

Sp/ Mr. Bulgin
10.1.94

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
SCA. #74/93



William Wickett v. Regina

- 3239/93 - Being concerned in the possession of
of a controlled drug (ganja)
- 3240/93 - Possession of ganja

Mr. John Furniss for the Appellant
Mr. Samuel Bulgin for the Crown

REASONS FOR JUDGMENT

On 17th August 1993 a 45 foot sailing vessel owned and captained by the appellant ran aground as it attempted to navigate the passage into South Hole, Little Cayman.

There were two people on board, the appellant and a Mr. David Smith, the other member of the crew. The vessel was approached by District Officer Eldemire with others, to render assistance. Officer Eldemire observed what appeared to him to be vegetable matter resembling ganja floating away from the vessel. No effort was made to recover any of that vegetable matter and no account was given as to its appearance or any other feature which led to the impression that it was ganja, and not seaweed, as the appellant later alleged.

Nonetheless, his suspicions having been aroused, Officer Eldemire with the assistance of others from the Customs Task Force conducted a thorough search of the vessel later that day.

During that search traces of ganja were found on the steps of the cabin and in dust pans inside the cabin.

The appellant's attention was drawn to these traces and upon being asked how they got there, he said he did not know.

The traces were collected and when later tested and analysed were found altogether to contain 0.1 grams of cannabis.

Although sufficient for the purposes of analysis and therefore not to be treated as falling within the maxim de minimis non curat lex, the fact that the quantity involved was minute had to be taken into account in considering an issue which arose on the appeal. That issue was whether the appellant would have had the necessary knowledge of the presence of the drug to constitute the mens rea of the abovementioned offences, with which he was charged.

The appellant appealed against his conviction and sentence, notwithstanding that he had purportedly entered guilty pleas to those charges.

After the search of his vessel and the recovery of the traces, the appellant was arrested and interviewed under caution about its presence on board.

He maintained he did not know how the traces got there.

At his trial the appellant was unrepresented and when the charges relating to the traces were put to him, he pleaded guilty.

However, in his own mitigation, he made the following statements which his counsel has urged reveal that his plea was equivocal. I quote from the notes of the learned magistrate which obviously paraphrase what was said:

"I am owner and captain of vessel. There were some seeds found, that places me responsible. Anyone could have come on board (but) I guess If for personal consumption can my boat be confiscated (?) Boat is also my home and also my business Boat is free and clear..... There was seaweed floating there. The only thing I saw floating was seaweed.

Anybody could have thrown stuff in (the boat) at the Yacht Club when I left on Sunday 15th August."

Mr. Furniss submitted it is expressed or implied from those statements that the appellant was not admitting to the offence of possession of the traces of ganja recovered or to being concerned in their possession in someone else.

Rather, that the appellant's words reveal a number of misconceived premises pointing only to equivocation on his part.

The first is that he was accepting responsibility simply because he was owner and captain. He had said as much even while reflecting that anyone could have had access to his boat and could have thrown "stuff" onboard while it was left at the Yacht Club (presumably in Grand Cayman) on 15th August.

The appellant also raised the question whether his boat could be confiscated if the presence of the drugs on board was consistent with personal consumption. He was clearly concerned not to lose his boat.

That question seemed to imply an admission he was aware that drugs had been consumed on board and that the traces may have been scattered about as a result.

If that is a reasonable implication of his question to the Court, as I think it must be, then for that reason also his plea must be regarded as equivocal. It implied he was prepared to plea guilty to circumstances related to consumption, not to offences which may result in confiscation of his boat.

It is trite that before his plea to the charge of possession could be properly accepted by the Court, it was essential that the appellant understood he was admitting to the particular offence of possession with its elements of knowledge coupled with physical custody or control of the traces of drugs recovered.

Similarly, in the case of the charge of being concerned in the possession of the drugs, it was essential that he understood he was admitting to knowledge and to in some way being involved with someone else's possession of the drugs.

In the particular circumstances of this case, the traces had become res derelicta.

Even though it may be surmised that the traces had been derived from some larger quantity, the charges related to the traces recovered, not to any other larger quantity.

