IN THE CAYMAN ISLANDS COURT OF APPEAL

CAYMAN ISLANDS CRIMINAL APPEAL No. 17/84

29-05-85
Reported

BEFORE: The Honourable Mr. Justice Zacca, President
The Honourable Mr. Justice Kerr, JA
The Honourable Mr. Justice Henry, JA

Handel Whittaker v Regina
and
Chester Watler v Regina

Mr. Norman Hill, QC and Mr. David Ritch for First Appellant
Mr. Norman Hill, QC and Mr. McField for Second Appellant
Mr. A. Smellie and Miss Dilbert for the Crown

March 25, 26, 27, 28, April 4, 1985, May 29, 1985

JUDGMENT

On April 4, 1985, we dismissed these appeals against the decision of the Chief Justice given on October 8, 1984, and affirmed his order that there be a new trial before a different magistrate. We promised to put our reasons in writing and now do so.

The first appellant, Handel Whittaker, was convicted for possession of cocaine and for dealing in cocaine. The second appellant, Chester Watler, was convicted for procuring the dealing in cocaine. The charges related to 1.87 grammes of cocaine. The appellants appealed against their convictions by the magistrate to the Chief Justice who, in his capacity as a judge of the Grand Court, allowed the appeals, quashed the convictions and ordered a new trial before a different magistrate. The appellants then appealed to this court in respect of the order of the Chief Justice that there be a new trial.

The charges arose as a consequence of the activities in the Cayman Islands of special agents of the United States Department of Justice Drug Enforcement Administration who had been requested

to come to the Cayman Islands to assist the Island Police. The evidence of the Crown witnesses indicated that on August 12, 1983, the special agents were introduced to the second appellant. He promised to introduce them to one of his sources of supply of cocaine and the next day introduced them to the first appellant. After a discussion at which the second appellant was present, the first appellant said he would contact one of his sources of supply. There were further meetings but no cocaine was produced because, the first appellant said, his source of supply was concerned and scared. On August 15, 1983, in a taped telephone conversation one of the special agents told the first appellant that he (the special agent) would be killed or have his legs broken if he did not produce the cocaine his employers expected. The first appellant promised to see what he could do to help and shortly after he produced a small packet of cocaine which he said was a sample of what the agents could expect to get. This packet is the subject of the charges. The defence of the first appellant was that in his dealings with these agents he honestly believed that he was assisting the Police. The learned magistrate made no specific finding of fact in this regard and the learned Chief Justice concluded that his failure to do so may well have deprived the first appellant of a possible acquittal having regard to the provisions of section 8 of the Penal Code. That section is as follows:

> "8(1) A person who does or omits to do an act under an honest and reasonable, but mistaken belief in the existence of a state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.
>
> (2) The operation of subsection (1) may be excluded by the express or implied provisions of the law relating to the subject."

The learned Chief Justice also concluded that the second appellant could not have been convicted if the first appellant had been acquitted pursuant to section 8 of the Penal Code.

In addition, it was conceded before the Chief Justice that the learned magistrate had during the course of the trial said something which was capable of conveying the impression that the guilt of the appellants had been prematurely determined and had declined when so requested to disqualify himself from proceeding further with the trial. In all the circumstances the learned Chief Justice concluded that the proper course was to quash the convictions, set aside the sentences and order a new trial before a different magistrate.

Counsel for the appellants submitted to us that there were several factors which cumulatively militated against the order for a new trial. Firstly he submitted that the terms of the learned magistrate's written reasons for judgment indicate that he entertained doubts as to the truth of the appellant's defence and since any such doubts would have to be resolved in the appellant's favour, the appellant was entitled to an acquittal. In his reasons for judgment the learned magistrate posed several rhetorical questions and made observations which suggest that he did not accept the defence. Thus in dealing with the evidence of one of the special agents he queried, "If Whittaker was aware that he was dealing with the D.E.A. agents would he have found it necessary to advise them that the boat anchored offshore was one of theirs?" and later, "If this was indeed a charade would such information be necessary?" Still later referring to the taped telephone conversation between the agent and the appellant he queried, "Could one infer from this conversation that he was helping the police in their investigation?" Then he observed, "Apart from what Whittaker read to the court in his statement from the dock there is no evidence to show that he was aware that the men with whom he was negotiating were police or D.E.A. agents." As to the defence he said, "His defence

