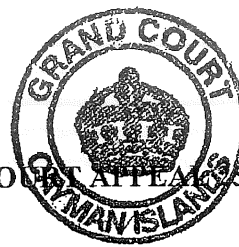


1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2
3 SUMMARY COURT APPEALS 5/08



4
5 BETWEEN: GARVIN BUSH

Appellant

6
7 AND: REGINA

Respondent

8
9
10
11
12 Coram: The Hon. Mr. Justice Cooke

13
14 Appearances: Mr. John Furniss for the Appellant
15 Ms. Kirsty-Ann Gunn for the Crown

16
17 Heard: 16th April 2010
18
19
20

21 **JUDGMENT**

22
23
24 1. The appellant was convicted on two counts which each charged him with
25 possession of cocaine with intent to supply. The charges arose from searches
26 which were carried out at the house of the appellant at 483 Further Lane, North
27 Side, Grand Cayman. The first search was on the 13th May 2005. This resulted
28 in the appellant's arrest. He was bailed. Then on the 27th May 2005 another
29 search was effected. These searches provided the evidence on which the learned
30 Chief Magistrate founded her verdicts of guilt. At the trial which effectively
31 commenced on the 31st October 2007 there was no issue as to the appellant's
32 possession of cocaine. The contest was as to whether or not the tribunal could
33 properly infer from the totality of the evidentiary material which it accepted, that
34 on each count it was satisfied to the requisite standard that the possession was
35 not for the appellant's personal use but that he had an intention "to supply". The

1 searches revealed paraphernalia consistent with the activity of "supplying". It is
2 unnecessary to itemize the recovered items as there is no challenge as to the
3 correctness of the verdicts of guilt and any such criticism would be doomed to
4 failure. He was sentenced to twelve years imprisonment ⁱⁿ of each count. The
5 sentences were concurrent.

6
7 2. At his trial the appellant was unrepresented. The first complaint is that the trial
8 was unfair in that he was deprived of legal representation. This submission, as I
9 understand it was on two limbs. Firstly, the Learned Chief Magistrate acted in
10 excess of her jurisdiction as regards "revoking" the appellant's legal aid
11 certificate as she did so in contravention of paragraph 10 of The Legal Aid Rules
12 1997 ("the Rules"). Secondly in the alternative, the circumstances were not
13 such that the appellant should not have had the continued benefit of legal aid.

14
15 3. In this respect of what I have termed the first limb it is necessary to set out
16 paragraph 10 of the Rules insofar as it is relevant.

17
18 "10. (1)
19
20 (2) *An assisted person may apply to vary his certificate for the*
21 *purpose of-*
22
23 (a) *enabling him to change his attorney; or*
24 (b) *in the event that he is jointly represented with a co-*
25 *defendant, enabling him to be separately represented;*
26
27 (3) *The Court may, of its own motion, revoke or vary a certificate if it*
28 *is satisfied that-*
29
30 (a) *The assisted person's application materially*
31 *misrepresented his financial means; or*

1 (b) The assisted person's financial means have materially
2 improved since the grant of his certificate".
3

4 4. Next I will reproduce the Learned Chief Magistrate's comments which
5 demonstrates her reasoning for "revoking" the grant of legal aid.

6
7 *"The defendant was unrepresented at trial having dismissed his attorney, Mr.*
8 *Ben Tonner. Asked by the Court on the 30th why he had dismissed Counsel, the*
9 *defendant responded, "If you give the lawyer a paper of instructions to carry it*
10 *forward he refuse, what you going do?"*

11
12 *The defendant confirmed before the trial commenced that he had received the*
13 *papers from Ben Tonner in the cells. The Court advised him that the trial would*
14 *be going ahead. The Defendant protested the Court's decision on the ground*
15 *that he was unrepresented. The Court reminded him that he'd had three lawyers*
16 *at the state's expense, including Howard Hamilton QC and had dismissed them*
17 *all. In order to avoid further unnecessary delay of the trial, the Court ruled that*
18 *the matter should go ahead and refused the application to adjourn for*
19 *representation. The Court formally revoked the grant of legal aid before*
20 *commencing the trial".*

21
22
23 5. The appellant has latched on to the last sentence of the passage above to urge
24 that the tribunal was in error as the considerations attendant to revocation as
25 stated in paragraph10 (3) of the Rules were absent. It is a fact that the word
26 "revoked" was used. However, rather than putting unwarranted emphasis on the
27 use of one word in the passage it would be more useful to appreciate the
28 substance of the comments within the context of what was there and then taking
29 place in the proceedings in court. The issue that faced the Learned Chief
30 Magistrate was whether or not the appellant's request for varying his certificate
31 to enable him to change his attorney should be granted. The appellant was in
32 fact making an application within paragraph10 (2) (a) of the Rules (supra). So
33 although the use of the word "revoked" may have been inelegant, the Learned

