

1994

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
SCA# 23 & 24/94

GEORGE ALBERT NICOLETTA

and

CHRISTOPHER ANTHONY MOXAM

v REGINA

JUDGMENT

Mr. Howard Hamilton Q.C. with Mr. Graham Hampson
for Nicoletta
Mr. Delroy Murray for Moxam
Mr. Samuel Bulgin for the Crown

The record of the proceedings before the learned Magistrate is
dauntingly voluminous yet the facts of the case may be simply stated.

On the morning of the 5th June 1993 three police officers, Detective
Sergeant MacArthur Bodden and Detective Constables Gregory Thompson
and Delroy Davis, kept observation at the house of Marvin Johnson at
Half Moon Bay, East End. At about 10:35 a.m. a motor car driven by
the appellant Christopher Moxam immediately followed by a motor car
driven by the appellant George Nicoletta drove up to Johnson's house.
They were almost immediately followed by a motor car driven by Raymond
Connolly who was delivering some meat to Johnson. He did so and left
the premises without further ado. There is no suggestion that



Connolly had anything to do with any illegal activity. A few minutes later Moxam and Nicoletta drove away. At about 10:55 a.m. a motor car driven by one Joseph Alberga Green drove up to Johnson's house. There was a passenger in the car. Green got out of the car spoke to Johnson and then left.

At about 12:40 p.m. the three police officers determined to search Johnson's premises which they did in Johnson's presence. Inside the utility room they found a large burgundy coloured suitcase the padlock of which was forced by Detective Sergeant Bodden.

Inside was found several neatly wrapped packages which were found to contain, on analysis, 54 lbs of ganja. Johnson was charged with , and was convicted on his own plea of guilty of, possession with intent to supply that ganja. He was sentenced to serve two years imprisonment, six months of which term was suspended. He was further fined \$2000.

That sentence was upheld on appeal to this Court.

The hearing of this case came after the hearing of Johnson's appeal. He testified before the learned Magistrate. He said that a few days before the 5th June 1993 Nicoletta told him that he, Nicoletta, would be getting his driving licence back on the Friday so he would call at his house and bring a suitcase. Nicoletta did not turn up on the Friday but on the Saturday morning he heard cars enter his yard and when he went outside he saw the cars of Moxam, Nicoletta and Raymond Connolly. He took the beef that Connolly had brought and Connolly went off. Johnson then went to Nicoletta and Moxam and Nicoletta asked Moxam whether his trunk was open and Moxam replied:



"yes my trunk is always open". Moxam then opened the trunk and Johnson lifted the suitcase out of it and put it in his utility room. The suitcase, the one the police later seized, was padlocked. Nicoletta and Moxam entered Johnson's house and Johnson gave Moxam some water. Nicoletta told Johnson to hide the suitcase "pretty good". During cross-examination Johnson said that while they were in the house Nicoletta opened the suitcase with a key and closed it up again. Johnson said he saw the packages inside it and testified that he had an idea that the suitcase contained ganja.

Johnson testified that Joseph Green called at the house later that morning asking for Nicoletta and saying he had an appointment to see Nicoletta. Johnson told Green that Nicoletta and Moxam had brought the suitcase to his house and Green said he could not take the suitcase because a police officer was living in the same yard as himself. Green went off saying he would look for Nicoletta. I should mention here that Green was charged together with Nicoletta and Moxam but the charges against him were dismissed at the end of the prosecution case.

Johnson also testified that on two occasion, very shortly before his appearance in Court, Nicoletta offered him \$10,000 for him to say that Nicoletta knew nothing about the suitcase.

In the same afternoon Nicoletta and Moxam were arrested and taken to Central Police Station. Moxam was interviewed that day by Detective Constable Davis in the presence of Superintendent Cutts. He said in that interview that he had earlier been approached by Nicoletta and Johnson to assist in securing a suitcase containing a small quantity



of vegetable matter. He collected the suitcase from a road close to Johnson's house and left it in some brush in South Sound Road. Johnson later sent a message that he would kill him if he did not return the suitcase so he returned it on the morning of the 5th June. When Moxam reached Johnson's residence he saw there Johnson, Nicoletta, Connolly and another man who was with Connolly. Moxam said in that statement that he thought Nicoletta and Johnson were "knitted together" in the enterprise.

Two days later Moxam elected to give a statement to Detective Constable Thompson. He said that on the 5th June Nicoletta called him and when he went to Nicoletta's house Nicoletta said he needed him to take a suitcase to Johnson's house. Nicoletta took the suitcase from a shed and put it in the trunk of Moxam's car. Moxam drove to Johnson's house and Nicoletta followed. Johnson took the suitcase out of the trunk and he asked Johnson for a glass of water. Johnson opened the suitcase in everyone's presence and he, Moxam, saw several packets. He had an idea what they were but he was not sure. He then quickly left the scene. Moxam said the reason why he did not tell the truth in the beginning was that he feared for his safety and his life.

On the 6th June 1993 Superintendent Cutts saw Nicoletta and cautioned him. Nicoletta said he needed to do a deal with the Superintendent and that he would give evidence for him. He said he looked after the suitcase for Johnson but he got nervous about it and asked Moxam to take it back to Johnson. After that a formal interview of Nicoletta was conducted and recorded. In that interview Nicoletta



said that a little over a week before, Johnson brought the suitcase to his house and asked if he could leave it there for a couple of days. At no time did he open the suitcase or tell Nicoletta what it contained. Nicoletta told him to leave it in a shed at the back of the house. On the Tuesday or Wednesday night, prior to the Saturday arrest, he went to Johnson's house with his girlfriend to ask Johnson when he was taking the suitcase back.

Nicoletta said he was suspicious about the suitcase. Johnson said he would come for it on that Sunday but because of his suspicions and because he wanted to get rid of it from the shed he asked Moxam to take it to Johnson on the Saturday.

Nicoletta said he followed Moxam because he was curious about what was in the bag. When he (presumably Johnson) opened the suitcase he saw something that looked like stuffing and that is when he left. He said he did not know what was in the suitcase but he "figured it was something bad".

Nicoletta testified. His evidence substantially corresponded to what he said in the interview with Superintendent Cutts. He testified that he did not actually enter Johnson's house but he saw Johnson open the suitcase from the doorway. When they were together at Northward Prison after their arrest Johnson said it was a good thing the police officers did not look for the suitcase keys because they were on his key chain. Nicoletta denied offering \$10,000 to Johnson.

Nicoletta also called his then girlfriend Kim Watler. She supported Nicoletta's evidence about the visit to Johnson's house



midweek. She also testified that one evening prior to his arrest she was with Nicoletta and they saw, and spoke to, Johnson who was seated behind the driving wheel of a motor vehicle. That evidence was led in the context of evidence which was before the Court to suggest that Johnson does not drive a motor vehicle.

Moxam elected not to give evidence and called no witness.

Counsel for both appellants attacked the learned Magistrate's reliance on the testimony of Johnson. He was an accomplice who received a light sentence and may be suspected of testifying to serve his own interests. Furthermore there were discrepancies between his evidence in this trial and his statement to police and his evidence in an earlier trial, this being a retrial. It was argued that, corroboration of his evidence being required, such corroboration must go to the two main ingredients of the charge challenged at the trial i.e knowledge of the nature of the substance in the suitcase and possession or control of it.

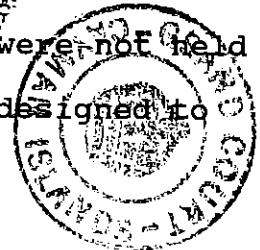
The learned Magistrate warned himself of the dangers of acting upon Johnson's evidence and he was clearly circumspect about it. The dangers inherent in acting upon the evidence of an accomplice are such that the Court must warn itself that it is dangerous to convict upon his evidence unless it is corroborated. In the case of both Nicoletta and Moxam there is such corroboration as to prompt learned Crown Counsel to suggest, and the suggestion is not without merit, that there is sufficient on record to warrant their convictions without Johnson's evidence being taken into account.



From Nicoletta's own mouth we have evidence that he kept the suitcase in his shed for several days and then secured the services of Moxam to transport it to Johnson's house. When it was in his shed did he not have control of it? Let us apply a simple test. During the time it was in his shed could he not have taken it to the police station or got rid of it in some other way?

