

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
BEFORE THE HONOURABLE THE CHIEF JUSTICE

ON 23RD AND 24TH MARCH 1988

SUMMARY COURT CRIMINAL APPEAL NO. 72 of 1987

15-04-88

BETWEEN VESSEL (MAD DOG II) APPELLANT
AND REGINA RESPONDENT

Mr. John Furniss for appellant, Michael Lacey

Mr. Anthony Smellie for the Crown

COLLETT, C.J. JUDGEMENT

This appeal is brought against a decision of Hon. Kipling Douglas sitting in Summary Court dated 28th April, 1987, whereby he refused an application filed by the Appellant, LLH Inc, for the return of the vessel, 'Mad Dog II'. She had earlier been ordered forfeited to the Crown under the provisions of section 15 (2) of the Misuse of Drugs Law (Second Revision). The vessel been siezed after entering Caymanian waters under stress of the weather and a search conducted by Police had revealed the presence of 3784 lbs of ganja aboard conealed in a number of secret compartments. The Captain and two other of the crew members subsequeuntly pleaded guilty to various offences and were sentenced to imprisonment under the Misuse of Drugs Law.

The Applicant's application to the Summary Court was grounded upon section 15 (6) of that Law, which allows the owner of a vessel ordered forfeited by a court to make a claim to the same Court within fouteen days of the order of forfeiture for the vessel to be restored to him. That Court is then invested with a discretion to order the return of the vessel to the owner upon payment of expenses but only where it is first satisfied that "the owner, charterer, master, pilot operator or person in control of the

vessel -

(i) did not permit any person convicted of an offence under the Law to use the vessel for the purpose of conveying any controlled drug in respect of which the offence was committed, and

(ii) had no knowledge that any person convicted of an offence under the Law would use the vessel for the purpose of conveying the controlled drug in respect of which the offence was committed."

It is apparent that these latter provisions comprised in subsections (7) and (8) of section 15 imposed upon the Appellant a burden of proof to satisfy the learned Magistrate upon a balance of probabilities that both paragraph (i) and paragraph (ii) were applicable to his claim. Both in the Court below and in the Grand Court the case was argued upon the basis that the Appellant as owner had to satisfy the court only as to his own lack of knowledge and as to his own innocence in regard to permitting the use of the vessel for illicit purposes. I am content to decide the present matter upon this footing but in passing I would nevertheless point out that mention of the charterer, master, pilot operator or person in control in subsection (8) may very well have the effect of casting upon an owner claiming under subsection (6) the more onerous burden of satisfying the court as to the absence of knowledge, etc. on the part of those others as well as of himself. I regard the point as an open one for decision upon a future occasion when the arguments upon each side are fully presented.

The learned Magistrate took evidence upon the application before him which consisted of the testimony of Michael John Lacey, the beneficial owner of the Appellant company and that of James Casson, a special agent for the Drugs Enforcement Agency of the U.S.A. and of Michael Russell the convicted captain of the vessel. The crucial witness was, of course, Mr. Lacey, since it was with his knowledge or the lack of it and with his actions or inactions concerning the vessel that the court was concerned in reaching its decision as to whether or not any basis was

established for the exercise of its discretion in the Appellant's favour. The learned Magistrate, after hearing and seeing Mr. Lacey in the witness box, observed in his judgement (at p. 47 of the record) that his testimony was so laden with inconsistencies and contradictions that he could place little reliance upon it.

On appeal the Appellant's counsel did not seek specifically to impugn the learned Magistrate's assessment of Mr. Lacey's credibility. Nevertheless, I have examined with care the narrative record of his lengthy testimony and that examination is enough to reveal the existence of a number of inconsistencies and contradictions which could well have led the Magistrate to the view which he took of this witness' evidence. One of the most striking is Mr. Lacey's insistence that he left the vessel in charge of his brother, Kevin, for the space of twelve months expecting to recoup his expenses though the operation of it for charter hire and yet at the same time knowing or believing that it was illegal for that vessel to ply for charter hire in the waters of the United States. During that period Mr. Michael Lacey told the Court that he had left the payment/^{of}substantial outgoings to his brother while he attended to his own business affairs in another distant point of the United States and yet that brother, on his own evidence, was not a shareholder in the company and had no beneficial interest in the vessel. One is compelled to wonder why Mr. Lacey was so confident of his brother's altruism in regard to the assumption of major expenses on a vessel whose possession would afford him no apparent benefit.