1 Chief Magistrate dealt with the issue before her - as regards which - she had
2 undoubted jurisdiction. She exercised her discretion not to vary the appellant's
3 certificate. This limb of the submission fails.
4

5 6. I now turn to the question of whether or not the appellant was wrongly deprived
6 of legal representation. I will begin by stating the following:

- 7
8 (a) Between 10th June 2005 to 20th July 2005 the appellant was represented
9 by Mr. James Austin-Smith.
10
11 (b) Between 3rd August 2005 to 6th September 2005 the appellant was
12 represented by Mr. Keith Collins who instructed Mr. Howard Hamilton
13 QC.
14
15 (c) Mr. Ben Tonner thereafter represented the appellant until the 4th October
16 2007.
17
18

19 7. The appellant dispensed with his attorneys. His stated reason for so doing was
20 that the lawyers would not follow his instructions. On the 1st November 2007 on
21 the continuation of the hearing but before any further evidence was taken
22 McGhee addressed the court as follows:

23 *"Mr. Bush has approached me to represent him in this matter. I understand his*
24 *trial began yesterday. I have a fair idea of the evidence that has already been*
25 *heard and the issues involved. I have indicated to him that for professional*
26 *reasons I would have a great difficulty coming on the record. If I were to come*
27 *on record, I would be petitioning the Court to vacate the trial and start anew.*

28
29 *I am seeking an adjournment on his behalf to assist Mr. Bush in identifying*
30 *Counsel to assist him".*
31

32 The court's response is now set out:

33
34 *"An application to vacate trial would not be entertained. The Court would be*
35 *prepared to recall witnesses for cross-examination but the trial will continue.*
36 *The defendant is free to seek legal representation but will not be granted legal*

1 aid as he has already had three lawyers assigned to him who he has dismissed.
2 Adjournment granted on application of the defendant".

3
4 The adjournment granted was for some three weeks. On the 22nd November

5 2007 Mr. Dixey addressed the court in the following terms:

6 *"I have been approached to act on Mr. Bush's behalf. I have had discussions*
7 *with Mr. Bush this morning in respect to my representing him. Mr. Bush feels*
8 *my contact with the case is too brief to allow me to properly represent him. I*
9 *don't agree: the issues are not complex and I am fully able to assume conduct of*
10 *the matter given the time I have spent reviewing it but he has no confidence,*
11 *despite my reassurances, in my ability to represent him. I am willing to remain*
12 *amicus. My difficulty is that I am on a private retainer and could not be amicus*
13 *on retainer. I could only remain if the court were to grant me legal aid for that*
14 *purpose".*

15
16 The record reveals that a court declines to grant legal aid in the circumstances.
17 Counsel granted leave to withdraw.

18
19 It is interesting to note the interventions of the appellant at this juncture. He

20 said:

21 *"Archibold states that the defence should be given ample time to prepare his*
22 *case. Mr. Dixey hasn't seen the document I have. He just saw papers*
23 *yesterday".*

24
25 Again the appellant said:

26
27 *"I am putting it on record that I need a lawyer to represent me but no lawyer is*
28 *taking instructions from me".*

29
30 I will subsequently be commenting on these interventions. At that stage this
31 matter had been before the court since 7th June 2005. There had been a multitude
32 of mention dates leading to the 19th September 2007 when there as an application
33 for the Learned Chief Magistrate to recuse herself from presiding over the trial.
34 On the 4th October 2009 this application (which if I may say so was on entirely
35 spurious grounds) was denied. Mr. Tonner's services were then terminated.

36

1 The appellant filed an affidavit dated 14th January 2010 in support of his appeal.

2 This is now reproduced *inextenso*.

3 *"1 A number of attorneys appeared on my behalf during the period of time*
4 *prior to the trial in the Summary Court. I ceased to be represented by them for*
5 *the following reasons:-*

6
7 *James Austin-Smith – Mr. Austin Smith would not agree to put my points and*
8 *questions to the witnesses. I therefore asked for a new lawyer.*

9
10 *Howard Hamilton QC and Keith Collins – Mr. Hamilton arrived on the morning*
11 *of the hearing and told me to plead guilty. I would not do that and so Mr.*
12 *Hamilton said he could not continue to represent me and would withdraw for the*
13 *case. Mr. Collins also withdrew at the same time as Mr. Hamilton.*

14
15 *Mr. Ben Tonner – After Mrs. Ramsey Hale denied me bail and refused to*
16 *withdraw from the case I felt that she was not listening to Mr. Tonner and as a*
17 *result asked for a new lawyer who I hoped the Senior Magistrate would listen to*
18 *and grant me bail and a new tribunal.*

19
20 *Mr. Philip McGhee – Mr. McGhee indicated to the magistrate that he would*
21 *require the two crown witnesses who had given evidence to date to start afresh*
22 *as one of the important aspects of the case was credibility. The magistrate*
23 *refused this request and MR McGhee did not appear on my behalf.*

