IN THE GRAND COURT OF THE CAYMAN ISLANDS
APPEAL BY WAY OF MOTION FROM THE SUMMARY COURT
CRIMINAL CASE NO. 711/87, 712/87, 853/87, 3344/87, 3345/87
G. C. APPEAL NO. 02/87

01- -88

BETWEEN : MARVIN ROBERT JOHNSON

AND : REGINA

Mr. Furniss for the appellant

Miss Dilbert and Miss Conolly
for the Crown

REASONS FOR JUDGMENT

The appellant was convicted in Summary Court on 8th June, 1987 of 5 offences against the Misuse of Drugs Law (Second Revision).

He appealed against convictions and sentences. On 18th January, I dismissed the appeals against the convictions other than 853/87, and I also dismissed all grounds of appeal against the conviction on 853/87 other than that with which I deal in these reasons.

On 19th January, I quashed the conviction on 853/87, and said I would subsequently give reasons.

By virtue of section 3(1)(m) of the Misuse of Drugs Law (Second Revision), any person who, without lawful excuse or without being authorized in that behalf, has in his possession any controlled drug, whether lawfully or not, with intent that it be supplied, whether by himself or some other person, to another person in contravention of the subsection commits an offence.

The same subsection also provides that any person who is concerned in such a matter (i.e. the unlawful possession of a controlled drug with intent to supply) is guilty of an offence.

The charge 853/87 alleges that Johnson, a man called Bailey and another man called Lake were on 25th February, 1987 in George Town together concerned (if I can paraphrase it thus) in the unlawful possession of cocaine with intent to supply it to another. The amount was less than 2 ounces. Johnson and Bailey were convicted. For present purposes, Lake can be disregarded.

The Crown case was that Johnson and Bailey had been seen to meet and talk in a desolate area of bush in Rock Hole, in George Town. Bailey removed a plastic bag containing cocaine on the ground between himself and Johnson. The two men continued to talk. There was evidence that another person in the vicinity heard Bailey say he would sell Johnson 'the white stuff' for $1500 and that Johnson said he would pay the money for it. The Police, who had been observing the incident, moved in before anything further occurred. Johnson made off. He was later apprehended in near Bodden Town where he was found to have $1500 in one pocket and $40 in another.

One of the appellant's grounds of appeal, against his conviction on this particular charge, is that he has been charged with the wrong offence.

Mr. Furniss submitted that there was no evidence that Johnson 'assisted' Bailey in the latter's possession of the cocaine with intent to supply. Its control remained with Bailey. Johnson had no control over it. There had been no supply by the time the Police moved in. A person who discusses price of an item is not 'concerned' with the dealer's possession of it (i.e. the possession of the person who is seeking to supply it). Johnson had not sampled the cocaine. He was not concerned with Bailey's possession but with the next stage i.e. as Mr. Furniss put it, he was "concerned" with an attempt to sell it.

He referred me to three cases, i.e. Blake and O'Connor 68 CR. App. R. 1, Hughes 81 CR. App. R. 344 and R. v. Maginnis [1987] 2 W.L.R. 783. H.L.

There is in my judgment ample evidence that, at the time when he was with Johnson, Bailey himself was unlawfully in possession of the cocaine with intent to supply it to another, i.e. to Johnson.

> Blake and O'Connor was a case in which O'Connor approached some young people in Piccadilly. He asked them if they would like some marijuana and subsequently took them to a flat for the purpose. Blake was there. By his conversation, he disclosed that he knew that they might be interested in obtaining drugs, but he did not know of the particular offer made by O'Connor to the young people in Piccadilly. He was convicted under the English legislation of the offence of "being concerned in the making of an offer to supply a controlled drug" unlawfully. O'Connor was convicted of offering to supply a controlled drug unlawfully.
>
> Blake's conviction was sustained on the appeal. The Court of Appeal held that the offence had been particularly widely drawn to include people

who may have been at some distance from the actual making of the offer. It rejected a submission that "being concerned" required a specific and close involvement in the particular offer that was made, and it rejected the submission that Blake could not be guilty if he did not know that the particular offer was made.

In Hughes, the appellant and a man called Thompson had met with 2 other men in a London Street. Hughes and the other 2 men each handed Thompson something. The Crown's contention was that this was money for the obtaining of drugs.

Thompson and Hughes then went into a chemist's shop where Thompson obtained drugs on a prescription and then both returned to the other 2 men. Thompson was seen to hand one of those other men some drugs, while all the men were apparently keeping a look out. Thompson and Hughes then left the others and Thompson was subsequently seen to hand something to Hughes. The police intervened. Hughes ran off. When eventually caught, he was found to have no drugs on his person.

He was convicted under the English legislation of being 'concerned in the unlawful supply of a controlled drug to another'. The conviction was quashed on the ground that the trial judge had failed to direct the jury on the meaning of the expression 'concerned in'. In the course of its decision, the Court of Appeal said that to prove the offence it was necessary to show :

(a) that there was an unlawful supply of a drug to another;

(b) that the appellant participated in an enterprise involving the supply; and

(c) that the appellant knew the nature of the enterprise, i.e. that it involved the supply of a drug.

Referring to Blake and O'Connor, the Court of Appeal commented that it was enough in that case that Blake was involved in the particular enterprise, even if he was not aware of the particular offer of supply made in pursuance of that enterprise.

