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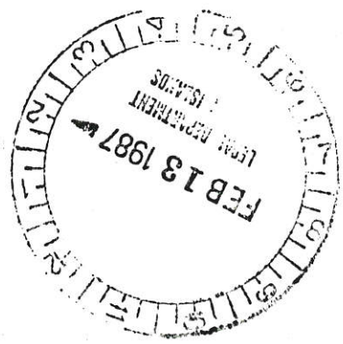
IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
BEFORE THE HON. MR. JUSTICE HULL
CIVIL CAUSE NO: 234 OF 1986

IN THE MATTER OF THE GRAND COURT (APPLICATION FOR ORDERS)
OR MANDAMUS, PROHIBITION, CERTIORARI AND HABEAS CORPUS) RULES
AND IN THE MATTER OF THE GRAND COURT LAW (LAW 8 OF 1975)

BETWEEN: MARIO FIALLO AND ANGIE SANTIAGO APPELLANTS

AND: REGINA RESPONDENT



Mr. Jenkins for the applicants.
Mr. Smellie for the respondent.

Reasons for Judgment

On the 8th January, 1986, the Police arrested Giampietro Salami, Joann Miranda, Mario Fiallo and Angie Santiago in the Cayman Islands on suspicion of offences relating to cocaine. In the proceedings which followed, the Crown relied on the following allegations.

On 2nd January, 1986, Salami flew here from Miami. On arrival, he went to the Ambassador Inn, George Town, and checked in, staying in Room 103. During this stay, he visited the docks. He returned to Miami on the following day. Miss Miranda travelled from New York to Miami on 5th January. There she was introduced to Salami. She had been told to go to see him, in order to accompany him to the Cayman Islands to obtain cocaine and import it illegally into the United States of America. They came here on the same day. Salami again checked into the Ambassador Inn and he and Miranda stayed in Room 204, which was a room upstairs, on the first floor, without a bathroom. The balcony leading to it overlooked the office and an outside terrace with tables and chairs, and an almond tree in its centre.

On the following day, they went into George Town, where Salami visited the docks again. At some time during the day, they obtained cocaine. This was contained in sixteen similar packets, which were all of roughly equal weight.

On 7th January, Salami also requested another room. He was given Room 104, which was on the ground floor, and he paid for one night at the double occupancy rate. Fiallo and Santiago, who were accepted by the Crown as being husband and wife, arrived in the Cayman Islands on the evening flight on that day. They stated in their immigration declarations that they were coming here for recreational purposes. They went to the Ambassador Inn where, on arrival, Salami spoke to them, and they stayed in Room 104. During their stay, they associated with Salami and Miranda.

On 8th January, Santiago was in Room 204 with Salami and Miranda. The proprietress came up to the room to remind Salami that check-out time was noon. Santiago gave her $50, saying that one person would be staying on in it for one night. Soon after lunch, Miranda, Fiallo and Santiago went to the airport in a taxi. Minutes after they left the hotel Salami also left, on a motor scooter, and went to the airport.

On arrival Miranda, Fiallo and Santiago all checked in at the ticket counter, received their boarding passes for an afternoon flight, and went up to the cocktail lounge. They then came down and approached the security clearance point that passengers pass through before boarding. As Miranda went through the security point, the signal sounded. What then happened, in short, was that after being checked with the electronic equipment twice more, Miranda was detained and searched by the Police. She was found to have five of the packets of cocaine taped about her waist, and she was accordingly arrested. At the time she was checking Miranda, the airport security officer was also aware that Santiago was at the security point. She had passed through the gate without setting off the electronic detection device.

While Miranda was being detained, Santiago and Fiallo were both seen to leave the area, and the terminal, in a hurry. Fiallo appeared to be holding his hands in front of his waist. They left behind them at the checkpoint Santiago's handbag and purse, as well as their immigration slips.

