17.9.93

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

SCA. #13/93

DORISSA POWERY V. REGINA

Mr. N. Levy for the appellant
Mr. S. Bulgin for the Crown

JUDGMENT

The appellant had been convicted by the Summary Court on the 20th day of August 1992 on charge number 44 of 1992 for the offence of consumption of cocaine.

She was sentenced, with her consent, on an order of probation for 12 months requiring her, among other things, to attend on the probation officer at such times as the officer may fix. She was also required to attend on the Drug Counsellor as and when directed and to abstain from the consumption of drugs or alcohol.

Pursuant to section 7 of the Probation of Offenders Law, the probation officer on the 26th January 1993 swore and filed an affidavit alleging that the appellant was in breach of the probation order.

In her affidavit the probation officer reported that the appellant had failed to report and attend on herself and on the drug counsellor as required and that she had received reports that the appellant had been consuming cocaine.

The affidavit goes on to explain that the appellant had therefore been detained at the West Bay Police Station where the probation officer and drug counsellor obtained a specimen of urine from her for testing.

The results of the test which is described as a "Drug Screen" were exhibited to the affidavit on a form produced from the Hospital Laboratory and initialed by someone who is described on the form as a "technologist".

The results of this "screening" are shown as positive for the presence of cocaine in the urine specimen.

Also exhibited to the affidavit were the records showing the appellant's attendance on the probation officer and correlated with that of the drug counsellor's office, in proof of the appellant's breach of the attendance conditions.

Pursuant to that affidavit and in accordance with section 7(1) of the Probation of Offenders Law, the learned magistrate duly directed that summons be issued to the appellant requiring her attendance to answer to the allegations of breach of her probation order, returnable in the Summary Court on the 8th February 1993.

The form of the summons was appropriate and it advised the appellant of the allegations of breach of the probation order which had been brought to the attention of the court.

The subject of criticism on this appeal is the procedure which was employed on 8th February 1993 when the appellant appeared to answer to the summons.

From the record there is no indication that a copy of the probation officer's affidavit had been provided to the appellant.

Instead, there is included among the court bundle, a document described as "Charge by Probation Officer" under section 13 of the Criminal Procedure Code which is a section prescribing the procedure for the laying of charges against persons who are alleged to have committed criminal offences.

A procedure which was inappropriate for the alleged breach of probation order and one outside the scope of that provided for in section 7 of the Probation of Offenders Law, was then followed on the appearance of the appellant before the court.

The record reveals that no proper enquiry was conducted, that the appellant was not afforded an opportunity to refute or accept the allegation of breach of the probation condition but, instead, that the court proceeded to vacate the probation order and impose a sentence of nine months imprisonment after only brief exchanges which took place in the main, between the court and the probation officer.

The only exchange between the appellant and the court during the course of the proceedings was as follows:

> "The court:.....When you came here last time, did I tell you if you committed an offence or any breach of of, of this probation order that you would be dealt with; do you remember that?
>
> The defendant: Yes sir.
>
> The court: Yes. All right, I am vacating that order...."

There is no indication that the charge brought by the probation officer under section 13 of the Criminal Procedure Code was ever put to the appellant and the significance of that charge in the context of these proceedings remains unclear, as no reference is made in section 7 of the Probation of Offenders Law, to the requirement for such a charge.

Be that as it may, it is clear the proper procedure was not followed when the appellant appeared on 8th February 1993 in answer to the summons in keeping with section 7 of the Probation of Offenders Law.

That section provides:

> "7(1) If it appears to the Judge or any magistrate that a probationer has failed to comply with any of the provisions of the probation order, he may issue a summons to the probationer requiring him to appear at the place and time specified therein

or may issue a warrant for his arrest. Provided that a magistrate shall not issue such a summons except on information, and shall not issue such a warrant except on information in writing and on oath.

(2) A summons or warrant under this section shall direct the probationer to appear or to be brought before the court by which the probation order was made.

(3) <u>If it is proved to the satisfaction of the court</u> by which the probation order was made that the probationer has failed to comply with any of the provisions of the probation order, then -

(a) without prejudice to the continuance in force of the probation order, the court may impose on the probationer a fine not exceeding twenty dollars; or (emphasis supplied)

(b) (i) if the probationer was not convicted of the original offence in respect of which the probation order was made, the court may convict him and pass any sentence which it could pass if the probationer had just been convicted before that court of that offence; or

(ii) if the probationer was convicted of the original offence in respect of which the probation order was made, the court may pass any sentence which it could pass if the probationer had just been convicted before that court of that offence.

Provided that where a court has under the provisions of sub paragraph (a) imposed a fine on the probationer, then, on any subsequent sentence being passed upon the probationer under the provisions of section 6 or of this section, the imposition of the said fine shall be taken into account in fixing the amount of the said sentence."

The words in emphasis in subsection (3) imply a form of procedure which would properly afford the defendant an opportunity to be heard on the allegations of breach of the probation order. The rules of fairness would require that as well.

Where there has been the need for pronouncement by the court of this basic principle, it has been clearly stated in the past.

In Anthony Nigel Holmes v. The Queen (1966) 50 Cr. App. Rep. 86, the English Court of Criminal Appeal held that:

> "where a defendant is arraigned in respect of an alleged breach of a probation order, he should be told when and where he was convicted, when the probation order was originally made and the duration of the order and how the breach is alleged to have taken place, and if it be by a further conviction, the date and place of the conviction and the adjudication of the court. He should be asked whether he admits all these matters. If he does, no further proof is required; if he does not, any matter which he has not admitted must be proved to the court."

As to the manner in which matters not admitted must be proved to the court, it is clear from the judgment of the Lord Chief Justice in Holmes case that the procedure laid down in the earlier case of Devine (1956) 40 C.A.R. 45 by Byrne J, was approved and is to be followed: "If he does not (admit), then a trial will take place albeit without a jury (if the matter is before the High Court), and he will have to be asked whether he desires to give evidence or call witnesses and the court will have to pronounce whether it finds that the breach of the probation order has been proved; but it is desirable that the proceedings should begin by the matter being put clearly to him and his being asked whether he admits the breach."

Those pronouncements by the English court were in respect of statutory provisions similar, for present purposes, to our own and are therefore of pertinent and persuasive force. In my opinion, they should be adopted and applied here.

In this matter, Mr. Bulgin for the Crown accepted that the procedure adopted was bad.

It was particularly deficient in this case as the result was the immediate custodial sentence which was imposed; the matters taken into account having included allegations of further consumption of illicit drugs.

In that regard I make the further observation that allegations of this kind which if proven may justify the loss of liberty of the subject are to be no less strictly proven if denied in proceedings for breach of a probation order, than in the context of contested original criminal proceedings.

Here all that was offered as proof in that regard was the form of "certificate" which would not have met the statutory requirements of the Misuse of Drugs Law, Section 6. Had the appellant been afforded the opportunity to be heard and admitted the allegations of further consumption, that form could have been accepted inthe proceedings as the necessary prima facie proof of consumption, when taken with her admission.

However it is a requirement in contested proceedings that the proof of consumption or possession of the particular drug should always meet the statutory evidential standards, which in a case such as this, would have required at the very least, a certificate of a qualified chemist or qualified medical laboratory technician of the type mentioned in section 6.

In this case the consequence of the procedural irregularity must be that the sentence of nine months imprisonment be set aside.

On the matter coming on for adjourned hearing on the 17th September 1993 a final decision on the appropriate order to be made instead, will be taken.

Until then the appellant has been admitted to bail and required to continue reporting to the probation officer and drug counsellor.

17th September 1993

A. Smellie Q.C.

Judge