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In the Grand Court of the Cayman Islands
Holden at George Town on Friday the 9th day of June, 1978
Before His Lordship, Sir John Summerfield, C.B.E., Q.C.,
Criminal appeal No. 7 of 1978

BERTRAM SMITH V. REGINA

Mr. C. Gill for appellant
Mr. D. Ritch for the respondent

JUDGMENT

The appellant was convicted of the offence of unlawful possession of ganja contrary to section 3 (1) (i) (k) of the Misuse of Drugs Law 1973. He was sentenced to two years imprisonment with hard labour and to a fine of $2,000. or two years imprisonment with hard labour in default of payment, the latter to run concurrently with the substantive term of imprisonment.

Under the Misuse of Drugs Law the imposition of a fine and a sentence of imprisonment is mandatory on conviction for the offence of unlawful possession of ganja.

The appeal was initially against conviction and sentence but, at the hearing, the appeal against conviction was abandoned and is accordingly dismissed.

In his able and helpful submissions learned counsel for the appellant attacked the record on several grounds.

He pointed out that section 157 (1) of the Criminal Procedure Code requires the magistrate to inform a convicted person of his right of appeal and of the steps he can take and to make a note of the fact that that has been done. There is no such note on the record.

No doubt the absence of such a note was an oversight on the part of the learned magistrate. However, it did not operate to the prejudice of the appellant who, immediately following sentence, gave verbal notice of appeal.

Nevertheless, it is important that these mandatory provisions be complied with as a matter of course. Such an oversight can lead to complications e.g. where a convicted person seeks leave to appeal out of time

Learned counsel for the appellant then went on to deal with a matter of some importance generally.

In purported exercise of his powers under section 160 of the Criminal Procedure Code the learned magistrate fixed a "cash bond" in the sum of $1000. to be paid within three days ~~of~~ for the due prosecution of the appeal. A "cash bond" is treated as a cash deposit.

The appellant was unable to raise this sum in cash and the question arose whether the appeal could properly be heard.

The relevant part of section 160 reads:

> "The appellant shall within three days after the day on which he gave or served notice of his intention to appeal enter into a recognisance before a magistrate, with or without sureties as the magistrate may direct, conditioned to prosecute the appeal to judgment thereon of the court, and to pay such costs as may be awarded by it, or if the magistrate thinks it expedient the appellant may instead of entering into recognisances give such other security by deposit of money with the Summary Court or otherwise as the magistrate deems sufficient."

It was pointed out that this provision does not entitle the magistrate to order the payment of a cash deposit as a condition of the prosecution of his appeal without the consent of the appellant. It provides that the appellant shall enter into recognisance before the magistrate, with or without sureties as the magistrate may direct. As an alternative the appellant may, instead of entering into recognisance, give such other security by deposit of money or otherwise. This alternative is subject to the discretion of the magistrate - "if he thinks it expedient" and subject to the magistrate being satisfied that the alternative security is sufficient.

In my view this is the correct interpretation to place on section 160. It is for the appellant to elect the alternative of making a cash deposit (or giving other security). It is for the magistrate to determine whether he will allow this alternative and to determine the sufficiency thereof. The magistrate has no power to require a cash deposit without the consent of the appellant.

The authorities on this point were fully reviewed but I think it is sufficient to cite the case R v Harrow Justices, ex parte Morris 1972 (2) A.E.R. 494. Although the wording under consideration in that case (section 37 (2) of the U.K. Criminal Justice Act 1948) is slightly different from the local section 160, it has sufficient areas of similarity to reinforce the view

I have taken.

The purpose behind this alternative is readily understandable. An appellant may not be able to find suitable sureties. More often than not only persons with Caymanian status or otherwise shown to be settled residents are acceptable as suitable sureties. Thus the law provides an alternative to sureties and allows the appellant to elect to pay a cash deposit (or provide other security) if the magistrate approves. This power was never intended effectively to deprive an appellant of his right of appeal as would otherwise have been the case here.

