

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CRIMINAL SIDE
3

4 SCA #26/19
5 (Case #02723/11)
6

7 ARON JAMES BUSH
8

9 v.
10

11 REGINA
12
13



14 **Appearances:** Ms. Amelia Fosuhene of Brady Attorneys
15 for the Defendant/Appellant
16

17 Mrs. Candia James-Malcolm for the
18 Crown/Respondent
19

20 **Before:** Dame Linda Dobbs (Acting Judge)
21

22 **Hearing:** 17th December 2019
23
24

25
26 **HEADNOTE**

27 *Criminal Law – Possession of Cocaine with Intent to Supply – s.165 of the*
28 *Criminal Procedure Code (CPC) - Appeal by way of a review of the Summary*
29 *Court's decision, not a re-hearing .*
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33 **JUDGMENT**
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1 **Introduction**

2 1. The appellant faced trial in the summary court charged with 4 counts of possession
3 of cocaine with intent to supply. The allegation is that he supplied cocaine on four
4 occasions to an undercover police officer Rachel Johnson in March 2011 as part of
5 a test purchase operation named Operation Spackle. A summary of the Crown's case
6 can be found in the Crown's submission on bail pending appeal. I do not intend to
7 rehearse the contents.

8

9 2. The Appellant initially pleaded guilty. He was remanded in custody before being
10 granted bail. A successful application was made to vacate his plea, which was not
11 opposed by the Crown. The Appellant did not give evidence. He was convicted and
12 sentenced to 5 years' imprisonment on each count to run concurrently, less time
13 spent on remand and on curfew with an electronic monitor. His application for bail
14 pending appeal was refused.

15

16 **Grounds of appeal: Conviction**

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18 3. A number of grounds are advanced in this appeal. In summary they are as follows:

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20 i. No authority to conduct the operation: No authority was produced by
21 the Crown to show that the operation was conducted with proper
22 authority.

23

24 ii. No safeguards or guidelines: The lower court could not safely rely on
25 the evidence relating to the test purchase as there were no safeguards in
26 place that would, in this case, ensure that the letter of any known
27 guidance as to the conduct of the Test Purchase operation, would
28 be followed.





1 In the Cayman Islands there are no guidelines laid down as to procedure.
2 However, unlike in the other test purchase cases in Operation Spackle
3 where the transactions were filmed and calls and text messages were
4 downloaded, this was not done in the Appellant's case. Whilst, it was
5 accepted that an explanation was given for not filming the transaction,
6 it was contended that there could have been telephone evidence which
7 could have provided accurate evidence about the exchanges. Such
8 evidence was apparently lost or destroyed. There was nothing to
9 demonstrate the extent to which the police officer encouraged the
10 Appellant.

11 As a result, it is submitted that the Summary Court's decision not to stay
12 the proceedings on grounds of abuse was wrong.

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14
15 iii. Continuity: The third issue is one of continuity. There was no proper
16 procedure followed in relation to the storage of the drugs and no way of
17 knowing whether the drugs produced in court were the ones actually
18 supplied by the Appellant. There were no proper records. Continuity of
19 the drugs for analysis was also lacking.

20
21 iv. Proving the drugs supplied: A further submission is made that even if
22 the Appellant admitted to supplying drugs in interview that was not
23 enough for the prosecution to prove that he was supplying the drugs.
24 The prosecution should have proved the drugs supplied.

25
26 4. Overall it is submitted that the Appellant did not have a fair trial and that the Crown
27 had acted as *agent provocateur*. Consequently, the evidence should not have been
28 admitted or the case should have been stayed.



1 **Grounds of appeal: Sentence**

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3 5. It is submitted that the sentence of 5 years was manifestly excessive in light of the
4 small amounts of cocaine involved – namely 4 deals amounting to under 3 grams. It
5 is submitted that not enough consideration was given to the length of time which had
6 elapsed since the offences were committed and, taking into account time in custody
7 and time on the electronic monitor, a suspended sentence could have been passed.

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9 **The Magistrate's ruling and verdict**

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11 6. The Magistrate's ruling and verdict ran to 39 pages. The first matters dealt with were
12 rulings on abuse of process; exclusion of the evidence of PC Johnson and a no case
13 to answer submission. These were done in July 20018 and the final verdict following
14 the trial was delivered on 15th May 2019.

