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In the Grand Court of the Cayman Islands
Holden at George Town on the 10th and 11th June 1980
Criminal appeal No. 6 of 1980

CARLOS N. RAMSAY

v

REGINA

Mr. W. Brown for appellant
Mr. J. Martin for respondent

The appellant was convicted of the offences of possession of a controlled drug (ganja) and importation of that controlled drug contrary to section 3 (1) (i) (k) and 3 (1) (i) (a) respectively of the Misuse of Drugs Law 1973. On each count he was sentenced to a term of imprisonment of 3 years and a fine of $3,000 or six months imprisonment to follow in default of payment of the fine. The sentences were ordered to run concurrently.

At the trial the appellant pleaded not guilty to both counts at the outset. He was represented by Mr. Ritch. The prosecution was represented by Mr. Martin.

After the first witness, a customs officer, had completed his evidence in chief Mr. Ritch asked the court for a short adjournment to consult with the appellant outside the court and this was granted.

Mr. Ritch had a private interview with the appellant in the robing room, only the two of them being present. There is no suggestion that counsel, Mr. Ritch and/or Mr. Martin, had had any private discussion with the presiding Magistrate in relation to the case at any time.

After the short interview in the robing room the record reads as follows:

> "Mr. Ritch returns to the Court and tells the Court that he will not cross examine this witness, and that he was given the defendant certain advice which he hopes that the defendant will take.
> The Defendant tells the Court that at this stage he wishes to change his Plea of Not Guilty to a plea of Guilty.
> Crown Counsel puts in Certificate of Analyst. (Marked X) and tells the Court that the Ganja was in false bottom of the box. The defendant begged for a chance and begged not to be arrested. Said same thing

after caution. Ganja put in. (Marked Y.)

Ritch for defendant in mitigation refers to change of plea of the defendant. He has a young wife and a new born child.

(1) Sentence: 3 Years Imprisonment.

Fine $3,000.00 or 6 months Imprisonment to follow if the fine is unpaid.

(2) Sentence: 3 Years Imprisonment
Fine $3,000.00 or 6 months imprisonment to follow if the fine is unpaid.
Both Sentences to run Concurrently."

The appellant now appeals against both conviction and sentence.

The main plank of his appeal against conviction is that his mind "did not go with" his altered plea of guilty in that he at no time intended or wished to admit the offences charged, yet was induced by his counsel and advised in very strong terms, namely, as stated in his affidavit in support of his appeal:

""It is best for you when you go back inside the Court to plead Guilty to both charges and you will get a short sentence of about 18 months or only a fine.""when he told me that I understood him as my lawyer to be telling me that I had no choice but to obey his instructions as my lawyer, so I obeyed him and changed my plea to guilty to both charges, although I know that I am innocent of the charges."

He further contends in his affidavit:

"That I at no time of my own free will intended to enter a GUILTY PLEA to the charges and my Counsel never made it clear to me that the ultimate choice was freely mine, but rather advised me in strong terms to change my PLEA to GUILTY. That I was thereby deprived of my opportunity of putting my Defence before the Court, and I know that I am innocent."

At the hearing of this appeal the appellant was represented by Mr. Bentley Brown. Mr.Ritch was called as a witness by the respondent in rebuttal of certain allegations in the appellant's affidavit. This is Mr. Ritch's evidence of the interview in the robing room and subsequent events:

"I said to appellant: "Ramsay, is the evidence of Mr.Whittaker true?" At first he refused to answer me. I put the question to him a second time. On the second occasion Ramsay said: "Yes".

I then said to him: Why have you lied to me in your instructions? because now I am unable to defend you." He never answered me at all. I then told him: "In the circumstances, if you persist to suggest that Tony Whittaker, a customs officer, was really the man responsible for the crime and are found guilty then it was my belief that he (appellant) would be sentenced to a very long term of imprisonment, bearing in mind the quantity of the drug involved."

He then asked me what would be likely to happen if he changed his plea to guilty. I informed him that, again, bearing in mind the quantity of drug involved the very least he could expect was 18 months imprisonment plus a very substantial fine and six months in default of paying the fine. He then said "O.K." and we returned to the court room.

When we returned the court reconvened. The learned magistrate asked me what I proposed to do as it was my turn to cross examine Whittaker. I informed the learned magistrate that he should put the charges to the accused again.

The learned Magistrate put the charges to the accused and accused entered a plea of guilty to both those charges.

I did not indicate to him that he had no choice but to plead guilty. I made it abundantly clear to Ramsay that it was a matter entirely for him whether he wished to proceed with the trial or not. And I answered whatever question he asked me on the potential sentence if he defended or pleaded guilty on the basis I have outlined.

I never indicated to him that he would get a fine only. Imprisonment is mandatory by law."