Furthermore, the general purpose behind section 160 should be kept in mind. The intention is to provide for the due prosecution of the appeal and to meet any costs awarded against the appellant. The amount covered by the bonds should reflect this purpose. It would appear that there is no recorded case where costs have been awarded against an unsuccessful appellant in a criminal appeal. That does not mean that this court will never exercise the power to award costs in such cases. It does mean that the likelihood of costs being awarded against such an unsuccessful appellant is not high.

For these reasons the amount covered by the bond should normally be moderate. Only in exceptional cases should a substantial figure be required. In all cases it should be manifest that the amount fixed is not such as to prove an apparent impediment to an appellant's right of appeal.

For the foregoing reasons the appeal was allowed to proceed notwithstanding the failure to meet the cash deposit ordered.

Turning to the appeal against sentence learned counsel for the appellant urged that the sentence was -

(i) contrary to law

(ii) manifestly excessive

(iii) at variance with general principles and out of line with sentences normally imposed for this type of offence where small quantities of ganja for personal use are involved.

It was pointed out that there was no power to impose a sentence of imprisonment with hard labour. This, of course, is correct and no doubt this order was the result of a slip of the pen. The order could not take effect otherwise than as sentence of imprisonment.

It was also pointed out that the sentence of imprisonment in default of payment of the fine exceeds that authorised by law. The Misuse of Drugs Act contains no specific provision relating to the term of imprisonment which may be imposed in default of payment of a fine. In the absence of such a specific provision one must turn to the general provisions in the Penal Code and Criminal Procedure Code. It is clear from section 25 of the former law and the proviso to section 78 of the latter that the maximum sentence of imprisonment that could have been imposed in the circumstances of this case is six month This contention must, therefore, be upheld.

Furthermore, it was properly drawn to the attention of the court that the sentence of imprisonment in default should not be made concurrent with the substantive term of imprisonment. This aspect has already been the subject of an earlier judgment (R v Verona Messias No. 5 of 1978)and here it is sufficient only to note section 24 (c) (i) of the Penal Code and the proviso to section 33 of that Code which support that submission.

Dealing with the sentence generally, attention was drawn to the well known cases of Gumbs 19 C.A.R. 75, Ball 35 C.A.R. 164, Whiteman 2 C.A.R 10 and Raybould 2 C.A.R. 184.
It was pointed out that the sentence imposed was based on the learned magistrate's mistaken belief that the appellant had a previous conviction for unlawful possession of ganja. The appellant has a record of some 21 convictions for various offences but none of them are drug related. The mistake appears to have arisen from the manner in which offences are described on the conviction form.

It is further urged that the sentence is out of line with those normally passed in similar cases. Only 1.1 gm. of ganja was involved in this case and there is no suggestion of trafficking.

Learned counsel for the Crown fairly concedes that the court must intervene in the matter of sentence but emphasises the 21 previous convictions albeit for unrelated offences, reflecting a complete disregard for law and order and suggesting the necessity for deterrence.

It is well recognised that an offender should not be sentenced twice for his previous record. Nevertheless, his previous record can properly be taken into account in determining whether he is entitled to lenient treatment. Unrelated earlier offences are usually disregarded, but where the record is

one of habitual violation of the law in a series of serious offences of different character that fact cannot be ignored. The court has a duty to deter the offender against repeated transgressions.

Bearing in mind all these factors the sentence is varied as follows: A sentence of six months imprisonment is substituted for the term imposed. A fine of $1,000. is substituted for that imposed. In default of payment a further sentence of six months imprisonment is imposed, consecutive to the substantive term. Any period in excess of the six months substantive term imposed (less remission) served to date will count as service of such part of the term of imprisonment in default of payment of the fine not already served.

To that extent the appeal against sentence succeeds but is otherwise dismissed.

Sir John Summerfield
Chief Justice
16 June 1978.