Mr. Burniss argued that the present case can be distinguished in two respects. In both of the English cases, the appellant was involved 'on the side' of the person providing the drugs. Here that

was not the case. Here it could not be said that Johnson was participating in an enterprise with Bailey involving the specific offence of possession with intent to supply.

Miss Dilbert, and subsequently Miss Conolly, contended otherwise. The nature of the Crown case, Miss Conolly explained, was that Bailey was on the evidence clearly in possession of cocaine with intent to supply it. Clearly, too, Johnson knew this. There was evidence that the two had met by pre-arrangment. Bailey's possession with intent to supply was a continuing offence. The correct inference to be drawn from the evidence was that by going to Rock Hole and meeting him, Johnson was encouraging Bailey's possession with intent to supply.

The words "assists or concerned in" had been introduced into the Misuse of Drugs Law, she explained, in 1983. They had replaced the words "or offers to do so or who causes, procures, solicits, entices, aids, abets permits or suffers .....". The word "concerned" had a deliberately wide meaning.

It is clear from Blake and O'Connor that the English Court of Appeal regards 'concerned' as being a word of wide meaning. In the Shorter Oxford English Dictionary the definition given is "1. Interested, involved .....".

Section 3(1) contains a number of other offences. It is an offence to sell, buy or otherwise deal in drugs unlawfully and it is an offence to unlawfully supply them. When section 3(1) is read with section 290 of the Penal Code, it is of course an offence to attempt to do any of these things, and by reason of the last portion of section 3(1), it is an offence to be concerned in any of the offences that I have specified in this paragraph.

If a layman were considering the evidence in this case, and he were asked what Johnson was doing, I think he would say plainly, "He was trying to buy cocaine"; in other words, that he was attempting to do so. (It might indeed be argued on the evidence that he did buy cocaine).

There is no rule, of course, that the Crown must charge a person with the offence which in the common understanding best fits the conduct complained of. It may not be a bad sort of rule of thumb in practice, but the Crown is entitled to prosecute for any offence where it considers that the evidence will prove the ingredients of that offence.

In this case, it decided to prosecute Johnson specifically for being concerned in Bailey's unlawful possession of the cocaine with intent to supply it to another. (The charge does not say that in terms but that it is, as Miss Conolly who prosecuted the case in the Summary Court acknowledged, the gravamen of the complaint. That is

what it is about).

At first sight, that is to my mind a rather more complicated and oblique way of describing Johnson's conduct under scrutiny than to say that he was attempting to buy drugs.

It is obvious from the evidence that Johnson knew that Bailey was in possession of the cocaine and that Bailey had the intention of supplying it - supplying it indeed to Johnson. But as wide as the words 'concerned in' may be, I do not consider that their incorporation into the Law was intended to abrogate the ordinary rule that in order for a person to be criminally liable, there must be an actus reus as well as a guilty mind. To establish that he was 'concerned in' criminal conduct of the kind alleged by it, the Crown must show some act or omission on his part that was directed towards Bailey's unlawful possession of the cocaine with intent to supply it. It has to show that Johnson participated with Bailey in that particular enterprise - the latter's possession of cocaine with intent to supply it.

Quite clearly, on the evidence, nothing done by Johnson was shown to have further or facilitated Bailey's possession. Bailey already had the cocaine. It was in his possession and control. If Johnson did anything so as to make him 'concerned in' this aspect of Bailey's conduct for the purposes of criminal liability it would have to be something that bore upon Bailey's intention to supply the cocaine to him. Miss Conolly relied in this respect on the inference to be drawn from the evidence, i.e. the very fact of the meeting and the fact that Johnson had the right amount of money, separately in one pocket, as proof of pre-arrangement. It could therefore further be reasonably inferred, she said, that by agreeing to meet him and by actually going to Rock Hole and speaking with him there, Johnson was positively encouraging Bailey to maintain his intention to supply it to Johnson. Putting it even higher, it could be reasonably inferred from the evidence that Johnson by his interest encouraged Bailey in the first place to form the intention to supply the cocaine to him.

I acknowledge the force of the submission but in my judgment it goes a step too far. Bailey was a dealer. He was in possession of cocaine with the obvious intention of supplying it to some other person or persons from the time he landed in the Cayman islands. The offence was then complete, even if thereafter it continued. I think that there is a reasonable competing inference that Bailey, throughout, may have been the instigator but in any case I agree with Mr. Furniss that what Johnson was involved in was the next stage in the events that developed. He was trying to buy cocaine. To the extent that he was concerned in criminal conduct by Bailey, what he was concerned in was the other's attempt to sell cocaine to Johnson, or to deal with him about it, or to supply it to him.

For those reasons, I set aside the conviction on charge ass/37.

On the charge 3344/87 (possession of a utensil used in the consumption of cocaine), the sentence was varied by substituting a term of one months imprisonment, to run concurrently with that under 3345/87 and a fine of $100, in default of payment within 3 months from today, 7 days imprisonment.

On charge 711/87 (failing to supply a specimen), the sentence was varied to a fine of $100, in default of payment within 3 months from today, 7 days imprisonment.

On charge 712/87 (possession of ganja), the sentence was varied to a fine of $500, in default of payment within 3 months from today, 1 month imprisonment.

In all other respects, the sentences and those convictions which stood were affirmed.

David Hull
Judge of the Grand Court
January 1988