1983

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

BEFORE THE HON. SIR JOHN SUMMERFIELD C.B.E., Q.C.,
CHIEF JUSTICE

APPEAL NO. 24/83

BETWEEN	WINSOME RUDDOCK	APPELLANT
AND	REGINA	RESPONDENT

Esq.
Frank Phipps/Q.C. (with him Peter Polack Esq.) for appellant

T. Scarborough Esq. for respondent.

JUDGMENT

The appellant was convicted of the offence of unlawful possession of ganja and sentenced to 9 months imprisonment with hard labour and a fine of $1000 or 3 months imprisonment in default.

There were three main grounds of appeal and they can be dealt with in the order in which they were argued.

Proof that the offending vegetable matter was ganja was given by way of a certificate, tendered under section 6 (2) of the Misuse of Drugs Law, under the hand of an officer holding herself out as a qualified medical laboratory technician of the George Town Public Hospital. It was urged that section 6 (2) required that the medical laboratory technician concerned should be appointed for the purpose by the Governor (in effect the Governor in Council) under that provision before the certificate could be treated as admissible in evidence and that no evidence of such an appointment was placed before the trial court.

It would appear that counsel for the defence raised no objection to the admission of the certificate during the trial.

Section 6 (2) (as amended by Law 10 of 1982) reads:

> "(2) Notwithstanding the provision of any other Law, a certificate purporting to be under the hand of the C.M.O., a qualified chemist, a qualified medical laboratory technician or any other person appointed by the Governor in that behalf either specially or generally, stating or certifying that a given substance has been analyzed or examined and stating the result of such analysis / or examination, shall be admissible in evidence in any prosecution under this Law and, in the absence of evidence to the contrary, shall be proof of the statements contained therein as to the foregoing matters and any other matter specified therein concerning the substance analyzed or examined or the analyst or examiner thereof, and no evidence shall be required by the court as to the signature or qualifications of the person purporting to have signed the certificate.".

Before the amendment it was necessary for the medical laboratory technician to be appointed for the purpose by the Governor before the certificate became admissible. It was argued that this Court should look to the Parliamentary history of this legislation in order to resolve what, it was urged, was an ambiguity in the amendment.

The amendment introduced significant changes. In my view, it is straightforward and clear in its intent and meaning. On the plain ordinary meaning a certificate under the hand of a qualified medical laboratory technician is admissible. It is not necessary that he or she be appointed by the Governor for the purpose. It is necessary for "any other person" to be appointed by the Governor for the purpose before a certificate under his or her hand becomes admissible.

The amendment sets out a list of persons whose certificate is admissible, without any specific appointment for the purpose, namely the Chief Medical Officer, a qualified chemist and a qualified medical laboratory technician. For this purpose there is no distinction between a qualified medical laboratory technician and the Chief Medical Officer or a qualified chemist. Either all those have to be appointed or none

of them i.e. the words "appointed by the Governor" govern the whole list or only "any other person". Clearly they govern only "any other person". It would be pointless to enumerate a person and a class of persons if they too had to be appointed for the purpose. It would have been sufficient for the provision to provide simply that the certificate of any person appointed by the Governor for the purpose would be admissible. The reference to the Chief Medical Officer and the other classes of persons would be quite unnecessary. The clear meaning and intention is that persons other than those listed have to be appointed by the Governor for the purpose. There is no significance to be attached to the use of the phrase "any other person" instead of "a person". Either fits in with the construction I believe to be the correct one.

The certificate was, therefore, admissible without further evidence as it purported to be under the hand of a qualified medical laboratory technician. Without deciding the matter, it seems to me that where counsel stands by and allows a certificate of this nature to be admitted without objection, a technical objection of this nature should not be allowed on appeal, albeit taken by another counsel. It may be that the appellate court can rely on the presumption that defence counsel agreed to the evidence pursuant to section 25 of the Evidence Law 1978. I also leave open the question of whether a court, in a small community of this size, can properly take judicial notice of the gazzeted appointment of a person who regularly appears before the court in a specialist capacity or who provides certificates of this kind which are regularly put in evidence. It could be argued that it would be wholly artificial and unnecessarily inconvenient if judicial notice could not be taken.