Another remarkable aspect of Mr. Lacey's testimony concerned a visit which he paid to the vessel in Florida in September, 1986. By that time the vessel had already been used under the control of brother Kevin, for transporting ganja from Jamaica to the U.S.A. on at least one occasion. Mr. Michael Lacey, on his own evidence, inspected the boat and noticed "many additions". Reference to the photographs produced in evidence shows that many of these additions comprised the secret locker compartments in which the ganja was discovered when Mad Dog II subsequently entered Caymanian waters for the second time. Mr. Lacey did not apparently obtain any satisfactory explanation

from his brother as to the purpose of these alterations, the number and character of which appear such as to be likely to put any reasonably prudent owner of the boat concerned upon enquiry as to their nature and purpose.

After examining with meticulous care the whole of the evidence before him the learned Magistrate in his judgement arrived at some fifteen specific findings of primary fact, whose correctness is not seriously challenged upon this appeal. What is energetically challenged is the inferences which the learned Magistrate then drew from these findings - (a) that Mr. Michael Lacey, if not himself concerned in drug trafficking, had knowledge that the crew of the Mad Dog II would use the vessel for the purpose of conveying ganja and (b) that he did permit the use of the vessel for committing the offence for which this crew was convicted.

In the circumstances of the present case there is little or no distinction to be drawn between these two specific inferences. In R v Soutar (1971) 2 All E.R. 1153, a decision of the English Court of Appeal, it was held that the use of the word 'permit' in a similar context to the present one must be taken to mean actual knowledge or knowledge of circumstances such that the person concerned could be said to have shut his eyes to the obvious. Earlier cases such as Evans v Dell (1937) 1 All E.R. 349 are to the same effect and in later cases such as R v Thomas (1946) 63 C.A.R. 65 the criteria laid down there have been followed and applied. I hold that this is the sense in which the words "permit" and "knowledge" are used in section 15 (8) of the Misuse of Drugs Law and in which the learned Magistrate used them in describing the inferences which he saw fit to draw.

It was submitted by counsel for the appellant that it is impossible for Mr. Michael Lacey to have permitted those who were subsequently convicted in the Cayman Islands to use the vessel for the purpose of conveying controlled drugs, because the evidence shows that he was at the relevant time quite unaware of the personal identity of those crew members aboard. Likewise it was submitted that he could not have known that those individuals would

would use the vessel for that purpose, being unaware of their personal identity at the time. This is an ingenious construction of the subsection but I am persuaded that it cannot be the correct one. If it were indeed so it would present a wide open loophole to any owner who wished to distance himself from an operation of drug running organised and financed by himself but controlled and operated by others with the use of that owner's vessel.

In my judgement, however, it is quite sufficient for the purposes of this subsection if an owner knows that his boat is being used for the purpose of transporting illicit drugs by one or more persons who are in fact aboard her and are subsequently convicted in the Cayman Islands of offences in connection with those drugs. It is enough if the evidence leads to the inference that, more probably than not, the owner shut his eyes to the obvious likelihood that his boat would be so used by those aboard her and who were subsequently convicted in that way. Indeed, unless the owner can satisfy the Court that the likelihood is that he did not know and did not shut his eyes to the obvious risk that his boat would be used by those aboard her to transport illicit drugs, then he must inevitably fail to establish either of the conditions precedent set by subsection (8) of section 15 of the Law for the exercise of the Court's discretion in his favour.

It is difficult to see how an applicant whose evidence the trial court has felt obliged to reject, as the learned Magistrate here rejected the testimony of Mr. Lacey, can hope to satisfy the burden of proof which lies upon him under the subsection. I have examined the whole compendium of the fifteen separate primary facts found the by learned Magistrate in his judgement and I find it difficult to see how any court could legitimately fail to draw the same logical inferences from them as were drawn here against this Appellant. At the very least it appears more likely than not that Mr. Lacey either knew or shut his eyes to the obvious likelihood that his company's vessel had been fitted out and was being used for the transport of illicit drugs and had thereby generated the payments which flowed in such

ample fashion into this company's bank accounts during the first six months of 1986.

In so finding, however, the learned Magistrate in one sense went further than he need have done for the purposes of deciding against this application. All he need have found was that the appellant had failed to satisfy him on either limb of section 15 (8) of the Misuse of Drugs Law. It was, of course, implicit in what he did say that he was not so satisfied. Having considered his judgement, the evidence before him and counsel's interesting submissions, I can see no possible basis for holding that he ought to have been so satisfied or that his conclusion was unreasonable.

This appeal is therefore dismissed.

Dated 15th April , 1988.



Chief Justice