24
25 *Mr. Dixie- although Mr. Dixie stated that he was ready to handle the case I did*
26 *not feel confident that he had been given enough time to really understand my*
27 *case. I was not therefore prepared to allow him to act on my behalf.*

28
29 *2 I do not therefore consider that I acted in any way improperly as far as*
30 *representation was concerned, I simply wanted to plead not guilty, to put my*
31 *points across and if the trial was not able to proceed to be granted bail".*
32

33 8. In my perusal of this affidavit the most striking aspect is the absence of the
34 appellant's "instructions" which counsel had refused to follow. It is therefore
35 impossible to assess the significance of this assertion. Therefore the appellant's
36 protestation in this regard must be characterized as a hollow ploy calculated to
37 prolong the process leading to a verdict. This was a case, which in my view was
38 devoid of any complexity. There was no issue as to whether the items found in

1 the appellant's home were so found. It was clear to all, not least to the appellant,
2 that as counsel for the crown in her opening said:

3 *"The only issue is whether he was in possession with intent to supply".*
4

5 9. During the investigation that preceded the trial the consistent stance of the
6 appellant was that the recovered cocaine was for his personal consumption as he
7 was a "hard user". It is difficult to perceive (the most unusual ingenuity
8 excepted), what "instructions" the appellant could have given. Perhaps more
9 light could have been shed on this – if there were affidavits from the various
10 counsel who had refused to follow the appellant's instructions. The Learned
11 Chief Magistrate cannot be faulted in terminating the legal aid assignment. The
12 appellant had had three lawyers among whom was a Queen's Counsel. The case
13 had first come before the court some twenty eight months previously. There is
14 the consideration of the state's expense. The appellant did not advance any basis
15 for yet another change of attorney which merited consideration.

16
17 10. Before departing from this aspect of the discussion I will cite, with approval two
18 passages from different judgments. The first is from a judgment of the English
19 Court of Appeal in *R v Kirk (Maurice)* (1983) 76 Cr App. R 194 at pages 198 –
20 199. This passage is relevant to the exercise of the discretion of a presiding
21 judge when faced with an application under 10 (2) of the Rules (enabling change
22 of attorney). The passage states:

23 *"The power is clearly discretionary and it is right that it should be, because*
24 *experience of the operation of the Legal Aid Act has shown that many accused in*
25 *criminal cases, when they get advice from the lawyers who are assigned to them*

1 **199 under the Legal Aid Act 1974 which is unpalatable-particularly when they*
2 *get advice that they have no defence to a charge-want to shop around until they*
3 *can find some gullible or inexperienced lawyer, who is willing to put up a*
4 *defence which is hopeless and which may occupy a court for days at*
5 *considerable expense to the public. It follows therefore that when somebody*
6 *does want to get rid of his legal aid representation the court is under no*
7 *obligation whatsoever to assign new legal aid representation. Judges should be*
8 *very careful about assigning new presentation if there is any reason to think that*
9 *the object is to shop around until such time as someone can be found who will be*
10 *willing to conduct a hopeless defence”.*
11

12 The other passage is also from the English Court of Appeal and it is from the
13 judgment in *R v Ulcay*; *R v Toygun* [2008] 1 All ER 547. Paragraph twenty
14 seven reads:

15 *“The correct meaning of the phrase ‘acting on instructions’, as it applies to the*
16 *professional responsibility of eh advocate in any criminal court, is sometimes*
17 *misunderstood, even by counsel. Neither the client, nor if the advocate is a*
18 *barrister, his instructing solicitor, is entitled to direct counsel how the case*
19 *should be conducted. The advocate is not a tinkling echo, or mouthpiece,*
20 *spouting whatever his client ‘instructs’ him to say. In the forensic process the*
21 *client’s ‘instructions’ encompass whatever the client facing a criminal charge*
22 *asserts to be the truth about the facts which bring him or her before the court.*
23 *Those instructions represent the client’s case, and that is the case which the*
24 *advocate should advance. In practical terms, that will often mean that*
25 *prosecution witnesses will be cross-examined on the basis that they are lying or*
26 *mistaken, or have misunderstand or misinterpreted something said or done by*
27 *the defendant; however there is almost always some evidence advanced by the*
28 *prosecution which, on the basis of the client’s instruction, is not in truth in issue*
29 *at all, either directly, or indirectly. Some decisions, of course, must be made not*
30 *by the advocate, but by the defendant personally, for example, and pre-*
31 *eminently, the plea itself, and in the course of the trial, the decision whether or*
32 *not to give evidence. The advocate must give his best professional advice,*
33 *leaving the ultimate decision to the client. It is however always improper for the*
34 *advocate to seek to challenge evidence which is accepted to be true on the basis*
35 *of the facts agreed or described by the client, merely because the lay client, or*
36 *the professional client, wishes him to do so. He may not accept nor act on such*
37 *instructions”.*
38