The next ground of appeal argued alleged a misdirection of law by the learned Magistrate in the standard and burden of proof applied. The passage in his reasons for decision which came under

the main attack reads:

> "In Cross-examination the accused gave a different version of the incident. She said I quote, "The second time I asked the Policeman if I could go and get a cigarette and he said go ahead.
>
> From her demeanor and the variation in her story I held that she was not a witness of truth. I therefore accepted the version given by the Constable, which clearly led to a strong inference that she knew that the ganja was there.".

It was suggested that this demonstrated that the proper test had not been applied; that the wrong principle had been applied. It was stated that the learned Magistrate had only accepted the prosecution evidence because he had rejected the defence; that the prosecution case rested, not on the strength of the prosecution evidence, but on the weakness of the defence case and, therefore, the wrong standard had been applied. Of course, if that had been the standard applied then, clearly, the appeal should succeed on this ground. One can also agree that if, in a direction to a jury, that test had been put to the jury as the one to apply, then it would be wrong.

It must be kept in mind that a Magistrate in his reasons for his decision is not giving a closely reasoned judgment. It is prepared ex post facto. It is not a direction to a jury. It is prepared, usually hurriedly because of pressure of time with other work, to set out the broad outlines of the reasons which led him to his decision. It should not be interpreted in the same way that a statute should be interpreted, each word having an exact meaning. Admittedly, it would be better if the Magistrate had used expressions such as "I was satisfied beyond all doubt that etc." "I was sure etc.". But one can safely assume that a qualified Magistrate with considerable experience well knows the burden and standard of proof in a criminal case unless the contrary appears. If he were to say: "I was satisfied on a balance of probabilities of his guilt" or: "He failed to prove his innocence to my satisfaction and so I found him guilty" then the contrary would appear and would startle an appellate court. However, one should not take what may be termed a loose use of language as indicating that a trained and experienced Magistrate had lost sight of the principles governing the

onus and burden of proof in a criminal case and that he did not apply the correct ones. For example, one could criticise the language in that same passage on another aspect not raised by counsel. Instead of the expression "strong inference", it would have been better if the hallowed expression "irresistible inference" or "the only reasonable inference" had been used.

One must look at the reasons as a whole and determine whether the Magistrate was in error in law or fact so as to justify intervention, bearing in mind the principles set out in section 176 of the Criminal Procedure Code.

Looking at the reasons as a whole I am satisfied that there are no grounds for intervention on this ground. Later in the reasons there are clear findings and I have no doubt that they were based on the proper principles.

Although urged otherwise, the appellant did in fact give a different version in cross-examination as stated in the passage quoted. There is nothing in the appellant's evidence in chief about having asked the Police officer if she could get a cigarette or any reply in the terms alleged. Further, that version does not appear to have been put to the Police Officer concerned in cross-examination. It whould have been a very material factor if it were true.

There were other discrepancies but this appears to have been the only one the learned Magistrate relied on.

The third ground of appeal alleged that the verdict was unreasonable. It is postulated on the basis that the learned Magistrate accepted the evidence of the Police Officer and resolved all conflicts in favour of the prosecution. From the reasons given this clearly was the basis for the conviction. To consider this ground the facts have to be outlined.

The appellant occupied the top apartment of a two apartment building in Bodden Town. Her landlord also owned and had access to the lower apartment. The landlord and his wife lived next door.

In the afternoon of 2nd May 1983 the appellant and the landlord's wife had a heated row in which the landlord's wife accused the appellant of having an affair with her husband. The wife used violence on the appellant and during the quarrel the husband (landlord) intervened. Some of the appellant's property was scattered around. This incident occurred in the appellant's apartment.

As a consequence the appellant left the apartment that same afternoon. She returned in the evening to get some clothes but was prevented from entering by the landlord. She spent the night with a friend at Northside.

The next morning the Police Constable involved in this case received information in consequence of which he obtained a search warrant to search the appellant's apartment for ganja. One cannot discount the possibility that the information emanated in some way from the jealous wife and, indeed, one must resolve that possibility in favour of the appellant. At about 12.30 p.m. the same day the Police Officer saw the appellant at Northside. He identified himself, told her that he suspected that she had ganja in her apartment and that he had a search warrant to search it. He asked her to accompany him.

