

15-2-94

Seen - [Signature]
[Signature]
[Signature]

1

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
SCA. 101/92



AUSTIN KEMPTON EBANKS
V.
REGINA

400/92	Possession of cocaine with intent to supply
401/92	Possession of cocaine with intent to supply

For the appellant: Mr. John Furniss of Ritch and Conolly
For the Crown: Mrs. Escalante, Crown Counsel,
(Mrs Banks)

REASONS FOR DECISION

The appeal is against convictions entered and sentences imposed on the above-mentioned charges.

The issues involved largely matters of fact and on the hearing of the arguments on the 10th September 1993 the appeal against sentence was allowed to the extent that the fines imposed were quashed but the appeal against convictions disallowed and the convictions upheld.

These reasons were reserved to a later date.

The determination of the appeal against conviction turned on the essential question whether there was any basis for departing from the learned magistrate's assessment of the evidence.

I concluded that there were no such reasons and that being so, my reasons follow from that factual determination which, to the extent relevant, I set out as follows.

Acting on information received, the police, on the 30th September 1991

mounted surveillance at the residence of the appellant at Boatswain Bay, West Bay.

Shortly after 4:00 p.m. that afternoon a young woman arrived at the premises and spoke to the appellant. She asked him for a cigarette which he provided and was heard to say to him "Aussi, have you got anything"? He replied "yes" and said something else to her which was not overheard.

She rode off in the direction of the Turtle Farm.

The appellant then returned inside his premises to an elevated cistern with a wooden top, where he was seen to remove a small object which he held between his right thumb and forefinger.

He then walked across the roadway which ran by the front of his premises, on to a footpath which led into bushes opposite his premises.

About five minutes later he emerged from the bushes, returned to the cistern and replaced what appeared to be the small object he had earlier removed, got on his bicycle and rode off towards the Turtle Farm.

Some ten minutes later the young woman who had earlier approached the appellant returned, the appellant close behind. She continued on and the defendant went back into his yard.

At about 4:45 p.m. a second young woman arrived on a bicycle. She stopped and called to the appellant. He came out in response and she handed him what appeared to be money which he put in his pocket. She then rode off in the direction of the Turtle Farm.

The appellant then repeated his actions taken following the exchange with the first woman.

He went to the cistern and removed a small object. He again crossed the road with this object in his hand and entered the bushes.

This time from a different vantage point a police officer observed the appellant digging in the earth as if searching for something.

The appellant then started to retrace his steps along the path in the bushes when the police accosted him.

On the approach of the police the appellant turned around and threw a small foil packet into the bushes.

He was also noticed to be holding a long pin in his hand, apparently the object which he had removed from the cistern.

In the struggle which ensued with the police, this pin was discarded and never recovered.

The small foil packet was, however, recovered.

When opened in the presence of the appellant, he denied any knowledge of the packet and of the cocaine rock which it contained.

Sergeant Brown, the officer best positioned to see the appellant while he was in the bushes, pointed out to Sgt. Gooding the area in which the appellant had been digging.

From a spot within that area Sgt. Gooding unearthed another packet which contained cocaine in rock form.

The appellant also denied any knowledge of that packet.

He protested that he had gone into the bushes to relieve himself but this was contradicted by the police officers and was rejected by the learned magistrate.

The contents of the two packets were later analysed and found to contain respectively 0.099 gram and 1.555 grams of cocaine.

As the learned magistrate observed, the single rock found in the second packet could be whittled down into 11 or 12 smaller rocks, the size of the rock in the first packet.

On the basis of the foregoing findings of fact, I conclude that the decision of the learned magistrate was unimpeachable.

As he was entitled to do, he accepted the police officers as witnesses of truth and having done so he was bound to find that the first packet was thrown away by the appellant and that his digging about in the area the second was found, was consistent only with the appellant having buried the second packet there.

As to the intent to supply, this I think could properly be deduced, as it was by the learned magistrate, from all the circumstances.

In particular it could properly be inferred that the second packet was kept as a cache from which the appellant would take smaller bits at a time for supply to others.

His modus operandi, coincidental with the arrival of the two women, one of whom appeared to pass money to him, as well as the quantity of drugs, gives rise to that as the only reasonable inference.

The conviction of the appellant on the two counts of possession with intent to supply was safe and sound.

As to sentence, I accepted the submissions of Mr. Furniss that no inquiry of means to pay a fine had been conducted by the learned magistrate.

A fine ought not to be imposed along with a substantive term of imprisonment if the likely result will be that the offender will only

serve an additional period of incarceration in default of payment because he has no means of paying the fine.

That principle has been the subject of pronouncements by this court on several occasions beginning at least as long ago as 1984 (Blackman v.

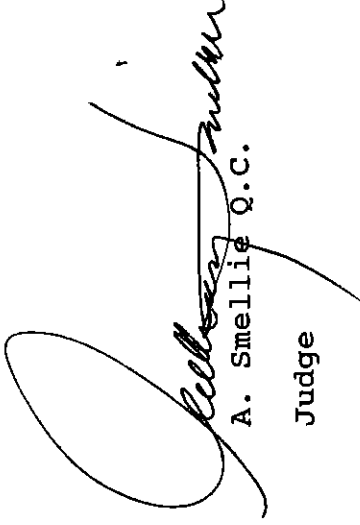
Regina 1984 CILR 55)

In this case there was no enquiry into the appellant's means and no evidence to indicate that he would be able to pay the fine imposed.

For those reasons the fine of \$2000 or 6 months in default of payment was quashed.

Otherwise, the sentences were in keeping with the established range applicable to a case such as this and to an offender ~~and~~ with the appellant's history, and were upheld.

Dated 15th February 1994


A. Smellie Q.C.
Judge