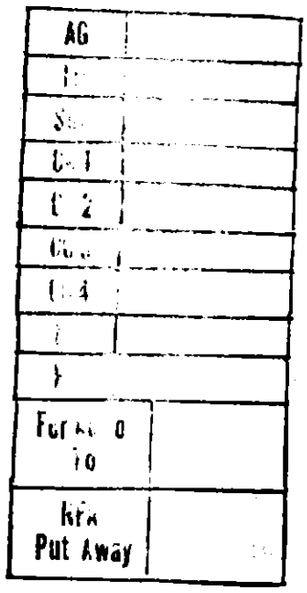
IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN. GRAND CAYMAN

CASE NO. 1641-42/88
APPEAL NO. 156/88

Criminal 26.4.89



MICHAEL ANTHONY STEWART

V.

REGINA

Mr. David Ritch for the defendant
Mr. Anthony Kerrins for the Crown

JUDGMENT

The appellant Michael Anthony Stewart is appealing his conviction in Summary Court on 8th December 1988. of one charge of possession of cocaine and one charge of possession of cocaine with intent to supply contrary to paragraph (k) and paragraph (m) respectively of S. 3(1) of the Misuse of Drugs Law. He was sentenced on each charge to imprisonment for four years to be served concurrently and a confiscation order was made in respect of $12,840.(CI) and $300 (US). He was also recommended for deportation.

The first ground of appeal is that the learned magistrate failed to consider the defence of the Appellant that he was on the property where the drug was found legitimately for a purpose related to his work as an environmental health officer and not to supply cocaine. The evidence concerning this issue, since the Appellant himself did not testify in his defence, came solely from Mr. Theodore Mills, a Senior Environmental Health Officer, who told the Court that the Appellant was an Environmental Assistant subject to his supervision. He had given the Appellant instructions to conduct surveys for rodents, in government and commercial establishments on the day in question and the Appellant had had no authority to conduct investigations on domestic premises that day. Although Mr. Mills

agreed in cross-examination that the Appellant had been issued with an i/d card which states that the holder is 'authorised to enter into or upon any premises or vessel at all reasonable hours' he explained that only Environmental Health Officers, not Assistants, had authority from the Department to go onto domestic premises upon their own initiative.

The effect of this evidence was to demonstrate that, although the Appellant might in general have had legal authority to go on the premises in question, yet on 13th May, 1988 he was not there in connection with the duties to which he had been assigned by his Department and was not supposed to be there in connection with any legitimate official purpose. It is true that the learned magistrate did not in his judgment analyse this issue which was raised before him as we have done but, nevertheless if he had done so, he could not reasonably have reached any different conclusions. Two police officers had given evidence before him of having seen the Appellant place a parcel which subsequently was shown to have contained 18 grams of 89% cocaine into the base of a limb of coconut tree on the premises in question. The learned magistrate stated in his judgment that on a careful and detailed review of the evidence he accepted the evidence of the Crown witnesses as true. It is clear therefore that so far as the learned magistrate is concerned the purpose for which the Appellant was found to be upon the property was the placement of the cocaine in the tree and not any other legitimate purpose which the Appellant might otherwise have had for being there. There is nothing in this point.

The second ground of complaint is that the magistrate erred in finding that the only evidence before the Court was that adduced by the Crown. The Appellant as already noted did not go into the witness box in his defence and his counsel called no defence witnesses. He did elicit evidence in cross-examination from the Crown witnesses and he obtained the production of the exhibit already mentioned into evidence by Mr. Mills who was one of these witnesses. Whether or not this is properly regarded as evidence adduced by the defence rather than by the Crown is a pure technicality. In the strict sense we think it is probably best regarded as adduced by the defence. But there is no reason to suppose that the learned magistrate ignored that

part of the evidence of the witnesses which was elicited by their cross-examination or the exhibit in question in his detailed review of the evidence as a whole. There is no reason therefore to elevate a simple case of misdescription into an error of law capable of affecting the result of the trial and we decline to do so.