1 When reviewed in the context of the guidance given in these two excerpts I
2 cannot say that the contents of the affidavit filed by the appellant advances his
3 cause. For the reasons given above the second limb of the submission fails.
4

5 11. The second complaint is that the Learned Chief Magistrate did not sufficiently –
6 if at all, - assist the appellant in his unrepresented state during the trial thereby
7 rendering the hearing unfair. There is a plethora of judicial pronouncements
8 pertaining to the role of a trial judge who presides over a case where the accused
9 is unrepresented. Essentially such judge should ensure that the unrepresented
10 accused is made aware of the issues that are relevant to the trial. He/she would
11 exercise great diligence in the propriety of the conduct of the prosecution
12 especially on questions of admissibility of evidence. However the trial judge is
13 not an advocate on behalf of the unrepresented accused. Nonetheless he is
14 obliged to assist the unrepresented accused in formulating questions and putting
15 his case to the court. The unrepresented accused should at no time be put to
16 disadvantage because of his lack of expertise in forensic skill. Obviously, the
17 role of the trial judge will vary from case to case. In this case there, as already
18 indicated, was only one issue. The appellant cannot say he was aggrieved
19 because he was denied the opportunity to cross-examine witnesses nor to make a
20 closing address. When he did cross-examine only one witness his performance
21 belied his posture of being a forlorn and helpless layman. I speak to the cross-
22 examination of the police officer, Detective Sgt. McLaughlin. The latter had
23 given evidence pertaining to incriminating phone calls which had come to the

1 home of the appellant during one of the searches. This officer was also
2 concerned with the recovery of a miniature scale from the appellant's home. The
3 record recalls the cross-examination as follows:

4 Cross-examination: Defendant in person

5 *"I didn't get any records from Cable and Wireless to support my testimony that*
6 *calls were received by that phone. I didn't verify that phone was his or what the*
7 *number was because the defendant told us it was his.*

8
9 *I didn't take the phone into the evidence.*

10 *Suggestion: It was exhibited in my presence.*

11
12 *Answer: Not by me*

13
14 *Suggestion: You were there and present when it was sealed.*

15
16 *Answer: They were a lot of exhibits being sealed.*

17
18 *I don't recall the phone being exhibited. If memory serves me I made the phone*
19 *available to the defendant. I ensured he had his phone. Told the officers to give*
20 *his phone back when he was released on bail for a specific reason. The custody*
21 *record will show.*

22
23 *Suggestion: I got it back six months later, into an exhibit bag at Northward.*

24
25 *Answer: I can't speak to that.*

26
27 *Question: The scales: you said the scale had a white residue on white*
28 *residue on it. Are you aware that the analyst found nothing?*

29
30 *Answer: No.*

31
32 *Certificate shown to officer.*

33
34 *Suggestion: It say "no cocaine found". You were lying about there being any*
35 *white residue.*

36 *Answer: Even now one can see white residue on the scale".*

37
38 When this cross-examination is added to the nature of his interventions to which

39 I have previously adverted, it does suggest that the appellant was not an

1 unsophisticated stranger to court proceedings. His cross-examination was
2 incisive as regards the charge of intention to supply.
3

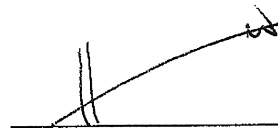
4 12. Police officer Borden gave evidence that during one of the searches the appellant
5 stated that he sold drugs to support his family. At that stage the court
6 immediately asked the appellant if he wished to object at which stage the
7 response was "I have nothing to say during this trial I am layman". The
8 appellant now criticizes the Learned Chief Magistrate for not sufficiently
9 indicating the significance of that particular piece of evidence. I do not agree.
10 The witness when he gave that evidence was immediately stopped in his tracks
11 and the appellant then and there could not have been more alerted of that
12 potentially damning bit of evidence. To have done more would have
13 transformed the judge into an advocate.
14

15 13. There was evidence that a not inconsiderable amount of money in small
16 denominations was recovered to which the appellant claimed was "rent money".
17 The judge is criticized for not advising the appellant that it was necessary to call
18 supporting evidence to substantiate that the notes did constitute "rent money".
19 This criticism can be disposed of peremptorily. If the judge had so done she
20 would have been in error as by so doing she would have been implying that there
21 was a burden on him. Moreover that would be the type of advice expected from
22 an advocate - not from a presiding judge.

1 14. Those were the two instances put before this court of where the judge did not
2 properly supervise the proceedings. The submission fails. Accordingly it is only
3 left for me to say that the appeal is dismissed.

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Dated 28th April 2010


Hon. Justice Cooke
Judge of the Grand Court (Actg)

