Privy Council Appeal No. 19 of 1985

Raul Gonzalez and Freddy Suarez *Appellants*

v.

The Queen *Respondent*

FROM

THE CAYMAN ISLANDS COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH NOVEMBER 1986

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
LORD ACKNER
LORD OLIVER OF AYLMERTON
SIR IVOR RICHARDSON

*[Delivered by **Lord Bridge of Harwich**]*

The appellants, Gonzalez and Suarez, were charged with four others with a number of offences under the Cayman Islands Misuse of Drugs Law alleged to have been committed in the early part of 1983. The first trial began before a Magistrate on 20th April 1983. On 4th May 1983 the prosecution conceded that they could establish no *prima facie* case against three of the accused, who were thereupon discharged. On 6th May 1983 the Magistrate disqualified himself from continuing the trial because of what he expressed to be the likely prejudicial effect on the trial of a statement broadcast from Radio Cayman at the instance of the Commissioner of Police. He stopped the trial and ordered that it be commenced *de novo* before another Magistrate.

The second trial began on 11th July and ended on 5th August 1983. It resulted in the acquittal of the third accused but in the conviction of the appellants of all the charges against them save that Suarez was acquitted of a charge of conspiracy to import cocaine. One of the offences of which the appellants were found to have been jointly guilty was the unlawful possession of 31 kilograms of cocaine on 22nd March 1983. For that offence Gonzalez was

sentenced to twelve years imprisonment and a fine of $30,000 or an additional six months imprisonment in default; Suarez was sentenced to six years imprisonment and a fine of $10,000 or an additional six months imprisonment in default.

To understand the ensuing appellate procedure it is necessary to refer to the Cayman Islands Criminal Procedure Code 1975, section 5(1) of which provides:-

> "For the purpose of determining the mode of trial before a court, offences shall be classified into three categories as follows:
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> Category A - offences triable upon indictment and not otherwise;
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> Category B - offences triable upon indictment which, with the consent of the prosecution and the person charged (or all of the persons charged if there be more than one) may be tried summarily; and
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> Category C - offences triable summarily and not otherwise."

The effect of sections 12 and 25 of the Misuse of Drugs Law, as in force at the material time, is that all offences under the statute fall within category C save, as provided by section 25, that:-

> "... where a person is charged with any offence contrary to this Law and such person is liable upon conviction to be sentenced to a term of imprisonment exceeding fifteen years then such offence shall be deemed, for the purpose of determining the mode of trial, a category B offence in accordance with section 5 of the Criminal Procedure Code."

On the appellants' appeal to the Grand Court of the Cayman Islands the Chief Justice, Sir John Summerfield, in a judgment delivered on 6th March 1984 held that the offences of which they had been convicted, save that of unlawful possession of cocaine, were category B offences which, since the appellants had not consented to summary trial, the Magistrate had had no jurisdiction to try. He accordingly quashed the convictions for those offences. He held, however, that the possession offence fell within category C and that the appellants' trial in respect of that offence was not vitiated by the joinder of other offences in the trial which were beyond the jurisdiction of the Magistrate. He dismissed the appellants' appeals against conviction and sentence in respect of the possession offence.

The appellants appealed to the Court of Appeal of Jamaica exercising jurisdiction as the Court of Appeal of the Cayman Islands pursuant to the Cayman Islands Court of Appeal Law. The appeal was heard by Zacca P., Kerr and Ross JJ.A., who announced at the conclusion of the hearing on 28th June 1984 that the appeal was allowed. The convictions were quashed and sentences set aside. But the Court thereupon ordered a new trial of the joint charge of unlawful possession of 31 kilograms of cocaine. They promised to put their reasons into writing and this they did in judgments handed down on 26th November 1984. The Court of Appeal affirmed the decision of Sir John Summerfield C.J. that the possession offence fell within category C. But they held that the joint trial of charges for this offence with charges for other offences beyond the jurisdiction of the Magistrate rendered the whole proceedings a nullity.

The appellants now appeal by special leave to Her Majesty in Council against the order for a new trial. They challenge the decision that the possession offence was in category C as wrong in law. If that were so, the order for a new trial could not stand. The alternative ground on which the order for a new trial is sought to be impugned is that the Court failed to exercise its discretion judicially.

