster identified it as the object he had shortly before thrown on the side of the road. Subsequent tests established that the bag did contain cocaine. D. C. Myers was unable to say positively that the bag which Foster picked up from the rubbish heap and later threw on the side of the road was the bag which the appellant had earlier thrown on the heap and set on fire. The appellant was shortly after arrested at his residence and taken to the police station where he was interviewed.

At the interview the appellant agreed that he had gone to Stillman Scott's house earlier that day. He had taken a bag of

whelks to be cooked. He denied having thrown any object on the garbage heap at that time. He stated that later he had gone to Stillman Scott's yard and had spoken to Foster. He had told him to throw the bag that "those guys" had somewhere so that the police could find it. He had seen in the bush a bag that had been scraped completely out. He had no idea where that bag had been located and had not seen it before noon on that day. He accepted that Foster had moved the bag from the heap on his instructions. He accepted that Foster had picked up the bag because he (the appellant) had told him that the police wanted it and that he should throw it on the side of the road. He also agreed that he was present, riding on his way down to meet Myers, when the bag was being thrown across the road.

In those circumstances the trial magistrate drew the inference that the object recovered from the side of the road was the object which the appellant had thrown there earlier that day. The inference was certainly justified and as the judge correctly pointed out does not conflict with the evidence of D. C. Myers that he could not be positive that the object he picked up in the bush at the side of the road was the object which the appellant had thrown there earlier. D. C. Myers could testify only as to facts which he could objectively demonstrate. Inferences are a matter for the Court.

In Ground 4 of his groundsof his appeal Mr. Hampson complained of the prejudicial nature of certain evidence admitted without objection from a witness Colin Scott.

Essentially he testified as to the conversation which took place in Stillman Scott's yard between the appellant and Foster before Foster left to pick up the object from the garbage dump. Towards the end of the examination in chief the prosecutor asked Colin Scott whether he had ever used drugs. The trial magistrate intervened to question the relevance of the question. The prosecutor asserted that it was relevant. Neither counsel appearing for the accused intervened and the examination proceeded. Colin Scott stated

that he had used cocaine and that the appellant had supplied him with the cocaine three days before the date of the incident to which he was testifying.

There was no reference in the judgment of the trial magistrate to Colin Soctt's evidence. Mr. Hampson submitted that despite this the trial magistrate could have been affected by the evidence. To show that he had not been affected he should have made a specific statement to that effect.

As has been indicated, the record makes clear that he was alert to the likelihood that the evidence was inadmissible because it was irrelevant. Neither counsel responded to an implicit invitation to object. The judgment of the learned magistrate reflects his doubts originally expressed as to the admissibility of the evidence. He placed no reliance on it.

In the result the appeal against conviction is dismissed.

Mr. Archie frankly and commendably concedes that the sentence of 2 years imprisonment imposed on the possession charge is out of line with the cases set out in the summary of decisions available to us. These are cases in the summary decided in 1990.

Essentially, however, an accused person convicted merely of the possession of cocaine can be regarded as a victim. Severe punishments are imposed where the possession is with intent to supply and the element of financial gain enters the picture.

The appellant had a previous conviction for refusing to supply a urine sample. In the circumstances a custodial sentence was appropriate. This also appears to be a proper case for suspending part of the sentence in the hope that it will serve as a deterrent and hopefully arrest the appellant's slide to addiction.

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The sentence of 2 years imprisonment in relation to the possession charge is reduced to a sentence of 18 months imprisonment 6 months of which will be suspended.

The sentence of 6 months imprisonment concurrent on the charge of failing to supply a urine sample is affirmed.