15
16 7. Magistrate Gunn set out in some detail the evidence of PC Johnson from paragraph
17 8 of the ruling onwards. She noted that for the purpose of the abuse argument and
18 the exclusion of PC Johnson's evidence, the defendant elected not to give evidence.

19
20 8. She addressed the legal test for abuse of process and directed herself as to the basis
21 for the exercise of the court's discretion. This can be found at Paragraph 53 et seq.
22 of the ruling.

23
24 9. Magistrate Gunn noted that there were no specific guidelines in the Cayman Islands
25 involving test purchases. She noted that, although the defendant contended that the
26 Cayman Islands was bound by the Home Office guidelines, no authority was
27 provided to make good the contention. (Paragraph 57 et seq.).

28

1 10. The Magistrate considered the principles to be applied in proactive policing
2 operations as set out in the case of *Loosely*¹. She pointed to the widespread problems
3 in the Cayman Islands of cocaine abuse as noted by the Chief Justice in 2002. She
4 found that there was no evidence to suggest that the police were acting in an arbitrary
5 way or in bad faith when they commenced Operation Spackle.

6
7 11. The Magistrate dealt with the evidence of the authorisation of the operation and the
8 guidance given to the participating police officers. She reviewed the authorities on
9 entrapment and found herself bound by the case of *Minzett v. R*².

10
11 12. The principles to be applied in cases of entrapment were set out and the Magistrate
12 concluded that the evidence did not support the submission that the defendant had
13 been entrapped. She noted that propositions put to a witness in cross-examination do
14 not become evidence unless adopted by the witness or a witness gives evidence to
15 support the proposition. The officer had denied every assertion put in cross-
16 examination.

17
18 13. The defendant chose not to give evidence on the *voir dire*, so the Magistrate was left
19 with the evidence of the police officer and the defendant's confession in interview
20 to supplying the officer with cocaine on three occasions. The Magistrate came to the
21 conclusion that there was no evidence remotely capable of constituting entrapment.
22 The application for a stay on grounds of entrapment was accordingly refused.

23
24 14. Magistrate Gunn considered another discrete issue which was abuse on grounds of
25 delay, namely, that the passage of time meant that the defendant's memory of matters
26 was so significantly hampered such that he was unable properly to defend himself.

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¹ [2001] 4 AER 897

² [2011](2) CILR 236



1 She was not persuaded that the defendant's memory was so diminished that he could
2 not have a fair trial. It was noted that the suggestions put to the police officer in
3 cross-examination were so specific and detailed that it was clear that the defendant
4 was capable of recalling the events.

5
6 15. Finally, the Magistrate dealt with the argument of abuse on other grounds such as
7 failure to record the face to face contact and telephone contact. (Paragraph 86 et
8 seq.) She reviewed the evidence and found that the failure to record messages left by
9 the defendant and by the police officer were unsatisfactory. She considered that the
10 failures were due to inefficiency rather than *mala fides* and thus not so grave that it
11 would offend the court's sense of justice to make it unfair to try the defendant.

12
13 16. The Magistrate also found the handling of the exhibits after they were sealed to be
14 inexcusable. However, she did not conclude that the prejudicial effect was so grave
15 that the defendant could not have a fair trial. The defendant had been able to cross-
16 examine the police officer at some length on the issue and it was noted that this was
17 only a limited part of the case. The trial process was such as to enable the defendant
18 to deal with the lack of exhibits. As to continuity of exhibits – the Magistrate
19 considered that this was more relevant to the weight to be given to the prosecution
20 evidence.

21
22 17. So far as the exclusion of the officer's evidence is concerned, the Magistrate noted
23 that she was bound to apply the law as confirmed in the case of *Minzett* and thus she
24 was not at that stage concerned with the way in which the evidence was obtained
25 (para 103 et seq.) Even taking into account the irregularities, Magistrate Gunn found
26 that the evidence of the officer did not act unfairly against the defendant for the same
27 reasons that she had concluded that they did not constitute an abuse of process.

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1 18. Turning to the submission of no case. In Paragraph 108 onwards the Magistrate set
2 out the relevant principles and, from Paragraph 114, the reasons why she found that
3 the prosecution had established a *prima facie* case. She concluded that the
4 prosecution evidence taken at its highest was such that she could safely convict.

