

1990  
Court of Appeal 6/90

IN THE COURT OF APPEAL FOR THE CAYMAN ISLANDS

C.I.C.A. MISCELLANEOUS 1/90

BEFORE THE HONOURABLE MR. JUSTICE ZAGGA - President  
THE HONOURABLE MR. JUSTICE GEORGES  
THE HONOURABLE MR. JUSTICE HENRY

Between BRIAN KILCULLEN Appellant  
and  
REGINA

Mr. Norman Hill, Q.C. for Appellant  
Mr. Robert Sheehan for the Crown

29th & 30th March, 1990  
23 7th June, 1990

REASONS FOR JUDGMENT

HENRY, J.A.:

The Appellant was the pilot of a Cessna twin engined aircraft owned by Titan Transport Corporation which landed in Cayman Brac on June 22, 1989. He was arrested in connection with the discovery on the aircraft of 2 seeds of ganja and subsequently pleaded guilty in the Magistrate's court to a charge of possession of ganja for which he was fined \$1,000.00. He was later advised by counsel that as a matter of law his conviction ought not to stand having regard to the evidence before the court and, the time for appealing to the Grand Court having by then expired, he applied to that court for an extension of time within which to appeal. His application was refused, the learned judge of the Grand Court being of the view that where a person was convicted on his guilty plea the effect of section 158 of the Criminal Procedure Code was to deprive him of the right of appeal against the con-

viction. Accordingly the learned judge felt obliged to consider whether the plea was a nullity and having decided that it was not, to refuse the application. The following grounds of appeal were argued on behalf of the Appellant:

- "1. That the Learned Judge in holding that the test of good arguable case was not the correct test to apply in this case erred in law.
2. That the Learned Judge erred in law in determining the issue of whether the applicants/appellants plea of guilty was a nullity in law as by so doing he was exercising a function which ought properly to be exercised in the Grand Court sitting as an appellate body."

Section 158 provides as follows:

"No appeal shall be allowed in a case in which the accused person has pleaded guilty and has been convicted by the Summary Court on such plea, except as to the extent or legality of the sentence."

In our view the section does not constitute an absolute bar to the filing of an appeal against conviction following a guilty plea. In the present circumstances where the application is for leave to appeal out of time, the primary consideration ought to be whether the applicant has given a satisfactory explanation for the delay. As to this, the learned judge of the Grand Court has stated in his judgment that he would have accepted as sufficient the explanation put forward by the Appellant in his affidavit in support of the application. The other consideration is whether it is just to grant the application. It is clearly just to do so if there is a likelihood of the conviction being set aside on appeal. In his affidavit the applicant indicated that counsel's advice suggests that the likelihood exists. If the Appellant can indeed show on appeal to the Grand Court

that as a matter of law his conviction ought not to stand, we consider that he ought to be afforded the opportunity of doing so.

For these reasons we allowed the appeal and granted the Appellant's application for an extension of time within which to appeal to the Grand Court.