was contained in a prepared statement which he read to the court. And I must congratulate him on how carefully it complied with the defence as argued by his learned attorney." Up to this point the conclusion appears inescapable that the learned magistrate was rejecting what he regarded as a contrived defence. However later in his reasons for judgment he observed, "Now as I said earlier on, apart from this statement that he was of the opinion that Snyder and Trouville were D.E.A. agents, there is in my opinion very little evidence to support this opinion. However the possibility still exists that he was of that opinion, but shrewdly concealing it throughout his dealing with the agents." He than proceeded to examine certain evidence from the Crown witnesses which appeared to support the first appellant's story that he had been encouraged to assist with information on drug movements and had in fact on a previous occasion assisted in the police investigation of a customs offence. Finally, without making any specific finding of fact the learned magistrate concluded as a matter of law that "even if his (the first appellant's) story were to be accepted he would still be in possession without lawful excuse." It may well be that what the learned magistrate intended to convey was that he rejected the first appellant's story, but that even if that story were to be accepted it did not in law constitute a defence. We respectfully agree with the conclusion of the learned Chief Justice that the failure of the learned magistrate to make a specific finding of fact makes the conviction of the first appellant untenable. We do not, however, accept the submission of counsel for the appellant that the learned magistrate's reasons for judgment considered as a whole, indicate that he ultimately was in doubt as to the facts and that consequently the first appellant ought to be acquitted.

The second factor to which counsel for the appellants referred was the conduct of the agent provocateur which he submitted, constituted a "special reason" within the meaning of section 12(8) of the Misuse of Drugs Law, and because it might therefore operate in mitigation of sentence, would affect the decision as to whether there might have to be a new trial. Section 12(8) is in the following terms:

> "(8) Notwithstanding the provisions of subsection (2), (3) or (4), where a person is convicted of an offence otherwise punishable under subsection (2) or (3) where that offence is a first offence or of an offence otherwise punishable under subsection (4) where such offence is that of buying, consuming, possessing, attempting, etc., and related to an amount of less than one-half ounce and is a first offence the court may, for special reaons if it so thinks fit, order him to be imprisoned for a shorter period than that specified therein or not to be imprisoned and in any case where it so determines that there are special reasons and exercises its power under this subsection it shall state the reasons for doing so in open court and shall also cause them to be entered in the record of its proceedings."

The expression "special reasons" in the section in our view bears a similar meaning to that attributed to it in Whittal v. Kirby (1957) 1KB 194 at 201 in relation to section 15(2) of the English Road Traffic Act, 1930 –

> "a mitigating or extenuating circumstance not amounting in law to a defence to the charge, yet directly connected with the commission of the offence and one which the court ought properly to take into consider-ation when imposing punishment."

In English law entrapment is not a defence (vide McEvilly and Lee (1974) 60 Cr. App. Rep. 150; Mealey and Sheridan (1974) 60 Cr. App. Rep. 59. There are, however, dicta in R v. Sang (1979) 69 Cr. App. Rep. 282 at 286, 287, 296, 303, Mealey and Sheridan (1974) 60 Cr. App. Rep. at 62 and Birtles (1969) 53 Cr. App. Rep. 469 which indicate that entrapment is a matter which may properly be taken into consideration when imposing sentence. We respectfully adopt those views. Accordingly in our view entrapment and in particular the pressure brought to bear on the first appellant in the taped telephone conversation with the special agent would be "special reasons" within the meaning

of section 12(8) of the Misuse of Drugs Law and would be factors to be taken into consideration in deciding whether a new trial ought to be ordered.

Another factor advanced by counsel for the appellants was the fact that one of the Crown witnesses, Mr. Walter Wilkowski, gave evidence which could be regarded as supporting the first appellant's defence and was resident abroad. It was counsel's submission that a new trial would permit the Crown in effect to fill the gap in their case by failing or refusing to call this witness whose attendance could not then be compelled by the defence. The relevant evidence by Mr. Wilkowski was that during the course of his investigation of a customs offence by the first appellant in March 1983 the first appellant had offered to give him drug information. We do not agree that by failing or refusing to call this witness the Crown would be filling the gap in their case. The present charges against the appellants relate to incidents in August 1983 - some five months after the first appellant's offer to Mr. Wilkowski. The evidence of Mr. Wilkowski was that he did not use the first appellant as an informer. There was other evidence indicating that the first appellant had in fact assisted the police on previous occasions. In the circmustances, we cannot see that the Crown could advance their case by failing to call this witness.

Another factor which counsel for the appellants submitted ought to be taken into account was the change in the law which had been effected since the first trial and which now deprived the appellants from making unsworn statements from the dock. The change referred to was effected by Law 8 of 1984 which came into operation on July 10, 1984.

We do not, however, consider that the appellants will necessarily be adversely affected by their inability to make unsworn statements. In the ordinary way a tribunal of fact is likely to attach less weight to an unsworn statement than to evidence on oath. The defence of the first appellant - an honest and reasonable belief in the existence of a certain state of things - must necessarily depend for its success to a large extent on the acceptance of his evidence to that effect. Prima facie therefore his inability to give that evidence by way of an unsworn statement may well be to his advantage, and as we have earlier indicated, his acquittal on this ground would necessarily result in the acquittal of the second appellant.

Counsel for the appellants also submitted that the fact that the appellants had elected to and had in fact served a portion of the sentences imposed on them was a matter for consideration in deciding whether a new trial ought to be ordered, as was the quantity of drugs involved. We accept these submissions.

In relation to the second appellant counsel submitted that on the evidence he merely introduced the special agents to the first appellant. This he submitted, did not constitute "procuring" within the meaning of section 3(1) of the Misuse of Drugs Law and the second appellant was therefore entitled to an outright acquittal. Section3(1) so far as is relevant provides as follows:

> "3(1) Whoever without -
> (i) lawful excuse...
> (e) sells, buys or otherwise deals in any controlled drug,...or who causes, procures, solicits entices, aids, abets, permits or suffers any other person so to do is guilty of an offense."

Counsel submitted that "to procure" at its lowest means to persuade or influence and that normally it includes an

element of incitement or inducement. We do not accept this submission in the context of section 3(1) of the Misuse of Drugs Law. In our view each word in the section is intended to convey a different shade of meaning and "solicits" is intended to cover the element of inducement or persuasion simpliciter while "entices" covers the element of inducement or persuasion by allure or blandishment of the offer of reward. In our view "procures" is intended to convey the meaning of achieving an objective by care or effort or positive action (whereas "causes" would cover a situation in which a result may be obtained by negligence or mere omission).

In Reid v. R (1978) 27 W.I.R. 254 the Privy Council at page 257 observed that "the interest of justice that is served by the power to order a new trial is the interest of the public that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge". If the only charge against the first appellant had been possession of 1.87 grammes of cocaine such a charge would probably not qualify as a "serious crime" meriting a new trial in the interest of justice. But the first appellant is charged also with dealing in cocaine and the second appellant with procuring the dealing in cocaine. These are on the face of it serious crimes as the penalties which may be imposed for them illustrate. We have taken into consideration the fact that the activities of the agent provocateur may result in a reduction of the sentences which might otherwise be imposed. We have also taken into consideration the fact that the appellants served some 7 weeks of their sentences before being bailed. As regards

the quantity or drugs involved while we do not wish to comment unnecessarily on the evidence it would appear from the evidence that the amount of 1.87 grammes was produced merely as a sample. We have also taken into consideration the expense and length of time involved in a new trial (both by the Crown and the appellants), the ordeal suffered by the appellants and the length of time that will have elapsed between the offence and the new trial. We do not wish to comment further on the evidence other than to say that in our opinion there was evidence at the first trial on which the appellants could properly have been convicted. Taking all the relevant factors into consideration we are of the view that the interest of justice requires that there be a new trial and that the learned Chief Justice was correct when he so ordered.

Dated the day of 1985

Edward Zacca, President

J.S. Kerr, J.A.

K.C. Henry, J.A.