The couple returned to the hotel. Soon after they arrived, they were seen to come down the stairs from the vicinity of Room 204, and then to walk across to the terrace, near the almond tree. After that they were observed leaving the hotel grounds by a side exit and they then went and stood on the road opposite the hotel. The police arrived and spoke to them. Salami then returned to the hotel and the police went with all three to Room 204 where, under the bed nearest the cupboard, seven of the

packets of cocaine were found in a cardboard box. The travel documents of Fiallo and Santiago were also taken by the Police while in Room 204 but the evidence as to where they came from was inconclusive. The three people were taken to the George Town Police Station and Santiago was searched and found to have traces of a residue about her waist.

Two days later, the gardener at the hotel, Mr. Rosegreen, found a white plastic bag near the almond tree. It was a bag of the kind kept in the bathroom near to Room 204. Inside were four packets of cocaine. Some of them had tape around them. It was similar in compostion to the residue about Santiago's waist. There was some silver foil under the plastic. These packets were of a similar size, and similarly packed, to the other packets that had been recovered.

To understand the present application properly, it is necessary to know the legal steps that were taken after the police detained the four people. They were of course arrested on suspicion of having committed offences relating to cocaine. They were eventually charged with various offences under the Misuse of Drugs Law. On 10th January, all four were charged with conspiring in the Cayman Islands between 4th and 8th January to commit an offence, namely the illegal exportation of cocaine. Then on 23rd January, further charges were laid against the defendants. Against Santiago and Fiallo, it was alleged that they had illegally attempted to export cocaine on 8th January. They were also charged, together with the other two, with being unlawfully in possession of cocaine in Room 204 between 8th and 10th January and further with being in possession between those dates, at the hotel, with intent to supply it, and they were all also charged with being concerned in the possession of cocaine in George Town between 4th and 9th January.

The last three charges were all triable summarily. The others I have referred to came to the Grand Court, on indictment.

When the defendants were arraigned, Miranda pleaded guilty to attempting to export cocaine on 8th January and to the conspiracy count as it then stood. The Crown offered no evidence on the remaining count against her on the indictment, which was one of storing cocaine with Salami in Grand Court between 6th and 8th January. Nor has the Crown proceeded against her on the summary charges laid against her.

Miranda gave evidence for the Crown in the trial of the other three defendants in the Grand Court.

In her initial statement to the Police, she had implicated Fiallo and Santiago. However at the trial, the effect of her evidence was that although she and Salami were confederates, she had herself seen nothing to indicate that the couple were involved. She also admittedly readily to defence counsel that she had told lies to the police, but she was insistent that her account from the witness box was true.

I should perhaps mention here that in relation to the allegations of conspiracy, the indictment was amended during the trial, but I do not think the details of the amendments are material.

The case put forward by the Crown against Salami and Fiallo at the trial before the jury was undoubtedly a strong one. Against Santiago, it did not depend on the testimony of Miranda, who was a fellow countrywoman. There was strong evidence, largely unchallenged, that having stayed in a room paid for by Salami, she was with him and Miranda on the morning of the 8th, in the room in which cocaine was later found; that there she handed over to the proprietress the money for the extra night's accommodation for one person; and that having gone to the airport with her husband and Miranda, she left when Miranda was detected, leaving personal items behind her in her haste. There was evidence that at the time of her arrest, she had about her waist the residues of tape similar to that on the packets by the almond tree and there was of course also the evidence of her being seen on the stairs after returning to the hotel, and by the tree. The evidence against Fiallo was not so strong. It was, in essence, evidence of association. He was never seen in Room 204. That evidence which related to his being at the security area, and his appearance as he left the airport, was open to challenge. No traces of tape were found on his body.

The jury, after a retirement of some 17 minutes, returned and acquitted all three remaining defendants on all the counts outstanding against them. In fact, their deliberations were even shorter than that, because they were ready to come back after about 10 minutes but it took a little time to assemble the court.

At the conclusion of the jury trial, Fiallo and Santiago were re-arrested and subsequently the Attorney-General announced his intention to proceed against them in the Summary Court. An application was made to the Stipendary Magistrate to disqualify himself on the ground that the preliminary inquiry in respect of the jury trial had been conducted by him. This was refused. He also refused to stay the proceedings on

pleas of autrefois acquit and on the principle of res judicata, and the charges were set for trial.