The first issue depends on what is meant by the words "liable upon conviction to be sentenced to a term of imprisonment exceeding fifteen years" in section 25 of the Misuse of Drugs Law in the context of the offences and punishments for which the Law makes provision. Analysis of section 3, which creates all the relevant offences, and of section 12 and Schedule 2 Part B which prescribe the maximum sentences which may be imposed, shows that every offence under section 3 will render the offender liable to one or other of the following maximum terms of imprisonment: three years, seven years, ten years, fifteen years or twenty years. In every case in addition to any sentence of imprisonment the offender may also be fined an amount either within a scale of prescribed maximum fines or without limit.

The maximum sentence prescribed for the offence of unlawfully possessing cocaine, which is a "hard drug" as defined by section 2, in an amount of two ounces or more, is fifteen years imprisonment plus a fine without limit as to amount. The effect of sections 24 and 25 of the Cayman Islands Penal Code, as in force at the material time, was to empower a court imposing a fine in addition to a term of imprisonment to order a further term of imprisonment not exceeding six months to be served in default of payment of the fine. The effect of these provisions, it is submitted for the appellants, is that a person charged with an offence of unlawfully possessing two

ounces or more of cocaine is "liable upon conviction to be sentenced to a term of imprisonment exceeding fifteen years" because the offender may be sentenced not only to an immediate term of fifteen years imprisonment but also fined and ordered to serve a further term of up to six months imprisonment if the fine is not paid. Their Lordships cannot accept this submission. On the true construction of the enacting words a term of imprisonment imposed in default of payment of the fine is not part of the term of imprisonment to which the offender is liable to be sentenced "upon conviction". This construction is put beyond doubt by a consideration of the several maximum sentences prescribed for various offences under the Misuse of Drugs Law. In setting the maximum at fifteen years as a means of defining the range of offences under the statute within category C, the draftsman must surely have contemplated the inclusion within that range of certain offences to which that maximum term of imprisonment would be precisely applicable. But, if the construction which the appellants invite the Board to adopt is correct, there are no such offences. To accept the submission for the appellants would limit the range of category C offences to those offences for which the statute prescribes a maximum sentence of ten years imprisonment or less taking account of the possible liability of the offender to a further term of six months imprisonment in default of payment of a fine. The language of the statute cannot have been used with this intention.

Their Lordships turn to consider the order for a new trial. A submission advanced in the written case for the appellants to the effect that the Court of Appeal had no power, in the circumstances, to order a new trial was not pursued at the hearing. Counsel for the appellants expressly conceded the existence of the power and confined his argument to the question whether the Court of Appeal erred in deciding to exercise it. Their Lordships nevertheless think it appropriate to refer briefly to the statutory source of the power and to consider its scope. At the material time by virtue of section 49 of the Constitution of the Cayman Islands appeals from the Grand Court of the Cayman Islands lay to the Court of Appeal of Jamaica and were governed by the Cayman Islands Court of Appeal Law. By section 5 the Court of Appeal is given jurisdiction "to hear and determine appeals from the Grand Court by a convicted person" against the conviction on various grounds. Section 6, so far as material, provides as follows:-

> "(1) Subject to the provisions of section 9 the Court on any such appeal against conviction shall allow the appeal if the Court considers that the verdict should be set aside on the ground that it is unreasonable

> or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any point of law, or that on any ground there was a miscarriage of justice ...
>
> (2) Subject to the provisions of this Law, the Court shall, if it allows an appeal against conviction, quash the conviction and direct that a judgment and verdict of acquittal be entered, or, if the interests of justice so require, may order a new trial in accordance with such directions as the Court may give."

It is clear from the statutory context, in particular sections 9 and 25, that the power conferred by section 6(2) to order a new trial is available to the Court of Appeal not only when they allow an appeal against conviction by the Grand Court following a trial on indictment, but also when they allow an appeal against a decision of the Grand Court in the exercise of its appellate jurisdiction, as in the instant case, affirming a conviction by a court of summary jurisdiction.

The language of section 6(2) could hardly be wider and their Lordships wish to emphasise that the discretion to order a new trial "if the interests of justice so require" is not fettered by any technical considerations and is available alike in cases where, for some reason, the trial leading to the quashed conviction has been held to be a nullity as in cases where the trial was flawed by some error of law or procedure. Whether or not the power should be exercised must depend on all the relevant circumstances.