5
6 19. As to the verdict, Magistrate Gunn noted that the defendant did not give evidence.
7 She reviewed the evidence and reminded herself as to the directions of law including
8 adverse inferences in respect of the defendant's failure to give evidence. She found
9 the defendant guilty on all four counts.

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11 **The test on appeal**

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13 20. Section 165 of the *Criminal Procedure Code* (CPC) 2019 Revision governs appeals
14 from decisions of the Summary Court. The appeal may be on a matter of law or fact
15 (or both) or by way of case stated on a point of law only. This appeal is on the first
16 basis. Counsel are agreed that the appeal is by way of review of the Summary Court's
17 decision, and not a rehearing.

18
19 **Appeal against conviction**

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21 21. The first thing to note is that the grounds of appeal were in effect a repetition of the
22 submissions made before the Magistrate. There was no analysis in relation to all the
23 decisions made by the Magistrate as to why she erred in making a finding of fact or
24 erred in her exposition of the law and principles. There was no analysis of her
25 reasoning, demonstrating where and why it was faulty. For example, where the
26 Magistrate upheld the defendant's submissions that the evidence collecting and other
27 aspects were lamentable, but nevertheless found that the failings were not such as to



1 render the trial unfair, there is no analysis as to why she was wrong to reach that
2 conclusion.

3
4 22. The Appellant did not give evidence. There was no challenge to the admissibility of
5 the Appellant's confession. The Magistrate could have convicted on the confession
6 alone. There was no evidence to contradict the evidence of the police officer and
7 thus no basis for the Magistrate to make findings of entrapment or any other adverse
8 finding. The confession of the Defendant was support for the officer's evidence that
9 he had supplied her cocaine. The other failings, whilst unfortunate, did not leave the
10 Prosecution case so denuded that there was insufficient evidence to convict.

11
12 23. In my judgment Magistrate Gunn dealt with all matters in a comprehensive manner,
13 addressing the submissions, reminding herself of the law and applying the law to the
14 facts, giving cogent reasons for her findings. As already noted, she did find some
15 unsatisfactory aspects of the case as submitted by the defendant, but she gave clear
16 reasons why those failings were not fatal to the prosecution's case. Her findings were
17 ones which were properly open to her on the evidence.

18
19 24. The grounds of appeal are in effect a disagreement with the findings and verdict of
20 the Magistrate and no more. They disclose no error of law or material error of fact.
21 This appeal against conviction is hereby dismissed.

22
23 **Appeal against sentence**

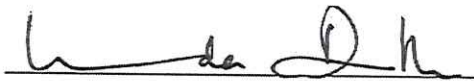
24 25. When sentencing the Magistrate considered the *Statement on Tariffs and*
25 *Guidelines for Sentencing for Certain Offences dated 16th January 2002* where the
26 tariff for a first offence of supplying a hard drug involving less than 2 ounces of
27 cocaine or less than 4 grams of cocaine base, absent mitigation, was 8 years'
28 imprisonment. She considered a number of local cases drawn to her attention and in



1 particular the case of *Smith v. R*³. She took a starting point of 8 years, increased the
2 sentence to 9 years because of the multiple deals, and also because the Appellant was
3 on Probation at the time of the offences and in breach of a suspended sentence in
4 relation to both possession of drugs and possession with intent to supply. She gave
5 credit for the extreme delay in the case coming to court and took note of the fact that
6 there was a significant gap in offending and that the recent offence was of a different
7 nature (Possession of a spear gun without a licence). She also noted that there had
8 been significant changes in the defendant's attitude. She made a four-year reduction
9 and also gave 50% credit for time spent on an electronically monitored curfew and
10 allowed for the deduction of time spent in custody. She took no action on the breach
11 of probation and the suspended sentences so as not to double count. With deductions,
12 the sentence would be 2 years' 9 months'. It is to be noted that this would not have
13 allowed for a suspended sentence to be passed being over 2 years' in length.
14

15 26. There can be no proper complaint about the sentence. The Magistrate went through
16 the process impeccably and reached a sentence which cannot be criticised for being
17 manifestly excessive. This appeal against sentence is also dismissed.
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20 **Dated this the 31st December 2019**

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24 **Dame Linda Dobbs**
25 **Acting Judge of the Grand Court**

³ [2012 (1) CILR Note 2].