The applicants then sought and obtained leave to seek judicial review of his decision. When the application came on for hearing, it became apparent that there were procedural shortcomings in it which needed to be corrected, and that in order to argue the issues he wished to raise, their counsel would need to obtain leave to widen the scope of the application. The Crown, very fairly, did not seek to place any impediment in the way of the applicants in these respects. Looking again at my notes, I should here say that they do not show that the submission that the further prosecutions would be oppressive was the subject of a specific application to amend, but rather that Mr. Jenkins developed this out of his submissions on the pleas of autrefois acquit. However both sides did argue the matter on the wider basis, and it was determined on that basis.

I think I understand why the Attorney-General decided to proceed on the summary charges. The jury were of course the judges of fact and it was for them to say, as forthrightly as they may have wanted to, that they were not satisfied that the charges had been proved. It was their prerogative to decide how soon they would come to that view. But by the same token, the verdict was also their responsibility (unless there were misdirections or inadequacies in my summing up.) It may have been that they were unhappy with Miranda and that they saw her evidence as being crucial to the Crown's case. The fact that Santiago, allegedly carrying packets containing silver foil, failed to trigger the alarm, may have weighed with them. The case against her husband was no more than circumstantial, and even in 1986, this may also have been a factor in relation to her own acquittal. But all of that is to speculate. The point was, and unless I am corrected, I see no reason not to make the comment, that the speed of the verdict took many of those who were present by surprise. (It has taken me longer than I had hoped to deliver these reasons, and in view of remarks I made very recently about juries in another matter, I should perhaps emphasise that I am here talking of course about this particular case.) It looked to be a case which at the least called for studied deliberation on the evidence. The way in which the verdict was returned was, I suspect, a factor that led the Attorney-General to his decision to proceed again. On top of that, this was a case involving a very substantial quantity of cocaine. That alone made it a grave matter but, more than that, it involved allegations of international trafficking.

Nevertheless, it is our law that the jury decides the issue in a criminal trial once it is left to them, and except to the extent that the legislature has specially provided otherwise, drug charges fall to be decided in the same way as other criminal offences.

Both counsel relied on Connelly v. Director of Public Prosecutions 48 Cr. App. R. 183 as the leading authority. That was a case in which the appellant had been charged, on one indictment, with murder arising out of an armed robbery and on a second indictment, with robbery with aggravation. His conviction for murder was quashed on appeal but the Court of Criminal Appeal gave leave to the Crown to proceed on the second indictment. Connelly deals with the scope of the plea of autrefois acquit, the application of res judicata and issue estoppel in the criminal law, and the power of a judge to direct that a prosecution, once instituted, should not proceed, i.e. the extent to which he may do so if it would be unfair and oppressive, and so an abuse of the process of the court, to proceed. It was a case in which the rule in R. v. Jones 13 Cr. App. R. 86; [1918] 1 K.B. 416 applied, i.e. that no count for any other offence should be included in an indictment for murder. In that respect the facts of the case differ from those in the present one. I think the difference is relevant to the question here as to whether it would have been oppressive to proceed in the Summary Court, although this present case has one apparently similar feature, which I also think I should deal with, which is that because of the way in which the Misuse of Drugs Law categorises the various offences created by it, it was never possible for the Crown to include all the charges against Santiago and Fiallo in one indictment in the Grand Court.

In Connelly, it was explained that autrefois acquit is a particular plea that has developed historically. It gives an accused person protection against the established rule against double jeopardy. It does not involve any exercise of discretion. Where the conditions for the plea are made out, it is an absolute bar to trial. The basis for the plea is however confined to the principle that a person cannot be tried twice for the same legal offence or substantially the same offence, not whether he can be prosecuted more than once for different offences stemming from the same facts.

Mr. Smellie submitted that the counts in the indictment were not in law offences with the same ingredients as those prosecuted in the Summary Court. The plea of autrefois acquit therefore did not apply. He also said that, in accordance with our criminal process, the jury had returned a general verdict. No one could say with certainty why the jury had acquitted the applicants. Their verdict was not incompatible with any subsequent decision that they were guilty of the charges to be tried by the Summary Court. Res judicata and issue estoppel therefore could not apply.