It must always be relevant in deciding whether or not to order a new trial to consider the history of the prosecution, its impact on the accused, the gravity of the offence and the nature of the case for the prosecution and the defence. This is not, of course, intended to be an exhaustive list of relevant considerations. Here, because of the abortive first trial, the appellants had already stood trial twice. When their appeal was allowed and a re-trial ordered, the appellants had been in custody since 29th July 1983. The gravity of the alleged offence of unlawfully possessing so large a quantity of the drug cocaine as 31 kilograms is obvious. The case for the prosecution on this charge depended wholly on the evidence of two undercover agents of the United States Drug Enforcement Agency ("DEA") named Pulley and Delgado. This is summarised in the following passage from the judgment of Sir John Summerfield C.J. in the Grand Court:-

" The evidence is that Pulley, a D.E.A. agent, had made contact with the first appellant and had had conversations with him relating to his (Pulley's) intention to purchase cocaine from him. Those conversations are relevant to the question of knowledge, although there is also ample other evidence on that aspect.

On 22nd March, in the afternoon, the first appellant took Pulley and another D.E.A. agent operating with him, Delgado, to the first appellant's cement plant. There they entered an office. While they were there the second appellant entered the office and the first appellant introduced him as his chemist. Pulley spoke to the second appellant in Spanish. Both appellants speak Spanish. The second appellant acknowledged that he was the chemist. Pulley asked him: 'How is the coke.' The second appellant said: 'Pure'.

All four then went to a car parked in the vicinity. The first appellant opened the trunk and took out a suitcase. They all then went to a bedroom, the first appellant carrying the suitcase. The first appellant placed it on a bed and opened it up. There were 31 oval packages in two layers in it, all about the same size. Delgado told the first appellant that he wanted to take random samples from two of the packages. He was told to go ahead. He picked one package at random from each layer and he and Pulley took a sample from each package. They then returned the packages. There was a conversation about the packages feeling as if they weighed more than a kilo and the second appellant said he always packed more than a kilo to allow for spill. The packages were returned to the suitcase and the second appellant carried them out of the room.

Those samples were sent to an analyst. They were identified as cocaine hydrochloride, 90% pure.

The learned Magistrate found that the chain of handling the samples from the D.E.A. agents to the analyst was unbroken and satisfactory and there was evidence to justify that finding.

On 23rd March there was a police raid on the first appellant's premises. However the suitcase with the 31 packages was not found. Those packages were never recovered despite a widespread search.

It is quite clear from the conversation which the first appellant and the second appellant, particularly the former, had with the D.E.A.

agents that they were holding out that all the packages in the suitcase contained cocaine, each containing at least one kilogramme of the drug. It was apparent from the negotiations that a substantial quantity of drug was intended in the proposed deal. Two of the packages were chosen at random and the sample from each was found to be cocaine hydrochloride, 90% pure. The only reasonable inference is that the suitcase contained 31 kilogrammes of that drug. From the circumstances narrated the only reasonable inference is that the two appellants had joint possession of the drug in the suitcase.

If that evidence is accepted then it amounts to an overwhelming case against the two appellants on this charge of unlawful possession."

The defence was a complete denial of the charge. The two appellants made unsworn statements from the dock and called no evidence. Thus the issue of fact which would arise for decision on a new trial would be a very simple and straightforward one.

Against this background it could hardly be suggested that there was not ample material to justify a decision to order a new trial. But it is submitted for the appellants that examination of the reasons given by the Court of Appeal shows that there was no judicial exercise of the discretion conferred by section 6(2) of the Court of Appeal law.

As already mentioned, the decision to allow the appeal and order a new trial was announced at the conclusion of the hearing, the reasons were given later. Before announcing the decision, the judges must have discussed the matter and agreed that a new trial was appropriate, presumably for reasons on which they also agreed. But, as will appear, when one looks at the reasons given later by Kerr and Ross JJ.A. in relation to the order for a new trial, they appear to be addressing their minds to different questions.

Zacca P. after discussing at length his reasons for allowing the appeal against conviction, simply concludes with the following paragraph:-

"Accordingly the trial was a nullity and for the reasons stated above the appeal was allowed. A new trial was ordered on the charge of unlawful possession of cocaine."

Kerr J.A. discusses the question of a new trial in the following passage:-

" Finally, Mr. Chin-See urged that assuming the Court had power to order a new trial on the charges of possession of the cocaine

hydrochloride they ought to decline having regard to the circumstances of the case. In that regard he adverted to the fact that it would be the 'third ordeal' for the appellants; the first trial had commenced on 20th April, 1983, and was aborted on 6th May 1983 through no fault of the appellants. The re-trial commenced on 11th July, 1983 and ended August 5, 1983 - and the appellants were in custody since then. Further, Suarez in particular, would be unlikely to meet the costs of representation if a new trial was ordered.