From Nicoletta's own mouth he admitted he thought something bad was in the suitcase. He said, according to Superintendent Cutts, that he was "nervous" about it. At another stage he said he was "suspicious" about its contents and at yet another that he was "curious" about its contents. Yet he says at no stage did he ask Johnson, his friend, what its contents were. He said he was so concerned about getting rid of the suitcase that he could not wait until the Sunday for Johnson to collect it. Yet he followed Moxam in his car out of curiosity. From all that evidence the Court was entitled to infer that he had knowledge of the contents of the suitcase even if Johnson's evidence is disbelieved.

Moxam accepted that he transported the suitcase to Johnson's house. He admitted in his initial interview by the police that he knew the suitcase contained herbal matter. I am urged by counsel to find that such statement being retracted and the true version of the incident being later related to the police, and accepted as true, that the Court should ignore Moxam's admission of knowledge of the contents of the suitcase in the first interview. One asks oneself the simple question - why would Moxam admit such knowledge if it were not held by him? Clearly the statements made on interview were designed to



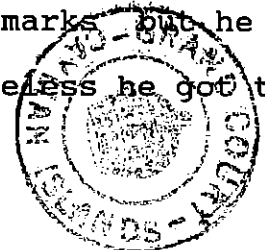
distance Moxam from any organizational role and were, in that context, partly inculpatory and partly exculpatory. Counsel showed some ingenuity in arguing that Moxam, according to his second statement to the police, only saw the contents of the suitcase after he had dropped it off at Johnson's house and so knowledge and control did not co-exist. But the Court was entitled to hold that knowledge of the contents of the suitcase rested with Moxam before he dropped it off at Johnson's house. So far as control is concerned I would ask the same question in Moxam's case as I asked in Nicoletta's. When the suitcase was in his car could he not have dropped it off at the police station? A left turn into Bodden Town Police Station on his way to East End would have been open to Moxam. Was that opening not sufficient to put him in control of the suitcase?

In short there was not only ample corroboration of Johnson's evidence, but that corroboration provided the Court with overwhelming evidence of the appellant's guilt.

Criticism has been made of the learned Magistrate's judgment that he did not analyze the case for and against each appellant separately. Criticism is made of this comment in the last paragraph of his judgment.

"In the words of Moxam,
'Nicoletta and Johnson
were knitted together in
this thing ".

The learned Magistrate put the statement in quotation marks but he did not exactly quote from Moxam's interview. Nevertheless he got the



gist of Moxam's statement in that regard.

In his judgment the learned Magistrate recited the evidence briefly and it is noteworthy that he mentioned the statements to, and interviews by, the police of both appellants. He reviewed the evidence of Nicoletta's witness at some length. The learned Magistrate clearly considered all the evidence and could be forgiven, in the light of such overwhelming evidence, for not expressly stating that he considered the case against each defendant separately.

The misquotation from Moxam's evidence was unfortunate but merely a comment made in summing-up his findings and cannot be taken as an indication that he did not give separate consideration to evidence against and for each appellant. It cannot be taken that he used Moxam's statement, made extra judicially, against Nicoletta.

At the end of the day there really was overwhelming evidence, against both appellants, that they each had possession and control of the suitcase containing 54 lbs of ganja at different times and that they had knowledge of its contents co-existent with that control. The quantity and circumstances of its possession prove an intention to supply the ganja, and the charges were proved.

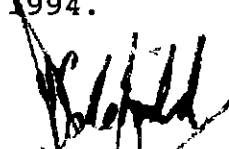
Nicoletta received a sentence of 4 years imprisonment and Moxam a sentence of 3 years imprisonment. Criticism is made of the manner in which the learned Magistrate considered the previous convictions of each appellant in that he considered non-drug related offences when sentencing. He was entitled to look at the total past record of each appellant to assess their past behaviour in all respects. Nicoletta has a previous conviction for possession of cocaine with intent to



supply. Moxam has previous convictions for simple possession of cocaine. The differential in sentences was thus warranted and the sentences were legal and appropriate.

The appeals are dismissed.

Dated this 25th day of November, 1994.


D. Schofield
Judge