As a matter of strict law - of the logic of the law - I have to agree with those submissions so far as they relate to those bases for intervening. I do have strong reservations about the extent to

which the charges of conspiracy to export cocaine and of being concerned in the supply of cocaine, on the facts of this case, were not substantially charges for the same offence and I do not believe that in fact in this case the jury's verdict involved its accepting the evidence so far as it would have proved the ingredients in the summary charges and rejecting that part of the evidence that sought to prove the additional ingredients necessary to sustain the counts in the indictment. But in logic I think his submissions are correct, and that to succeed the applicants have to invoke the residual, discretionary ground that it would be oppressive to proceed.

Connelly, in my view, is in this case authority and guidance for the following propositions:

(1) An English criminal court (and so the Caymanian court) has an inherent power to prevent the abuse of its process and to defeat any attempted thwarting of its process. There is a policy and a tradition that, even in the case of wrongdoers, there must be an avoidance of anything that savours of oppression. The High Court has inherent jurisdiction (subject to statute) to make and enforce rules of practice to ensure that the court's process is used fairly and conveniently by both sides. (Lord Reid at page 201; Lord Morris of Borth-y-Gest at pages 206 and 207; Lord Devlin at page 259; Lord Pearce at page 275).

(2) The courts cannot transfer to the executive their responsibility for seeing that the process of law is not abused. (Lord Devlin at page 268).

(3) In the High Court, the inherent power involves a general power to prevent unfairness to an accused person. This power takes various specific forms. The process of the evolution of the power is still continuing. The pleas of autrefois do not exhaust the inherent powers of the courts. (Lord Devlin at page 259; Lord Pearce at page 276).

(4) An abuse of process is a proceeding which is vexatious and harassing, without reasonable grounds. For example, the repetition of a charge after an acquittal or a conviction is an abuse. The courts have power to prevent repetitive prosecutions, even in circumstances beyond the scope of the pleas of autrefois. It would be an abuse of process if a prosecutor could bring several separate prosecutions against

> a defendant on the same facts, even though they involve different offences in law, in order to make fresh attempts to break down on a defence. And if the Crown were to be allowed to prosecute as many times as it wanted to do on the same facts, so long as for each prosecution it could find a different offence in law, there would be a great danger of abuse and of injustice to defendants. The Courts have a duty to conduct proceedings so as to command the respect and confidence of the public and for that purpose it is absolutely necessary that issues of fact that are substantially the same should, whenever practicable, be tried by the same tribunal and at the same time. (Lord Devlin at page 266; Lord Pearce at page 282).

The case does not, however, in any way afford a trial judge an unfettered discretion to stop a prosecution. It laid down a number of important qualifications, of which the relevant ones appear to me to be the following:

(1) The inherent power to prevent an abuse of the process should not prevent access to the courts when a lawful claim is presented.
(Lord Hodson at page 247).

(2) A judge must not stop a prosecution simply because it offends his personal sense of fairness, nor because in some imprecise way it seems to be unfair. (Lord Morris at pages 205, 208 and 211; Lord Hodson at pages 248 and 249).

(3) There has never been a rule that the same facts may not form the basis of successive charges. (Lord Morris at page 207).

(4) It has been held proper in a very large number of cases to try a man a second time on the same criminal conduct where the offence charged is different from that charged at the first trial. (Lord Reid at page 200).

(5) The inherent power of the court has never been regarded as allowing the court to say that evidence given in reference to one charge may not be repeated in reference to another and different charge. (Lord Morris at page 208).

The first of these qualifications is however itself subject to a qualification because Lord Hodson went on to say at page 247 that he did not dispute that once proceedings were lawfully instituted, the court could use its power to prevent its process being abused. As I understand the position, the two propositions show the discretionary nature of the general or residual inherent power and also that it is invoked as to the way in which a particular proceeding is pursued. A prosecutor, in this case the Attorney-General, is entitled of right to institute criminal proceedings if the indictment is in proper form and it discloses an alleged offence. If, once the proceedings are commenced however, the court considers that in a particular case they are being conducted oppressively so as to amount to an abuse of its process, it may intervene in a proper case.