Mr. Chin-See then referred to the Privy Council case of *Reid v. R.* (1978) 27 W.I.R. p. 254 (an appeal from the Jamaican Court of Appeal) wherein certain principles or guidelines in deciding whether a new trial should be ordered were formulated.

In ordering a new trial this Court has good reason to be mindful of the judgment in *Reid v. R.* While due consideration must be given to the factors urged by Mr. Chin-See, regard must also be had to the following important factor identified in *Reid v. R.*, and applicable to the instant case:

> '(i) .....
>
> (ii) The interest of justice that is served by the power to order a new trial is the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury.'

For these reasons I concurred in the appeal being allowed and a new trial ordered in respect of the charge of possession of cocaine on March 22, 1983."

If one could stop at that point, there would be no ground whatever for criticism of the decision. The reasoning in the judgment of Kerr J.A. is impeccable. The omission of Zacca P. to give express reasons for his decision affords no basis for questioning its propriety. The difficulty arises from the judgment of Ross J.A. He appears to have been beguiled by counsel for the appellants into thinking that the question whether or not to order a new trial depended on legal technicalities and he proceeds to discuss a number of authorities which their Lordships, with respect, regard as irrelevant. He concludes as follows:-

> "It seems to me that in the instant case, as the proceedings before the learned magistrate were a nullity, the appellants have not been effectively tried on the informations laid against them and there should be a new trial before a different magistrate."

Their Lordships have to accede to the submission that the reasons given by Ross J.A. show that he never directed his mind to the right question, viz. whether, in all the circumstances, the interests of justice required that a new trial should be ordered. How then does the matter stand? Their Lordships think that strictly the appeal fails on this ground. It is for the appellants to establish that the decision of the majority of the Court was vitiated by misdirection and there is no reason to impute to Zacca P. the error apparent in the reasons given by Ross J.A.

However, it would be unsatisfactory that the appeal should be disposed of on that ground alone. Their Lordships have, in the circumstances, thought it appropriate to consider how they would themselves exercise the discretion whether or not to order a new trial if it were open to them to do so on the ground that the Court of Appeal had failed to exercise their discretion judicially.

If their Lordships had been called on to decide that question on 28th June 1984 they would unhesitatingly have ordered a new trial precisely for the reasons given by Kerr J.A. It is not, however, on that date but on the date of the delivery of this judgment and in the light of all relevant circumstances now prevailing that any discretion on their Lordships' part would fall to be exercised.

Two important factors require to be taken into consideration. First, the appellants have remained in custody throughout. Secondly, the offence of unlawful possession of two ounces or more of cocaine carries a mandatory miniumum sentence of three years imprisonment plus a fine of $10,000. In the light of these factors their Lordships were anxious to be assured, and were assured by counsel on both sides, that if the new trial leads to conviction of the appellants and hence to the imposition of fresh sentences, the appellants would be entitled, either as of right or in the discretion of the sentencing court, to have the time they have already spent in custody counted as part of their sentences. In the light of the unfortunate history of the matter it is difficult to envisage any circumstances in which it would not be appropriate to give the appellants credit, when imposing any new sentence, for the time during which they have already been deprived of their freedom.

Counsel for the appellants points out that before any new trial can now take place it is likely that the appellant Suarez will have been in custody for a period approaching the length of time he would, with full remission, have had to serve if the sentence of six years imprisonment originally imposed on him in August 1983 had stood unchallenged. Even on the assumption that the whole of that period will count towards any new sentence imposed, counsel cogently submits that to subject him to a new trial, when effectively the only object a conviction could achieve in his case would be to justify retrospectively a term of imprisonment already served, would not be in the interests of justice but would rather tend to bring the process of the criminal law into disrepute. While they appreciate the force of this submission, their Lordships think that it focuses on too narrow an aspect of the interests of justice. Regrettably it must be accepted, in the light of the long and unfortunate history of this case, that, whatever the eventual outcome, the process of the criminal law cannot emerge with its image untarnished. There have been errors to which those who have conducted the case on both sides and the courts have contributed and it is now impossible to eliminate their effect by putting the clock back. Nevertheless, even if exercising a fresh discretion at the date of delivery of this judgment, their Lordships would conclude that the interests of justice in the broadest sense still require that there be a new trial to determine the guilt or innocence of the appellants of the very grave offence of which they stand charged.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed.