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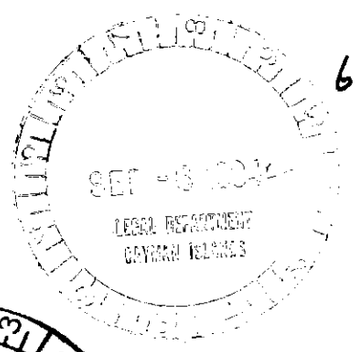
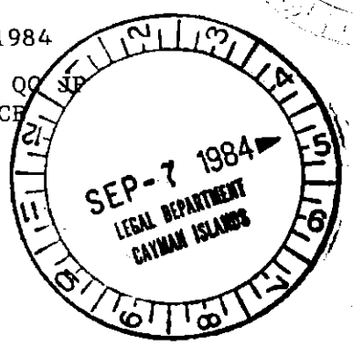


IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN ON 4TH SEPTEMBER 1984
BEFORE THE HON. SIR JOHN SUMMERFIELD CBE QC JP
CHIEF JUSTICE



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CASES NOS. 1595, 1621, 1620, 1600/83

APPEAL NO. 14/84

ELDON EBANKS V REGINA
AIDING AND ABETTING THE SALE OF COCAINE

DAVE KELLY V REGINA
SELLING COCAINE
POSSESSION OF COCAINE

Mr. Levy for appellant; Kelly
Eldon Ebanks present unrepresented
Mr. Smellie for respondent

JUDGMENT

The appellant Eldon Ebanks was convicted of the offence of aiding and abetting the appellant Dave Kelly to sell a controlled drug, namely, cocaine hydrochloride being a salt of cocaine, less than two ounces in weight. He was also convicted of the offence of unlawful possession of that controlled drug.

The appellant Dave Kelly was convicted of the offence of selling that controlled drug and also the offence of unlawful possession of it.

The amount of cocaine hydrochloride involved was 1.31 grammes.

All the offences arose out of the same facts.

The appellant Ebanks had a clean record. The appellant Kelly had four previous convictions, including one for smoking ganja in 1976;

8 years ago. Both are young men in their early twenties.

The appellant Ebanks was sentenced to 12 months imprisonment and a $2000 fine or 6 months imprisonment in default for the offence of possession and 3 years imprisonment and a $10,000 fine or 12 months imprisonment in default for the offence of aiding and abetting the sale.

The appellant Kelly was sentenced to 2 years imprisonment and a fine of $3,000 or 12 months imprisonment for the offence of possession and 5 years imprisonment and a fine of $12,000 or 2 years imprisonment in default for the offence of selling.

The appeal in both cases is against sentence only.

The minimum penalty for a first offence of possessing a hard drug under Part B of the Second Schedule to the Misuse of Drugs Law is 1 year imprisonment and a fine of $1000 if the quantity involved is less than 2 ounces.

The minimum penalty for a first offence of selling or aiding and abetting the sale of a similar quantity of a hard drug is 3 years imprisonment and a fine of $10,000.

The sentence for a second offence is substantially heavier.

No minimum sentence of imprisonment in default is prescribed, but normally such a sentence is necessary to discourage default. The length of such a sentence is within the discretion of the Court within the maximum prescribed.

Neither appellant is in a position to pay the fines or any substantial part of any of them.

The learned Magistrate treated the appellant Kelly's conviction as a first offence for the purpose of Part B of the Second Schedule despite the earlier conviction of smoking ganja which is not a hard drug.

In my view he was right to do so. The Misuse of Drugs Law does not specify exactly what constitutes a second offence in relation to the offences specified in the first column of Part B of the Schedule. I am of the opinion that the Courts should give a beneficial construction, that is to say, that the offence involving a hard drug is only a second offence for the purpose of Part B if the first offence also involved a hard drug.

The position might be different if the first offence involved a hard drug and the second offence involved a drug which was not a hard drug. It is probable that a Court would take the view that in those circumstances the second offence was a second offence for the purpose of section 12 of the Law because the first offence was more serious than an offence involving a drug other than a hard drug. But I am not called upon to pronounce on that position now.

It is clear that the learned Magistrate took the view that, having regard to the appellant Ebanks' part in the transaction and his clean record, he should be treated more leniently than the appellant Kelly. Therefore, having imposed the minimum or near minimum on the appellant Ebanks he imposed a heavier sentence on the appellant Kelly to demonstrate the difference in degree of blameworthiness.

With respect that is not the correct approach. The court, faced with minimum penalties, must do its best to achieve justice within the constraints imposed on it by those minimum penalties. It should not compound the injustice. If looking at the circumstances fairly the court considers one of two accused more blameworthy than the other, but would not have imposed on either a sentence in excess of the minimum, then it should impose the minimum on both. That may appear unfair to the less blameworthy accused person, but it is the legislation that is inflicting that injustice, not the court. At least the court is not compounding the injustice in relation to the other accused person.

The foregoing is, of course, subject to the operation of subsections

(5) to (8) inclusive of section 12 of the Law.

Furthermore, it is open to a court to manipulate the sentence of imprisonment, if any, in default of the fine to mitigate any injustice.

And it may be of assistance to observe that where an accused person is clearly unable to pay a substantial fine there is little point in imposing a fine above the minimum prescribed by law.

Bearing in mind that neither appellant can pay the fines imposed or any substantial part of them, the effect of the sentence imposed on the appellant Kelly is that he is to serve a sentence of 8 years for related offences arising out of the same facts involving 1.31 grammes of cocaine hydrochloride. Viewed thus, it must appear excessive in relation to a first offence by a young man. In the case of the appellant Ebanks, with a clean record, the overall term becomes 4½ years for a first offence involving 1.31 grammes.

With these principles in mind I feel obliged to vary the sentences, imposing the minimum sentences in each case. First offences involving only 1.31 grammes of hard drug hardly call for more than the minimum penalty except in exceptional circumstances, e.g. contaminating young children, and certainly not in a straight entrapment case.

Accordingly the sentences are varied as follows:

Appellant Kelly: For the offence of selling 3 years and a fine of $10,000.

For the offence of possession, 1 year imprisonment and a fine of $1,000

The substantive sentences of imprisonment will run concurrently.

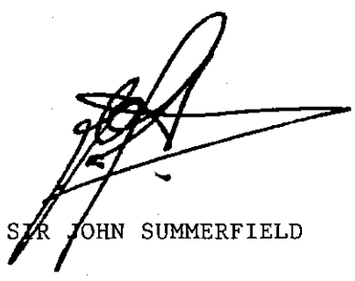
The appellant Ebanks: For the offence of aiding and abetting the sale, 3 years imprisonment and a fine of $10,000.

For the offence of possession, 1 year imprisonment and a fine of $1,000.

The substantive sentences of imprisonment will run concurrently.

In each case there will be no sentence of imprisonment in default of payment of the fine. In the event of default execution will have to be levied if the appellants' own goods justifying that course.

The appeal against sentence succeeds to the extent specified but is otherwise dismissed.



SIR JOHN SUMMERFIELD

6th September 1984