There was no suggestion, nor could there have been from the available evidence, that the appellant had had anything to do with any such larger quantity, even if it could be inferred it had existed.

The Court below was therefore obliged not to associate his plea with an admission of anything to do with any larger quantity.

In Robinson and Hart v. Regina 1990-91 CILR Note 8

this court determined that to establish the offence of being concerned in the possession of a controlled drug contrary to section 3 (1) of the Misuse of Drugs Law (Second Revision) the prosecution must be able to prove possession of the drugs by another, participation of the accused in an enterprise involving such possession and his knowledge of the nature of the enterprise.

Having regard to all the legal and factual issues discussed above, I am satisfied, in the first place, that the appellant might not have fully understood all the implications of his pleas.

Observations earlier made by this Court in the case of

Rankine v. Regina (1990-91) CILR Note 12

are also appropo as it was held that the procedure under the Criminal

Procedure Code S. 63 for receiving a plea of guilty to a charge, requires that the court satisfies itself that the accused understands and admits every ingredient of the offences charged.

Further procedural guidance worthy of repetition here was also given in that case. It is desirable for the magistrate, after hearing the facts from the prosecutor, to ask the accused whether he accepts the facts as related. The Court should then record the accused's admission in relation to every ingredient of the charge and ensure that his version of events does not raise a possible defence.

Those procedural steps are all the more important where, as here, the accused was unrepresented.

Had they been followed in this case the appellant's obvious equivocation would have been addressed and his plea ascertained.

In Kilcullen v. Regina 1990-91 CILR Note 12 (full written judgment unreported, delivered on 18th February 1991)

it was held that this Court's power to entertain an appeal against conviction following a plea of guilty was limited to those exceptions specified in Section 158 of the Criminal Procedure Code. Further, however, that the section did not otherwise constitute an absolute bar to an appeal in circumstances where (a) the appellant did not appreciate the nature of the charge, or did not intend to admit that he was guilty of it; and (b) upon the admitted facts he could not in law have been convicted of the offence charged.

The circumstances of this case fall within those parameters.

Unlike the circumstances of Kilcullen's case where the conviction was upheld based upon the appellant's immediate admission, when confronted, of knowledge of the traces of drugs aboard his aircraft;

an admission which was also consistent with his later guilty plea; the appellant in this case throughout denied any personal knowledge of the presence of the traces onboard his vessel.

Taken at its highest, his reference to personal consumption of drugs on board can properly only be treated as an admission that the traces may have been the remains of a larger quantity which, at some stage, had been present for consumption. His willingness to accept responsibility was thus qualified.

Nothing in that could constitute an admission of the requisite men rea of the particular offences with which he stood charged.

What is more, in this case, where the circumstances suggest the traces had become res derelicta, scattered about simply by happenstance, the physical element of custody or control could not with certainty be said to reside in this appellant or in anyone else.

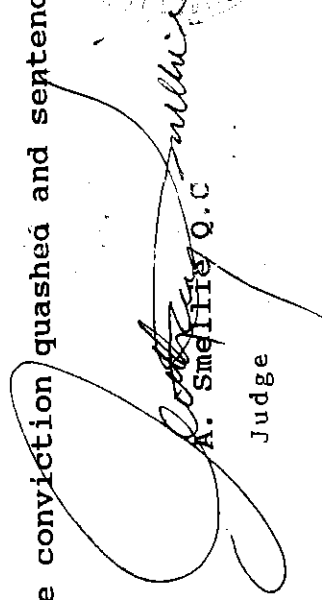
Upon the admitted facts, the appellant could not, in law, have been convicted of the particular offences charged.

In the absence of the appellant's guilty "plea" and faced with reasonable explanations of the presence of the drugs consistent with the appellant's innocence; the Crown could not have expected to mount a successful prosecution of the present charges even by reliance on the presumptions in Section 7 of the Misuse of Drugs Law.

Charges brought against the other crew member had been abandoned. The appellant's status as owner and captain of the vessel could not, without something more, be decisive of his guilt where at least one other person had had equal access to the vessel.

For all the foregoing reasons, the appeal against conviction and sentence was allowed, the conviction quashed and sentence set aside.

10th January 1994


A. Smellie Q.C.
Judge