In cross examination he said:

"When I returned to court I told the court I would not cross examine Whittaker and that I had tendered advice which I hoped he would take. My recollection is that the magistrate put the charges to him and he changed his plea to guilty. The magistrate did not offer Ramsay advice as to possible change of plea."

"My recollection is that the charges were put to him again. I am not certain but that is the best of my recollection."

"I said to him that the least he could expect was 18 months

plus a substantial fine and that if he went on with the trial he could get substantially more - 4 to 5 years.

When I asked for the adjournment I wanted to put to him the options open to him. I thought it was in his best interest. He said only: "O.K." to me. I took him to mean he knew what he was doing. I made it abundantly clear to Ramsay that it was a matter for him as to whether he changed his plea to guilty or to continue with the trial."

Mr. Martin who prosecuted at the trial stated from the Bar that the appellant, on return from the interview, was re-pleaded on both counts and pleaded guilty.

I have no hesitation in accepting Mr. Ritch's evidence in full. Where it conflicts with any part of the appellant's affidavit I reject the latter.

Mr. Ritch did not tell the appellant that he should not plead guilty unless he had committed the acts constituting the offences charged. However, that is understandable in the circumstances. The appellant had admitted to him that the evidence of the customs officer was true. That evidence coupled with formal evidence that the contents of the box, featuring in the case, was ganja was, if true, sufficient to substantiate the charges. Mr. Ritch had a copy of the analyst's certificate from the outset of the trial. The appellant's admission that customs officer's evidence was true was an admission that he had committed the acts constituting the offences charged. The appellant's earlier instructions to Mr. Ritch had been radically different from the customs officer's evidence and those instructions were obviously retracted by the admission that the evidence was true. This case is easily distinguishable from the case of R. v. Turner 1970 54 C.A.R 352. That case turned on the fact that defence counsel had seen the trial judge in private and the appellant in that case may well have thought that the advice given to him by his counsel reflected the views of the judge as to the consequences of changing his plea or continuing with his trial. It was felt that the views supposedly so conveyed fettered the appellant's freedom of choice. What is important to this case were the views of Parker L.C.J. in Turner's case at p. 357:

"The first point taken by Mr. Hawser is that Mr. Grey exercised undue pressure on the appellant, something beyond the bounds of his duty as counsel, so as to make the appellant feel that he must retract his plea, and that he had no free choice in the matter. The Court would like to say that that is a very extravagant proposition, and one which would only be acceded to in a very extreme case. The Court would like to say with emphasis that they can find no evidence here that Mr. Grey exceeded his duty in the way in which he presented advice to the appellant. He did in strong terms. It is perfectly right that counsel should be able to do so in strong terms, provided always that it is made clear that the ultimate choice and a free choice is in the accused person. The one thing that is clear here from all the evidence is that at every stage of these proceedings, certainly up to the interview in the cell, it was impressed upon the appellant by Mr. Grey, by Mr. Laity, by Miss Nelson herself, that the choice was open to him, and in so far as the appeal rests upon undue influence by counsel, the Court is quite satisfied it wholly fails."

I am quite satisfied that Mr. Ritch made it perfectly clear to the appellant that the choice was his and that he was completely free to change his plea or to continue with the trial on his original plea of not guilty. The advice was forceful. It was proper to point out the prospective consequences. As it turned out the advice was sound and this was reflected in the comments of the presiding Magistrate when passing sentence. I am quite satisfied that the change of plea was a voluntary one with full knowledge of the alternatives open to the appellant and that he had complete freedom of choice.

This case has more in common with the case of R. v. Peace Criminal Law Review February 1976 p. 119 where the alternatives were forcefully put to the appellant. On an application for leave to appeal it was held, refusing the application that:

"it was clear from Shannon, 59 Cr.App.R. 251 that an ill advised plea of guilty was not such an irregularity as came within section 2(1)(c) of the Criminal Appeal Act 1968. The only possible alternative available to P was an order of venire de novo on the ground that his plea was a nullity. A good example was Inns, 60 Cr.App.R. 231. What had to be shown was that the apparent plea of guilty was no plea at all

because it was made under pressure or threats or the like in circumstances in which the defendant had no free choice but was driven to adopt a certain course whether he liked it or not. It was a little like the situation where an appellant sought to say that an abandonment of his appeal was a nullity: Medway [1976] Crim.L.R. 118. In the present case the facts did not make the plea a nullity. A defendant who pleaded guilty following advice of the kind given, albeit he did so unhappily and regretfully, could not be said to have lost his power to make a voluntary and deliberate choice. It would be a serious matter if it were accepted that when counsel gave strong advice indicating the prospect of being found guilty and the alternative of pleading guilty it could be said that the plea was forced on the defendant. It was a question of fact in every case."

In my view there is no substance in this ground of appeal.

In passing it may be noted that it was because of the contention that the plea of guilty was a nullity that the appeal was entertained despite the provisions of section 158 of the Criminal Procedure Code.