If that analysis is correct, I think it leads on to a distinction between the facts in Connelly and this case. At first sight they are similar in the respect I have already mentioned, ie. that in each case the prosecution, instituting all the proceedings which it wished to lay, had no option but to commence separate proceedings. But in Connelly, the rule which the prosecution had to observe had been laid down by the courts themselves, to protect their process. To observe such a rule could not be said to be an abuse. Here, the statute law provides that some of the charges may be tried on indictment but that the others must be dealt with summarily.

Although that is the case here by reason of a statute, I do not think that the matter thereby falls within the limitation on the inherent power of the courts to control their process which was referred to by Lord Devlin at page 259 of Connelly when he said that the power to enforce rules of practice was "subject of course to any statutory rules". The position as I see it is that the legislature, by enacting a Law, has defined certain categories of offence but the Law itself does not direct the way in which prosecutions under it are to be pursued; it is not directory as to what charges are to be laid in any given situation. That is in the first instance a matter for the Attorney-General. He decides what proceedings he will commence, and he in his discretion is entitled to do that. And then, in a particular case, if the circumstances warrant it, the court may intervene to protect its process.

So the fact that the Crown could not have brought before the Grand Court those charges which had to be tried summarily is not, in my view, in itself sufficient to rebut the possibility of oppression, but two other questions then need to be decided. The first is whether, in this case, the summary proceedings were oppressive so as to constitute an abuse of the Grand Court's process. The second, which seems to me to be intertwined with it, is whether a subsequent proceeding in a lower court can be said to be an abuse of the process of the Grand Court.

In the circumstances of this case I consider that it would be oppressive to have allowed the summary prosecution to proceed.

The Crown's case on the indictment was quite clear. It was saying that Santiago and Fiallo came here to take part in the smuggling of cocaine into the United States of America. For that purpose they made an illegal agreement with Salami and Miranda to export the cocaine. Having received it, they left for the airport with Miranda and went so far as to check in and proceed to the security point. When Miranda was caught there, they panicked and returned to the hotel.

What was the evidence against Santiago that could have supported any one of the three summary charges considered in isolation?

She had stayed the previous night in Room 104, which had been paid for by Salami. She had been seen to associate with him on that night. On the day of her arrest she had been seen at one point of time in Room 204, when she had passed to the proprietress $50 to have the room kept for one person for another night. After her return from the airport she had been seen coming down the stairs in the vicinity of Room 204, and then near the almond tree, and then leaving the grounds by a side entrance, and then standing on the road opposite the main entrance. Shortly thereafter, seven packets of cocaine were found in Room 204 under a bed, in a box. When she was examined after her arrest, Santiago was found to have traces of a residue about her stomach. Two days later, four packets of cocaine were found under the almond tree, similar in size and packaging to those found in Room 204, and in a bag of the kind found in the bathroom servicing but not within Room 204. They had tape on them which in the opinion of the Crown's expert witness was of similar composition to the residue on Santiago's body. He said the residue could have originated from that tape or from another tape like it. It appeared to him to be a fairly common type of tape and he would not go beyond saying that the residue could have arisen from it.

Pausing there, I think that that is as high as one could put the evidence against Santiago in relation to any of the summary charges alone.

I recognise that the answer to the question whether the Crown would ever have brought the summary charges against Santiago, if it had not also had the evidence on which it would rely in order to prosecute the charges before the Grand Court, necessarily involves a degree of surmise. The fact was that it did lay summary charges soon after her arrest. Moreover, the evidence on the summary charges does provide some basis for alleging a connection between Santiago, the cocaine by the tree, and the cocaine in Room 204.

But having said that, there is no doubt that that evidence, by itself, amounted to a much more tenuous case against her than the one presented in the Grand Court. Two important things are missing. The first is that evidence which the prosecution had which went to show that Santiago tried to leave the territory. Even that, if added alone, does not complete the picture. The linch-pin in the Crown's case was the evidence that it might lead to show that all of these events were aspects of a conspiracy to which she was a party.

