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IN THE GRAND COURT OF THE CAYMAN ISLANDS – Criminal.
APPEAL NO 3 of 1977

R. v KENNETH HURLSTON

HEARD: MARCH 7, 1977

Ramon Alberga, Q.C., and C. Gill for the appellant

S. Panton, Legal Assistant, for the Crown

GRAHAM-PERKINS J: The appellant was, on January 11, 1977, convicted by His Honour Mr. Shaw on two informations, numbered 1638/76 and 1639/76 each of which charged that the appellant had, on September 6 and 7 respectively, sold a controlled drug namely, ganga, contrary to S. 3(1) (i) (e)of the Misuse of Drugs Law, 1973. He was sentenced to three years imprisonment in respect of each conviction the sentences being made to run concurrently. He now appeals against these convictions and sentences.

The case advanced by the Prosecution at the trial depended almost entirely, if not entirely, on a witness, Schister Ebanks, who had been used by the Police to procure the alleged sales by the appellant of the subject matter of the charges. In his written reasons for concluding that the Prosecution had established the two charges against the appellant the learned magistrate said, inter alia:

> "In assessing his credibility, I am mindful that His application to join the Force was not successful, that he was not sworn as a Constable - he says he quit the force in mid September and was not fired - and that, was elected by Defence Counsel he is presently before the Courts on a charge of Arson. I have considered his demeanour carefully, I am convinced he is giving truthful evidence.
>
> I have considered and weighed the evidence of the accused with equal care; I am convinced his denial of the two sales is false.
>
> The story of the two sales given by Schister Ebanks is supported by considerable surrounding detail."

The two informations were tried together and it is this circumstance which, in my view, gives rise to the really crucial question that falls to be resolved on his appeal. Another but, perhaps, less vital question is the extent to which the magistrate can be held to have acted rightly in reaching a conclusion adverse to the appellant in circumstances in which that conclusion proceeded from his assessment of the evidence of witness whom he saw and heard, and opportunity which this court has not enjoyed.

I proceed to attempt an answer to the first question. It is I think, beyond debate that at common law a defendant could not, in a court of summary jurisdiction, be called upon, without his consent, to answer two or more charges at the same time. In a judgment of a Divisional Court of the Queen's Bench Division in BRANGWYNNE V. EVANS

(1962) 1 All E.R. Lord Parker, C.J., said at p. 447

> "If there was any doubt on the matter, it seems to me that it is resolved by a later decision of this court, R. v. Ashbourne J.J., Ex parte Naden (1950) W.N. 51. There, as in the present case, there were in fact two informations, and, although the defendant did not expressly object to the hearing of the two informations together, he was not asked to give his consent. The court found on the facts that the justices were justified in assuming that the defendant's solicitor did consent to both charges being heard together, but the whole basis of the decision is that, unless the defendant consents either expressly or impliedly, it is wrong for two informations to be heard at the same time."

The principle as there stated, and with which this court respectfully agrees is one which has been accepted and acted on in all common law jurisdiction and I am aware of no statutory inroads that have been made therein. Section 13 (6) of the Criminal Procedure Code provides:

> "Every complaint shall be for one matter only, but the complainant may lay one or more complaints against the same person at the same time and the court hearing any one of such complaints may deal with one or more of the complaints together or separately as the interest of justic appear to require."

This section does not, either expressly or by implication, seek to do any more than to enable two or more complaints to be heard together where the interests of justic make that course desirable. Where the interests of justice do not, in the court's vie permit such a course then, clearly, two or more complaints cannot be heard together. There is, however, nothing in the section to warrant a conclusion in favour of the abrogation of the principle that two or more complaints may be heard together without the prior consent of the person charged. If the Legislature had intended any such farreaching consequence it would, I apprehend, consistently with established canons of interpretation, have so declared in clear and ambiguous language. It has not done so.

