IN THE CAYMAN ISLANDS COURT OF APPEAL
HOLDEN AT GEORGE TOWN, GRAND CAYMAN.
C.I.C.A. No. 11/87

10-12-87
Reported

BEFORE: THE HON. MR. PRESIDENT ZACCA
THE HON. MR. JUSTICE GEORGES J.A.
THE HON. MR. JUSTICE HENRY J.A.

JEFFREY De WITT V. REGINA

APPEARANCE: MR. SHARMAN FOR CROWN.
MR. N.W. HILL Q.C. with MR. CHARLES QUIN FOR APPELLANT.

AUGUST 26 & 27TH, 1987

On August 28, 1987 we allowed the appeal on information 1343/86 which charged the appellant with being in possession of ganja with intent to supply. We quashed the conviction and set aside the sentence. We also dismissed the appeal against conviction on information 1109/86 which charged the appellant with having unlawfully imported ganja into the Cayman Islands. We, however, allowed the appeal against sentence and substituted a sentence of 6 months. We promised to put our reasons into writing. This we now do.

The appellant was convicted in the Summary Court on both these charges. Ganja weighing 10 ounces and 215 lbs. was found aboard a yacht which the appellant had sailed into the Islands along with one Aubrey Martinez, a crew man.

Two small quantities of ganja, weighing about 10 ounces were found in a windbreaker and on a shelf respectively, on the yacht. The second lot of ganja weighing some 215 lbs. was found in a sealed

compartment behind a locker in the cockpit. On the charge of possession with intent to supply, he was sentenced to 5 years imprisonment and to a fine of $10,000.00 (or 1 year imprisonment in default of payment). On the charge of importation, he was sentenced to a term of 2 years imprisonment, concurrent with the five year term, and a fine of $500.00 (or 6 months in default). The vessel was forfeited to the Crown.

From these convictions, the appellant appealed to the Grand Court against his convictions and sentence. His appeal was dismissed.

He now appeals to this Court.

Several grounds of appeal, numbering seven in all, were argued. These were set out in an amended grounds of appeal which was filed on August 24, 1987.

In view of our findings which will be set out later, we think it necessary to consider only three of these grounds of appeal.

GROUND 1"

" The learned Grand Court Judge erred in law in holding that the appellant had waived the provisions of section 62(1) of the Criminal Procedure Code
Grand Court Judge erred in law in holding that the provisions of section 62(1) of the Criminal Procedure Code were directory and not mandatory."

On this ground, Mr. Norman Hill for the appellant submitted that the appellant had not been pleaded on information 1343/86 which charged him with being in possession of ganja with intent to supply.

Procedure Code was mandatory and therefore the omission of a formal arraignment and the consequent failure to take a plea was fatal and that the conviction ought to be quashed and the sentence set aside.

Counsel submitted that section 62(1) of the Criminal

Mr. Sharman for the Crown submitted that section 62(1) was

The Court was referred to R.V. Williams 1977 1 ALL E.R. 874: R.V. James Ellis, 1973, C.A.R. 571. Reference was also made to R.V. Gonzalez and Saurez, C.I.L.R. 10.

Martinez pleads guilty to 1343/86

Martinez pleads guilty to 1110/86

Dewitt pleads not guilty to 1109/86.

26/6/86

1110/86 - Possession of Ganja

Information 1109/86 - Importation of Ganja

Aubrey Martinez

"Regina v. Jeffrey D. Dewitt

(6) The Magistrate's notes now disclose the following:

(5) The trial commenced on June 26, 1986;

subsequent date, 2, June 1986;

possession with intent to supply was laid on a

(4) Information 1343/86, charging the appellant with

1986;

assume that the information was also laid on May 7,

does not form part of the record. It is reasonable to

of ganja was before the Summary Court. This information

(3) Information 1110/86 charging appellant with possession

importation was laid on May 7, 1986;

(2) Information 1109/86 charging the appellant with

6, 1986;

The ganja was discovered on board the yacht Sea Gypsy on May

The record discloses the following facts:

The Court was informed that it was conceded before the

learned Judge of the Grand Court that the appellant had never been

pleaded on information 1343/86.

