

95/2001

OPEN COURT

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
SCA. 15/02

14-06-02

716

KURTNEY SOMOSA JOHNSON

-V-

REGINA

For the Appellant: Mr. Douglas Schofield

For the Crown: Mr. A. Roberts

Heard April 12th, 2002

Before Sanderson, J.

REASONS FOR JUDGMENT

On March 13th and 14th 2001 the defendant was tried and then convicted in

Summary Court of:-

1. Possession with intent to supply cocaine, contrary to Section 4 (1) (m) of the Misuse of Drugs Law, Law 13 of 1973 (1995 Revision);
2. Possession of cocaine, contrary to Section 4 (1) (k) of the Misuse of Drugs Law, Law 13 of 1973 (1995 Revision); and
3. Refusing to provide a urine sample, contrary to Section 4 (2) of the Misuse of Drugs Law, Law 13 of 1973 (1995 Revision).

The learned Magistrate sentenced the defendant to –

- (1) 7 years under Count 1;



- (2) ruled that Count 2 was subsumed in Count 1 and;
- (3) 10 days under Count 3 which was to be concurrent with Count 1.

The typed record of the Magistrate's notes appear to be dated March 13th, 2001. That record contains the evidence and a brief summary of the arguments for the Crown and the defendant. The record concludes by saying:

“Verdict: Guilty”.

The Committal Warrant is dated March 21st, 2001 and the file reveals that a Notice of Appeal was filed on March 28th, 2001.

In her Reasons for Judgment dated June 12th, 2001 the learned Magistrate indicated that the trial had lasted 2 days and then set out the reasons for her decision.

The defendant appealed his conviction on the basis that the learned Magistrate had failed to comply with Sections 53 and 54 of the Criminal Procedure Code, Law 13 of 1975 (1995 Revision) by failing to deliver, date and sign her Judgment in open court. Those sections provide:

53 (1) "Except in a case in which the personal attendance of the accused person has been dispensed with under any law or by leave of the Court, the judgment of any court in the exercise of its original jurisdiction in any criminal trial shall be pronounced, or the substance of such judgment explained, in open court either immediately, after the termination of the trial or at some subsequent time of which notice shall be given to the parties and their legal representative, if any:

Provided that the whole judgment shall be read out by the Court if so requested by the prosecution or the defence.

(2) In any case in which judgment is required by subsequent subsection (1) to be read, or the substance thereof explained, in open court the accused person shall be required to be present to hear the same.

54 (1) Every judgment in a summary trial, except as otherwise expressly provided by this Code or any other law, shall be written by the magistrate and shall be dated and signed by such magistrate in open court at the time of pronouncing it.

(2) In the case of a conviction the judgment shall specify the offence of which, and the section of the law under which the accused person is convicted, and the punishment to which he is sentenced or other lawful order of the court upon such conviction.

(3) In the case of an acquittal the judgment shall state the offence of which the accused person is acquitted, and the section of the law under which the charge was preferred, and shall direct that he be set at liberty in respect of any charge."

The defendant is correct in his submission that the learned Magistrate has not properly complied with the provisions of the Criminal Procedure Code (supra), that I have referred to above. However, Mr. Schofield pointed out in argument the provisions of the Section 179 of the Criminal Procedure Code which states:

179. "The Court may adjourn the hearing of the appeal, and may, upon the hearing thereof confirm, vary or modify the decision of the Summary Court, including the passing of some other sentence (whether more or less severe) or remit the matter to the Summary Court for retrial, or may make such other order in the matter as it may think just, and may, by such order, exercise any power which the Summary Court might have exercised, and such order shall have the same effect and may be enforced in the same manner as if it had been made by the Summary Court:

Provided that the Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if the Court considers that no substantial miscarriage of justice has actually occurred."

He also referred to the decision of this Court in *R v. Smith and Ebanks* [1988-89] CILR at page 162, where it was held that, where there is ample evidence on which a court could have been satisfied of the guilt of a defendant, the failure to comply Sections 53 and 54 would not necessarily be fatal. Mr. Schofield agreed that the record in the present case was sufficient

to meet that requirement and accordingly he did not pursue that ground of appeal.

The appeal against conviction is therefore dismissed.

However, this appeal must serve as a reminder to this Court and the Magistrates, the importance of the requirements and observance of Sections 53 and 54 of the Criminal Procedure Code. Failure to comply with these Sections may result in appeals being allowed and will certainly invite Appellate Courts to review the Trial Court's record to ensure that there is ample evidence to support any conviction.

With respect to the appeal against the 7 years sentence for the possession of cocaine with intent to supply, Mr. Schofield submitted that the amount of cocaine involved was $\frac{1}{4}$ of an ounce, that the tariff at the time was 5 years after a guilty plea and that the defendant did not argue that he was in possession of drugs, rather he argued that he did not know it was cocaine.

The learned Magistrate imposed the sentence on the basis of a guilty plea but gave 7 years on the basis that:

“This defendant has a substantial criminal record and the court was of the opinion that he should receive a substantial custodial term of this offence of dealing in light of that record, the amount of cocaine involved and the fact that he was on bail for other matters.”

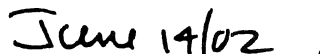
The difficulty that I face is that there was no material on file or record which disclose what that criminal record was. It simply was not in the file.

Given that it seemed to form an important factor in her decision, this Court cannot determine if her sentence was legally sustainable, without knowing that record. Accordingly, the appeal against sentence is allowed and the matter remitted back to the Magistrate pursuant to Section 179 of the Criminal Procedure Code, for re-sentencing based upon the proper criminal record which should be referred to and contained in the file.

I add parenthetically that this Court and the Court of Appeal recently upheld a sentence of 7 years for possession of cocaine with intent to supply *in R V. Shawn Bares, Summary Court Appeal 5/01*, where that defendant had 36 prior convictions and he plead guilty to possession of 2 ounces of cocaine with intent to supply.



D. Sanderson
Judge of the Grand Court


~~4th May 2002~~