I am advised by counsel who appeared at the trial herein that the magistrate indeed, seek the consent of the appellant to a joint trial of the two charges of sell a controlled drug and that such consent was not given. It was in that circumstance that the magistrate, as the record reveals, said: "I direct joint trial under Section 13(6) C.P.C." As I have already shown there was no warrant for any such direction in the particular circumstances of this case. It may be that the magistrat

did not have the benefit of any citation of relevant authority. The record does not reveal that he received any such assistance. Be that as it may I have not the least difficulty in concluding that, in the circumstances with whcich I am here concerned the joint trial of the charges herein was contrary to the law of this Island. The questio that now arises, therefore, is what is this court to do in view of its conclusion as to the first question posed earlier in this judgment. Mr. Panton urged me to take the vie that having regard to the circumstances of the two offences alleged it could not be sai that the appellant had suffered any prejudice by reason of the joint trial. The simple answer is that no question of prejudice can arise where, as here, convictions are recor ed as in consequence of a form of procedure which "ought never to have been adopted" an are, therefore, contrary to law. Those convictions must, in the circumstances, be set aside.

This conclusion is sufficient to dispose of this appeal. I go on, however, to answer, albeit very briefly, the second question posed. It is an elementary propositio that an appellate court ought not to interfere with findings of fact reached by a trial court where those findings rest upon the credibility of witness whom the trial court ha seen and heard. It is, however, clearly the duty of an appellate court to so interfer where it is convinced that the tribunal of fact has not fairly taken advantage of the opportunity it enjoyed of hearing and seeing the witness whose credibility is in issue. With the most profound respect for the view of the learned magistrate as to the assessm of the credibility of Schister Ebenks I am constrained to the conclusion that I am unab to share that view. Any assessment of the evidence of Ebanks in the circumstances of t case demands not simply a conclusion as to his demeanour but certainly, in addition, a critical examination of the other evidence in the case against the background of which the truthfulness or otherwise of the evidence of Ebanks falls to be judged. It is, in view of the conclusion at which I have already arrived, unnecessary for me to embark on any detailed examination of the testimony of Ebanks. Suffice it to say that his evid as to the alleged sales is neither, in the words of the magistrate, "supported by considerable surrounding detail," nor is it reconciable, in material areas, with the other evidence in the case. A conclusion that Ebanks' evidence was truthful necessari involved a rejection of other evidence where that evidence depended equally on the credibility of witness and about which I do not have the benefit of the magistrate's v I cite two examples only. With regard to the second sale, Ebanks swore that he gave t appellant two $25.00 bills in exchange for "a brown paper bag" which, a very short tim afterwards, a minute, he handed to Inspector Evans. Evans, on the other hand, swore t while he was holding the appellant, Ebanks "came to me and gave me a silver foil paper

packet, and told me 'this is what I bought from him.'" Was Ebanks speaking the truth when he described what he had received from the appellant as "a brown paper bag," or was Evans speaking the truth when he described what Ebanks had handed to him as a "silver foil paper packet." There cannot have been any room for error in the identity of whatever Evans swore he received from Ebanks. What, therefore, happened to the brown paper bag in the very short space of time that elapsed between its alleged receipt from the appellant by Ebanks and the arrival of Evans on the scene? Surely the answer to this vital question could not be resolved merely by reference to the demeanour of Ebanks Indeed his demeanour was irrelevant to the question which appears, rather unhappily, to have escaped the attention of the magistrate. The other point I cite relates to the evidence of Evans that Ebanks said to him: "Look there I think he dropped money there." If Ebanks had, indeed, seen the appellant drop money anywhere, it is improbable that he would, according to Evans, have said "I think he dropped money there." More significantly, however, Ebanks said: "As Inspector Evans and Hall approached scene I saw the accused turn around and he dropped something (be it observed, something, not money) He was standing to the left of his car." Certainly, there was no evidence that anything was found "to the left of (the appellant's) car. Two crumpled $25. were allegedly found in some rose bushes to the front of the appellant's car. This fact, if fact it was, remained unexplained by any evidence in the case. I say "if fact it was" because the magistrate's findings in this connection are completely unsupported by the evidence. The resolution of this important discrepancy did not, as in the other example cited, depend on the demeanour of Ebanks, and this, too, appears to have escaped the magistrate's attention.

I do not pursue the several other discrepancies that emerge in the evidence of Ebanks. In the result I am compelled to the conclusion that the magistrate's assessment of his evidence did not proceed on correct principle. The appeal is allowed and the convictions and sencences set aside.

Chas. H. Graham-Perkins,
9th March, 1977