We turn now to the most substantial issue in this appeal which was raised by grounds 3 and 4. These allege that the learned magistrate misdirected himself in law as to what evidence was admissible to support the charge of possession with intent to supply and that he wrongly admitted prejudicial evidence relating to other criminal offences alleged to have been committed by the Appellant but for which he had never been charged or convicted. The disputed pieces of evidence in question were respectively a piece of paper which Chief Inspector Biggs said he found in the Appellant's trouser pocket when he was first searched at the Central Police Station after his arrest at the premises on 13th May 1988 and opinion evidence of that officer tendered and received as expert testimony for the purpose of interpreting the figures and calculations which was what the writing on the piece of paper consisted of. The official's evidence was that the figures were a tally of previous drug sales designed to show a drug dealer how much he has sold, whats left and the amount of money he has left from his sales. There is no doubt that this evidence has a strong prejudicial effect inasmuch as it points to a likelihood of the Appellant having previously acted as a drug trafficker or pusher.

The first question which we have to ask ourselves is was the evidence admissible at all for the purpose for which it was tendered by Crown Counsel, that is to say to prove the existence of an intent to supply the cocaine which the police officers saw the Appellant put into a tree. Before this Court as indeed before the learned magistrate Crown Counsel has sought to justify the reception of this evidence upon the basis of the res gestae rule of evidence. We were referred to a number of 19th century authorities which however all dealt with the reception of direct testimony of circumstances surrounding the commission of the offence alleged in the charge before the Court. Here by contrast as counsel for the Appellant points out the evidence in question is purely circumstantial in character and

from which the trial Court was invited to draw inferences. Ratten v. Queen (1971) 3 AER 801 was also cited and in particular the careful analysis by Lord Wilberforce at p.806 of the various situations in which the res gestae rule has been invoked to justify the reception of evidence not otherwise admissible. None of these situations bear any resemblance to that which faced the learned Magistrate in the present case.

If res gestae is not applicable is there any other principle of law by which the admissibility or otherwise of this disputed evidence my be tested? In Makin v. Attorney General for New South Wales (1894) AC.57 Lord Herschell LC at p.65 uttered the well known passage -

> 'It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other then those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury....'

In R. v. Sims (1946) 1 KB 531, Lord Goddard CJ delivering the judgment of the Court of Criminal Appeal in England said, at p.537-

> 'Evidence is not to be excluded merely because it shows the accused to be of a bad disposition but only if it shows nothing more'

Finally in Harris v. D.P.P. (1952) AC 694 Lord Simon L.C. delivering the leading speech in the House of Lords at p.706 observed that sometimes the purpose properly served by such evidence is to help to show what was the intention with which the accused did the act which he is proved to have done. He went on at p.707 to cite with approval the words of Lord Du Parcq in Noor Mohammed v. the king (1949) AC 182 that

> 'in all cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial having regard to the purpose to which it is professedly directed to make it desirable in the interests of justice that it should be admitted. If so far as that purpose is concerned it can in the circumstances of the case have only

trifling weight the judge will be right to exclude it."

Applying these well established principles to the present issue it seems to us that the document and the expert testimony which interpreted it did go directly towards proof of the element of intent to supply inasmuch as it could legitimately lead to the inference that the Appellant was in the business of selling cocaine and was therefore likely to intend to sell the substantial quantity which he had cached in the coconut tree so soon as a willing customer in funds might offer for it. As such in all the circumstances it cannot be described as having trifling weight and despite the inescapable prejudicial effect we have concluded that the learned magistrate was right to admit it. The manner in which he did so as seen from the record of the trial may have been confused: the impression is given that he thought the expert nature of the testimony could cure the prejudice which of course it could not. But once the evidence is seen as strongly probative of the element of intent in the charge before the Court, and the learned magistrate clearly so regarded it, his decision to admit is one which cannot be criticised in the light of the legal principles just discussed.

Great reliance was placed both in this Court and in the Court below in relation to these points on R. v. Whittaker and Watler SCA No. 13 of 1984 and in particular to certain observations of Summerfield CJ which are however obita dicta only since the appeal was determined on other issues. In the course of those observations he remarked - "In particular evidence relating to earlier or unrelated offences is not admissible save in the case of well defined exceptions which do not apply here." In the instant case by contrast as we have seen one of those well defined exceptions does apply namely the reception of evidence logically probative of the element of intent to supply which was not an element of any of the offences charged against the accused in Whittaker and Watler.