It was also argued that if the plea of guilty was not a nullity it was equivocal and should have been declined on the principles set out in R. v. Tottenham Justices ex parte Rubens 1920 1 W.L.R. 800. On the facts reviewed there can be no question of an equivocal plea of guilty and I need not consider this submission further.

Some complaint was made of the fact that the record merely records that the appellant only expressed a wish to change his plea and there is no record of his having done so. The evidence of Mr. Ritch and the statement from the Bar by Mr. Martin leave no doubt that the appellant did in fact change his plea after the charges had been put to him again. The record of what was said in mitigation makes it clear that the plea was in fact changed. The appellant's original notice of appeal and his affidavit are clear admissions that he did in fact change his plea to one of guilty. There can be no doubt on that score. I agree, however, that it would have been preferable had the learned Magistrate made a specific note of the occurence.

Although not made a specific ground of appeal in the original notice or supplementary grounds of appeal, argument was directed at the apparent

failure of the learned Magistrate to comply with sections 50, 52, 63 and 76 of the Criminal Procedure Code and it was contended that this defect rendered the trail a nullity or was fatal to the conviction.

I accept that it is important that a presiding Magistrate should comply with the procedural provisions required by law. However, failure to do so need not be fatal or render the trial a nullity unless serious consequences flow from the omission or unless the accused is prejudiced thereby or unless he is otherwise deprived of a fair trial.

It was argued that there was no note that the learned Magistrate had granted him leave to change the plea, or that the charges had been put to him again; that there was no note of the actual plea of guilty or of the learned Magistrate having convicted the appellant thereon.

The question of charges having been put again and the appellant's changed plea thereto have been dealt with earlier. Implicit in that course was the presiding Magistrate's consent to that course. It should be emphasised that the appellant was legally represented and the learned Magistrate was giving effect to the change of plea in the presence of the defence attorney who was there to protect his client's interest and who would have intervened had there been any misunderstanding or any step taken not in conformity with his client's wish. Although the omission to record a formal conviction on the plea is unfortunate this is one of those omissions which one frequently encounters on the record. There can be no doubt that the learned Magistrate did convict on the changed plea and sentenced the appellant accordingly. This is implicit from the record as a whole. The omission of a formality does not affect the justice of the case. These and the other omissions referred to are clearly covered by section 176 of the Criminal Procedure Code which is designed to avoid appeals turning on technicalities. In my view, there was substantial compliance with section 63 of the Criminal Procedure Code and any short fall is adequately met by section 276. Certainly no injustice was occasioned.

It was also submitted that the order embodying the sentences was a nullity for failure to comply with section 52 of the Criminal Procedure Code in that the offences and relevant sections of the law were not specified on the record. It is manifest from the commencement of the proceedings that the possession charge was the first charge and that the importation charge was the second charge. The learned Magistrate was merely employing a form of short hand distinguishing and the referring of those two charges by the symbols

(1) and (2) in the sentencing order. This is merely a technical matter of form and no injustice could arise. In my view the defect in form is cured by section 276. In any event, the same sentence was passed in respect of each charge and no difficulty arises in interpreting the order.

The remaining grounds of appeal, in essence, amounted to a contention that, in the light of the evidence of the only witness before the change of plea, the customs officer, the learned Magistrate should have declined to accept the plea of guilty. It was urged that evidence, of parts of it, should not have been admitted, and that in any event, far from implicating the appellant, it demonstrated that the appellant was not participating in the offences charged, in particular the offence of possession. The short answer is that the evidence was admissible and demonstrated clearly that the appellant was a principle in the offences charged. It remained only to prove that the contents of the box, featuring in the case, were ganja. Furthermore, it is not the case that before a change of plea can be accepted the evidence so far tendered must amount to satisfactory proof of the offence charged, as was also contended. The change of plea might come at any time e.g. after the first witness has merely given his name. It must again be emphasised that the appellant was legally represented and his attorney would not have allowed the plea to have been changed unless that was a proper course. However, in principle, I would accept that if the evidence tendered disclosed that an accused person was not implicated in the offence charged the proper course for the presiding Magistrate would be to decline to accept a change of plea to one of guilty. That is not the case here.

In my view, there is no merit in the appeal against conviction. It is accordingly dismissed.

As to sentence, the views of this court on these offences are well known and the deterrent sentences passed are well established. The amount of ganja involved was 31bs. 9 ozs. The sentences imposed were generally in line with others imposed in this type of offence involving this quantity which was obviously intended as merchandise. However, as indicated in another case, the two offences arise out of the same transaction and, while a fine is mandatory, the fine imposed for the offence of possession should be on a modest scale. Otherwise the effect would be, in the case of default, to extend the term of

imprisonment substantially for what is, in effect, a single transaction. Accordingly, I reduce the fine for the offence of possession to $100. or two weeks imprisonment in default.

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

SIR JOHN SUMMERFIELD

20th June 1980.