That this was so, in my view, is indicated by three things. The first is that Mr. Smellie said as much, in arguing to justify the joinder which was permitted in the Grand Court. The next is the order in which the Crown laid its charges. The first one laid was the conspiracy. It was an allegation of a conspiracy to export. The other charges followed some days later. Finally, there was the fact that no attempt was made to pursue the summary court charges against Miranda. Of course it often happens that the prosecution will accept that a plea of guilty to a greater charge justifies their not proceeding on lesser charges. Nevertheless, as a matter of common sense, it is obvious that in Santiago's case, after she had been found not guilty by the jury, the Crown's purpose was to try again, in another court. I accept that I cannot say so with certainty, because it was a matter ultimately within the knowledge of the Law Officers, but I think it is very unlikely in the circumstances of this case, including the way in which it unfolded, that the Crown would have laid these summary charges against Santiago otherwise than incidentally to the indictment.

On the application to justify the joinder in the Grand Court, the existence of the charges below was not mentioned. That was no more than inadvertence, and it may well have been that Crown Counsel thought I would have realised this from the bundle (though in fact I did not). But the joinder was allowed and this was done on the basis that the conspiracy count would disclose the overall criminality alleged against Santiago and that this was in the interests of justice. What was being said, at the time, was that the nub of the case against her was that she attempted to export cocaine and that she was doing so as a party to a conspiracy to do so.

The expression "overall criminality" means what it says. The jury heard the case that the prosecution was enabled to present because of the joinder, and it acquitted Santiago.

There is another point, which strictly is unrelated. It cannot be said that in law simple possession and possession with intent to supply are offences with the same ingredients as attempted export. And although Connelly itself refers to manslaughter and murder as an example of offences which differ in degree rather than in kind, and so acknowledges

that there can be such a difference (at page 215), that particular example is a rather special one. To try a person for manslaughter would necessarily involve considering what, if any, intention accompanied the killing. To that extent, any further trial of a defendant for the same killing would necessarily appear to involve a consideration of the very same issue. And that would apply also if a murder charge were decided first and then the prosecution sought to indict for manslaughter on the same facts. On that basis alone, it seems to be understandable that a trial for manslaughter precludes the further trial of the same defendant, on the same facts, for murder. In the present case, I do not think it can be said that the summary charges differ from the indictment in degree only, in the same sense. But still the differences are not in any way the same as those between murder and robbery. The latter are clearly two different kinds of offence. The essence of one is an unlawful killing, and of the other it is theft with force. In this case, the differences between the various charges are, in this sense, much more obviously ones of degree rather than of kind. The case is about different shades of illegal conduct relating to drugs.

Why would it be oppressive to proceed on the summary charges in this case? The reason, as I see it, is that Santiago had already been called on to answer a case which by its nature put forward the overall criminality that was being alleged against her. She was tried before the proper court having jurisdiction to consider that allegation, and all its aspects were ventilated before the court. The conclusion is surely inescapable that if the summary charges were subsequently to be tried, she would be exposed to a re-trial of what in reality was simply one part of the case against her that had already been heard and determined. Viewed objectively, that would in my judgment be oppressive, not in any personal or vague sense but in one which would be widely seen as being so. I do not think it matters that the Crown, for procedural reasons, was never able to seek to join the conspiracy with any one or more of the summary charges only. In the particular circumstances of this case, I do not think that was in any way the heart of its case, for reasons which I have sought to demonstrate. In any case, I am not sure that where the prosecution is allowed to portray the overall criminality alleged, in a conspiracy count on indictment, that would in any circumstances leave alive the possibility of later pursuing summary proceedings that relate to one aspect of that overall pattern of conduct.

What applies in respect of Santiago must also apply, a fortiori, to Fiallo. Without the evidence of the events at the airport, and without the evidence supporting the count of conspiracy, the case against him was virtually non-existent.

There remains the question whether or not subsequent proceedings in a lower court can properly be said to be an abuse of proceedings which have already been determined in the Grand Court. In this case, I think the answer must be that they can be. If the summary charges involve the re-trial of part of the case already dealt with in the Grand Court, that must in effect amount to a challenge to the latter's process. It opens up the possibility that the Summary Court might reach a different verdict to that already returned by the jury. That must reflect on the process of this court and I think it must therefore amount to an abuse.

For these reasons, I granted the application and stopped the proceedings before Summary Court.

D. Hull.

David Hull
Puisne Judge

13 February, 1987.