As the reception of expert testimony in order to interpret a document of this type, written in a kind of cypher, we have been referred to passages in Thompson on Evidence 13th Edition which strongly suggest that it is competent for the opinion testimony of an

expert to be given on such a subject and these we accept. As to the qualification of Chief Inspector Biggs as an expert in that field that was a matter for the learned magistrate's discretion and we see no good reason on the evidence to hold that he exercised it wrongly.

Ground 5 of appeal suggests that unjustifiable inferences were drawn by the learned magistrate adverse to the Appellant. Such inferences could only relate to the issue of intent to supply since the element of possession was proved by direct testimony. The judgment in the Court below shows that it was the amount of cocaine found in the tree together with the amount of money found in the Appellant's house the same day together with what the magistrate regarded as conflicting statements as to how he came into possession of the currency which led him to draw those inferences. Evidence as to the alleged conflicting nature of the statements came from Sgt. Brown and Const. Novak. At the hearing of the appeal counsel for the Appellant submitted that the statements which they reported amount to no more than three different explanations as to how different parts of the money found had been obtained. That is not the impression gained by reading the record of the officer's evidence and it was not suggested to either of them in cross-examination (so far as the record discloses) that they had misunderstood what the Appellant was saying about it.

From the possession of nearly $18000 in cash by a junior civil servant at the same time as possession and concealment of a quantity of 18 grams of cocaine alone an inference of intent to supply could rightly be drawn. When to this is added the finding of the document in his trouser pocket and the expert evidence as to its meaning the inference becomes overwhelming even if the evidence of conflicting statements is put upon one side as a possible misunderstanding on the part of the police officers. Therefore it cannot be said that the inference was in any way unwarranted on the part of the learned magistrate.

This is enough to dispose of the appeal against conviction. The point was however argued that if this Court considered grounds 3,4 or 5 of appeal to have merit, it would be open to us to apply the

proviso to section 172 of the Criminal Procedure Code as amended and to dismiss the appeal nevertheless on a finding that no substantial miscarriage of justice had actually occurred. In order to take that course in a case in which it is held that evidence has been wrongly admitted, the appellate court is obliged to consider whether, if the inadmissible evidence had not been tendered it can say that the decision of the trial magistrate would certainly have been the same: see Archbold 42nd Ed. 7-46. All the evidence referred to in grounds 3,4 and 5 relate to the element of intent to supply and none to the proof of actual possession and we think therefore that, if we had found any substance in those grounds the correct course would have been, in accordance with that proviso to dismiss the appeal against conviction for the charge of possession of cocaine simpliciter although the proviso could not have justifiably been applied to save the conviction for possession of cocaine with intent to supply.

As it is of course the question of application of the proviso does not now arise and nor does the question of ordering a retrial. The appeals against convictions are dismissed.

Turning now to sentence it has been urged on behalf of the Appellant that 4 years imprisonment is excessive and out of line with sentences passed on others convicted of possession with intent to supply of like quantities of cocaine. So far as sentences which have been considered by this Court on appeal over the past 12 months that does not seem to be the case. Every sentence must of necessity be framed with the particular facts and circumstances of the case in mind and of these circumstances the amount of cocaine involved as well as its purity are factors but only two out of many to be borne in mind. While, therefore, this Court strives to ensure consistency in sentencing levels so far as it is possible to attain it, we do not review sentences passed in the Summary Court with a view to substituting our own judgment for that of the learned magistrates but only look to see whether a particular sentence appears manifestly excessive or wrong in principle, so that we ought to interfere.

Here although 4 years imprisonment is a heavy sentence it does not appear to be manifestly excessive for possession with intent

to supply of 18 grams of a deadly hard drug 89% pure. The four years imprisonment to be served concurrently for simple possession is however quite excessive and calls for a substantial reduction. Moreover that possession is apparently the same possession as has drawn the concurrent four years sentence on the more serious charge. We do not think that it was correct for the learned magistrate to have punished the Appellant for both these offences. That appears to us to offend the maxim that no one shall be punished twice for doing the same criminal act. The charges may indeed be laid under separate paragraphs of the subsection but in this case they were laid as true alternatives and should have been treated as such. Justice will best be served therefore by quashing altogether the sentence passed in case No. 1641/88. To that extent only the appeal against sentence is allowed.

Dated 26th. April, 1989

Chief Justice

Puisne Judge