It will therefore be necessary to examine the record to see

what transpired and also to look at section 62(1) of the Civil

Procedure Code. Thereafter to consider the case of R. v. Williams.

relied on this case to support his arguments. He argued that there

was no disadvantage to the appellant.

directory and also referred the Court to R.v. Williams (supra). He

Possession with intent to supply

Dewitt pleads not guilty to 1110/86

There is nothing in the record to suggest that Information 1343/86 was brought to the attention of the appellant or that he was asked to plead on this information. The record discloses that the trial against the appellant proceeded on Information 1109/86 and 1110/86. It is to be observed that the appellant and Martinez were charged jointly on Information 1343/86 and that Martinez pleaded guilty to this charge.

Section 62(1) of the Criminal Procedure Code states:

> "If both parties appear, the Court shall proceed to hear the case and the substance of the charge or complaint shall be read to the accused person by the Court and he shall be asked whether he admits or denies it."

In R.V. Williams, 1977, 1 All E.R. 874, the appellant was charged on an indictment containing one offence of dishonest handling of stolen property.

This was a case in which, before the accused was pleaded, Crown Counsel applied for the case to be adjourned on the ground that a prosecution witness who was ill and could not attend was required by the defence for cross-examination. Counsel for the accused endorsed the statement of Crown Counsel thereby clearly intimating that the accused intended to contest the charge and to plead not guilty to the indictment. Although the appellant was not called upon to plead, the Court record was endorsed 'adjourned to date to be fixed. Plea Not guilty.' On the adjourned date, the appellant was not asked to plead. The indictment was read to the jury and told that the appellant had pleaded not guilty to it. The appellant did not demur.

It was held that where an accused intended to plead not guilty, the omission of a formal arraignment and the consequent failure to take a plea did not vitiate the trial provided that a plea of not guilty had been vicariously offered or tacitly conveyed, or a formal arraignment had been impliedly waived by the accused, and the ensuing proceedings followed the same course as they would have done

had there been an arraignment and had a plea been taken.

Lord Justice Shaw in his judgment after stating the facts said that there was a clear intimation that the appellant intended to contest the charge and that he therefore proposed to plead not guilty to the indictment.

After stating that the indictment had been read out to the jury, Shaw L.J., said at page 876:

> " Thus the appellant heard the indictment read out. He heard also the statement that he had pleaded not guilty to it. No one present, other than the defendant himself, could have known that the assertion that he had pleaded not guilty out of his own mouth was not in accord with the facts. However, the appellant made no demur. If any question had arisen to his mind, he would no doubt have dismissed it as being of no practical consequence. After all it was his intention and desire to enter a plea of not guilty to the charge and to be tried by the jury."

Again at p. 876, Shaw L.J., stated:

> " Counsel for the appellant has submitted that the omission of any formal arraignment, with the consequence that no plea was taken, is fatal to the validity of the trial. He took his stand in a judgment of this Court in R.v. Ellis, where the Court of trial had accepted a plea of guilty for Counsel for the accused. In setting aside the conviction, Edmund Davies, L.J., referred to the rule that before a criminal trial by judge and jury can be properly launched, there must generally be an arraignment of the accused of the offence charged and he must personally answer to it....."

He went on to say:

> " We think that the only safe and proper course accordingly is to say, as we now do, that (apart from a very few special cases) it is an invariable requirement that the initial arraignment must be conducted between the Clerk of the Court and the accused person himself or herself directly, whatever may be the decision in relation to the cases where as in Tasamulug there is a change of plea in the course of it, though there also, we express the strong view that is highly desirable that the same rule of practice should be followed.

It has to be observed that this proposition stated in those wide terms went beyond what was necessary for the decision of the appeal. There the critical issue was whether a plea of guilty tendered by Counsel and not by the accused himself could be regarded

as an effective and binding plea. It is, of course, plain to see why it cannot and should not be so regarded. It is a plea which is self-incriminatory and self-incrimination cannot be vicariously accomplished. Any contrary view would be fraught with manifest dangers. Injustice rather than justice would be the likely product of a principal which permitted indirect delegated confessions of guilt.

No qualification or deviation from the rule that a plea of guilty must come from him who acknowledges guilt is thus permissible. A departure from the rule in a criminal trial would therefore necessarily be a vitiating factor rendering the whole procedure void and ineffectual. The court so affirmed in R.v. Ellis where Counsel had assumed the function of pleading guilty on behalf of his client.