On arrival the door to her apartment was locked. The appellant said that she had forgotten her keys. However, there was a malfunctioning window in the premises which the appellant opened, and both gained access. The Police Officer then began a search of her apartment. It is appropriate at this stage to truncate the narration of the events. In a drawer in the appellant's bedroom where she kept her personal possessions was found a plastic bag. In that plastic bag was the ganja. Her immediate reaction was that it had been planted. In a later search by the Police Officer

in the landlord's house next door he found a knife with traces of ganja on it. There were also bits of ganja on the staircase leading to the appellant's apartment. The landlord's wife, the jealous wife, has since been charged with possession of ganja. This was additional evidence allowed for the purposes of this appeal. The appellant also claims that she noticed some of her jewellry missing but she made no complaint about that to the Police Officer.

On those bare facts one could not discount the possibility that the ganja had been planted by the jealous wife as a means of revenge. One would have to resolve that possibility in the appellant's favour.

The circumstances surrounding the search, the finding of the ganja and what followed thereafter give rise to a different conclusion as an irresistible inference.

The search commenced in the appellant's living and dining area where there was a closet with paper bags. The Police Officer went to it and told the appellant to stand there and watch him while he searched. As he pushed his head inside the closet to get out the paper bags he saw her run towards the bedroom. He followed her and noticed that she was going to the right hand side of the bedroom where there was a chest of drawers. He asked her why she left when he asked her to stand. She did not reply. He took her back to the living room and asked her to stand by while he searched. As he started to pull out the bags she again ran into the bedroom. He followed her. He then became suspicious. He decided to search the area to which he had seen her run. She was standing right beside him while he pulled the top/back drawer out and as he did so, he heard the appellant say: "See it there; somebody put that on me." The Police Officer then looked into the drawer and saw a plastic (transparent) bag. Looking in it he saw vegetable matter resembling ganja. He showed it to her and said: "This is Ganja." She

said: "I saw when you found it, but I did not put it there." After the search he told her that he was arresting her for possession of vegetable matter resembling ganja (sic). She asked him his name. He told her. She then said: "I am asking you to destroy it." He told her that he could not do that. She then asked him how much he thought that amount would weigh. He told her he did not know. She then asked what the sentence was for that amount of ganja. He told her he did not know. He then took her to the George Town Police Station. She returned to collect her belongings from the apartment that evening.

The learned Magistrate clearly rejected her explanation about going to the bedroom for a cigarette. He was clearly entitled to infer guilty knowledge of the presence of ganja where it was found from that evidence. She could not have known of the location of the ganja if it had been planted there without her knowledge. He was justified in concluding that she placed it there. She obviously still had dominion and control over it as she did over her other possessions still in the apartment. It had not been abandoned.

In my view the learned Magistrate had no alternative but to find her guilty as charged on that evidence.

There remains the question of sentence. The amount involved was a little over half an ounce. One must assume in her favour that it was for personal use. There was nothing to suggest trafficking or distribution to others. It would appear that she has no other previous convictions. There is no note of the address in mitigation and so one must assume that she was previously a person of good character.

While I agree that violations of the Misuse of Drugs Law must be treated severely and that deterrent sentences are called for, small quantities for personal use without any aggravating feature can, when the person is a first offender, be properly punished with a stiff fine and a

nominal prison sentence. A factor which is often overlooked in these cases is that a second offence of this nature, however small the quantity involved, attracts a mandatory minimum sentence of 2 years imprisonment and a very substantial fine. That in itself must operate as a strong deterrent to any further violations and it would be appropriate for the court to bring that fact to the notice of convicted personsat the time of sentence for a first offence.

In all the circumstances I will reduce the term of imprisonment to one which allows her immediate release. She has served 12 days imprisonment. The fine (and imprisonment in default) will remain unaltered.

To that extent the appeal succeeds but is otherwise dismissed.

SIR JOHN SUMMERFIELD

Dated the 13th day of September 1983.