It does not seem to this Court, at any rate at the present day, that the same fundamental objection exists where a plea of not guilty is vicariously offered or tacitly conveyed. It is difficult to conceive what possible prejudices to an accused person could derive from such a procedure."

At p. 880, Shaw L.J., concludes his judgment:

> " In the judgment of the Court, while the omission of a formal arraignment was unfortunate and regrettable, it did not, in the peculiar circumstances of the case, have the result of vitiating the trial as such."

In Williams' case Shaw L.J., was distinguishing between a plea of guilty and one of not guilty. My understanding of this case is that where it concerns a plea of guilty, then there must be a formal arraignment. However, in the case of a plea of not guilty, the omission of a formal arraignment was not fatal where a plea of not guilty is vicariously offered or tacitly conveyed. This latter proposition was held to be the position in that case.

In his reason for judgment, the learned Grand Court Judge stated at p. 9:

> " I agree with Mr. Sharman that Williams is authority which I ought to follow for the proposition that,

> where no plea is taken from a defendant in the outset of a summary but the trial proceeds on the basis that he has pleaded not guilty and the omission does not affect the outcome, it is not in itself a sufficient ground for a re-trial."

Again at page 10, the trial Judge said:

> " So far as the apparent lack of a plea to the charge of possession with intent to supply was concerned, it was assumed for the purpose of this appeal that the record was in fact correct. It may be that the record was in fact correct. It may be that in fact a plea was taken, but inadvertently omitted from the record. Whether or not that was so in this case, I do not interpret Williams as meaning anything more than that, where no adverse consequences flow an omission to take a plea, it is not a sufficient ground for a re-trial. It is still important to observe the formalities of trial procedures, the more so when the charge is a serious one. Williams does not say otherwise.

There was no basis for the learned Judge to suggest that a plea may have been taken as it was conceded before him that no plea was in fact taken. The learned Judge, in our view, also erred in his interpretation of Williams' case and in holding that it was a case in point with the instant case before this Court.

In Williams' case, Shaw L.J., held that because of the peculiar circumstances of the case, the omission of a formal arraignment, whilst unfortunate and regrettable, did not vitiate the trial. The reason clearly being that in that case, a plea of not guilty was vicariously offered or tacitly conveyed.

In the instant case before the Court, the record is clear that neither was the charge brought to the attention of the appellant nor was he pleaded to the charge. Further, there was nothing in the record to suggest that the appellant had either vicariously offered or tacitly conveyed a plea of not guilty.

We would therefore hold that whilst section 62(1) is not mandatory in the sense that a formal arraignment is required, there must be some evidence that a plea of not guilty was either vicariously offered or tacitly conveyed on behalf of the appellant. This was

this evidence. This matter was raised before the Grand Court Judge to Cayman the previous year."

In his reasons for judgment, the Magistrate does not refer to

"

trip a boat on a boat was taken on a photograph was taken on a boat on a trip firearm. He stated that this photograph

agreed that it was a photograph of himself holding an automatic

he photographs, he been involved in crimes and guns. Having been shown the photograph, charged. Martinez had denied under cross-examination that he had ever witness on behalf of the appellant. He had already pleaded guilty to charges which related to the same ganja for which appellant had been him on a boat holding a firearm. Martinez was called as a defence The first was a photograph of Aubrey Martinez which showed

decision."

prejudicial items of evidence which influenced the Magistrate in his Mr. Hill submitted that the Magistrate admitted two highly

to both accused."

concluding that the appellant admitted that the ganja concealed in the boat (Exhibit 5 and 20) was to belong on the evidence and thereby had not erred in law in that the learned Magistrate had not misdirected himself Ground (2) The learned Grand Court Judge erred in law in holding by such evidence;"

as a consequence of which it cannot be said that the learned Magistrates decision was not thereby affected admitted inadmissible and highly prejudicial evidence holding that the learned Magistrate had not wrongly

(1) The learned Grand Court Judge had erred in law in

Grounds of appeal 2 and 3 may be taken together. These are:"

and the sentence set aside."

We therefore conclude that the conviction should be quashed

clearly not so in the instant case.

I replied that I
leaf was shown on the shirt to which I
showed me these photographs and asked me what kind of
exhibits in the aforesaid trial. The Learned Magistrate
seen to be wearing in photographs which were tendered as
asked me certain questions about a shirt Jeffrey was

His Honour, the Learned Magistrate Mr. Kipling Douglas,

(2) That whilst I was being cross-examined by Crown Counsel

Court."

against Jeffrey David Dewitt at Cayman Magistrate's

witness for the defence in the trial of the Crown

(1) That on the 25th day of June, 1986 I was called as a

and say as follows:

I, AUBREY VAN MARTINEZ, of Northward, Grand Cayman make oath

affidavit of Aubrey Martinez which set out the circumstances relating
to the questioning of the witness by the Magistrate about the motif on

the shirt:

shown to the Court and we would not describe the leaf as a ganja leaf."

The witness denied that it was a ganja leaf. This shirt was

Magistrate was as a result of questions being put to Martinez by the
Magistrate himself. A shirt which belonged to the appellant was shown
to the witness by the Magistrate. On this shirt was a motif in the

The second item of evidence which was admitted by the

form of a leaf. The witness was asked by the Magistrate if the leaf
was a ganja leaf.

prejudicial to the appellant's case.

admission of this evidence cannot be said to have been highly

cannot be said to have been admitted for any other purpose. The

The evidence clearly went to the credit of Martinez and

" In itself, the use of the photograph
does not go beyond testing Martinez's
credibility. It has not been shown
that the Magistrate regarded it as
proving anything more far reaching."

and in his reasons for judgment at page 2, said:

though it was a Canadian Maple Leaf. The Learned
Magistrate stated that he thought it was a ganja leaf
and when I disagree with the Learned Magistrate he
indicated that this was a sign that Jeffrey and I were
involved in drugs. The Learned Magistrate ordered the
shirt which was a greeny-blue shirt to be produced
before the Court and again he asked me if I thought it
was a ganja leaf to which I replied no.

(3) That I recall Jeffrey Dewitt's attorney, Mr. Charles
Quin, indicating to the Learned Magistrate that his
client had bought the shirt in a store in Miami and was
no different from thousands or indeed millions of other
shirts. Mr. Quin also added that it was such a common
type of shirt that Chief Inspector Dent could quite
still stated that he though the motif on this shirt
easily have been wearing one but the learned Magistrate
resembled a ganja leaf.

(4) Save where otherwise appearing, I depose to the
foregoing from facts within my own knowledge.

I accept the word of the police that accused admitted
that the ganja was to belong to both men."

Magistrate made the following findings:

Mr. Hill also complained that in reasons for judgment, the

comments and views as to the motif did not influence his decision".

the appellant's case and we are unable to say that the Magistrate's

These comments by the Magistrate was highly prejudicial to

The Court was informed that this affidavit was shown to the

magistrate who stated that he had no comments to make. The affidavit

was also before the Grand Court Judge.

There was evidence from the police that the appellant had admitted that the ganja in the windbreaker and in the shelf was for personal use. However, the appellant denied any knowledge of concealed ganja. The admission related to some 10 ounces of ganja, whilst the concealed ganja weighed some 211 lbs.

It was argued by Mr. Hill that the Magistrate was stating that the appellant had admitted to the police that both the 10 ounces and the 211 lbs of ganja belonged to both men.

It may be that the Magistrate was referring only to the 10 ounces of ganja which the appellant admitted but he should have specifically said so. His finding is also open to an interpretation that the appellant had admitted all of the ganja. This, of course, would have been an incorrect finding.

The charge of importation of ganja against the appellant was with respect to all of the ganja. There was evidence on which the Learned Magistrate could properly have convicted the appellant with respect to the 10 ounces of ganja. It was for this reason that we dismissed the appeal against conviction. The sentence of two years imprisonment and a fine of $500, or in default six months was, however, on the basis of all the ganja discovered. We therefore varied the sentence to one six months imprisonment. We did not interfere with the fine.

Having regard to our findings we did not consider it appropriate in these circumstances to order a new trial. We also took into account the fact that the appellant had already been incarcerated for some sixteen months.

Delivered 10th day of December, 1987

Mr. President Zacca