

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

MCRAP 2009/001

BETWEEN:

[1] LESTER CHARLES

[2] AHMED WILLIAMS

Appellants

and

THE COMMISSIONER OF POLICE

Respondent

Before:

The Hon. Mde. Ola Mae Edwards

Justice of Appeal

The Hon. Mde. Janice George-Creque

Justice of Appeal

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal [Ag.]

Appearances:

Mr. Steadroy Benjamin for the first Appellant

Mr. Cosbert Cumberbatch for the second Appellant

Mr. Anthony Armstrong, Director of Public Prosecutions for the Respondent

2009: December 11;

2010: March 15

Criminal Appeal – joint enterprise – possession of cocaine with intent to sell – possession of a firearm without holding a firearm's licence – possession of ammunition – mental elements required to constitute possession - appeal against conviction – whether judge's decision was unreasonable or cannot be supported by evidence – whether the judge's decision is erroneous in law – appeal against sentence – sentence was unduly harsh -

The appellants were jointly tried, convicted and sentenced for the offences of possession of cocaine with intent to sell, possession of a firearm without holding a firearm's license and possession of ammunition. They have appealed their conviction and sentence. The grounds of appeal against conviction are that the decision was unreasonable or cannot be supported having regard to the evidence and erroneous in law. They also contended that the sentence imposed was unduly harsh.

The prosecution's case is that the appellants were in a parked car and as the police approached the car, the 2nd appellant fled from the back seat. In the process a package

of cocaine fell out of the car. The first appellant who was the driver of the car was caught trying to get out. The car was searched and two more packages of cocaine were found on the back seat. A 9 mm semi automatic pistol with seven rounds of ammunition was found between the driver's seat and the passenger's seat at the front of the car. A large sum of money was also found in the car. The appellants denied knowledge of the cocaine, firearm and money. They also denied that the second appellant was in the car.

Held: dismissing the appeals against conviction and allowing the appeals against sentence to an extent:

1. Being the driver of the car and taking into account the conspicuous places in which the cocaine and firearm were found, the inference could properly be drawn that the first appellant was in possession of its contents with the requisite knowledge.

Faultin v Attorney General of Trinidad and Tobago (1978) 30 WIR 351 followed.

2. The evidence was sufficient to infer a joint enterprise between the appellants in respect of the offences charged.
3. That the fines imposed in respect of the firearm and ammunition charges are quashed as the magistrate had no jurisdiction to impose a fine and imprisonment in respect of these charges. The sentence imposed in default of payment of the fine on the charge of possession of cocaine with intent to sell is varied to six months.

JUDGMENT

- [1] **BAPTISTE, J.A. [AG.]:** The appellants Lester Charles and Ahmed Williams (the first and second appellants respectively) were jointly tried, convicted and sentenced for the offences of possession of cocaine with intent to sell, possession of a firearm without holding a firearm's licence and possession of ammunition. They have appealed their conviction and sentence. The appellants advanced two grounds of appeal against their conviction: (1) the decision is unreasonable or cannot be supported having regard to the evidence; (2) the decision is erroneous in point of law. With respect to sentence they contended that the sentence imposed was unduly harsh.

- [2] The prosecution's case is that a white rental car with three persons in it was parked on the right side of a road. The police alighted from their vehicle and approached the car. The second appellant who was sitting at the back of the car on the right side came out from the back right door and ran. In so doing a white package of cocaine fell out of the car as he fled from it. The first appellant was the driver of the car. He was caught trying to come out of the car with one foot in and one foot out. The officers who went in search of the second appellant found him and brought him back to the car.
- [3] While searching the back seat of the car where the second appellant was sitting the police found two more packages of cocaine. A 9mm semi-automatic pistol was also found between the driver's seat and the passenger's seat at the front of the car. The magazine was loaded with seven rounds of ammunition. US\$16,446.00 was found on the back seat of the car and EC\$41,965.00 was also found in a white plastic bag on the floor of the passenger's seat.
- [4] Both appellants gave evidence on oath. They denied knowledge of the firearm, cocaine and money. They denied that the second appellant was ever in the car. The appellants also disputed the area in the car where the items were found. They stated that the police officer took the gun from under the mat at the front seat. The second appellant also said that the police officer also took up a small plastic bag and shook it out on the same seat. Money and three packages fell out on the seat.
- [5] The first appellant explained his presence on the scene that evening. He was employed in a rent-a-car business operated by Kent Seraphine. Seraphine gave him a job to drop a car to a mechanic. Seraphine accompanied him. The mechanic turned out to be the second appellant, someone he did not know before. On arrival, he (the first appellant) stepped out of the car and the second appellant came and stood by the passenger door. The first appellant also stated that two

persons ran past and as he turned around three men were in his face with guns. He was ordered to lie on the ground.

- [6] The second appellant stated that he was a mechanic and did not know the first appellant before. He denied being in the car with the first appellant and Seraphine. He stated that he never went in the car. The second appellant explained that he saw the first appellant and Seraphine by a pick-up next to a rent-a-car. The first appellant was standing next to the quarter panel. As he (the second appellant) approached his car someone said "watch here dread." He walked up to the rent-a-car. The first appellant gave him a head sign indicating that it was Seraphine that called him. Seraphine was seated in the front passenger seat. He went to the passenger door and Seraphine spoke to him. Seraphine then shouted, "fuck ah who dem man dey wid gun?" and ran out of the car. The second appellant said that men in plain clothes approached him with guns; he also got scared and ran into a shop. A few minutes later he was handcuffed in the shop. He was put to lie on the ground next to the first appellant.
- [7] The case against the appellants proceeded on the basis of a joint unlawful enterprise. Mr. Cumberbatch, counsel for the second appellant, submitted that the prosecution failed to establish that he acted with anyone else in an unlawful joint enterprise. Mr. Cumberbatch argued that the facts being disputed it could not be reasonably said that the second appellant was acting in concert with the first appellant. Mr. Cumberbatch also argued that the items were not found on the person of the second appellant or in a place under his control to which he had access. The car did not belong to him. Mr. Cumberbatch pointed out that the Magistrate adopted a simplistic approach to disputed evidence by simply saying that he believed the evidence of the prosecution. Finally, Mr. Cumberbatch submitted that the facts of the case do not constitute possession as known to the law and stated that the case of **R v Monica Williams**¹ is instructive in the present

¹ (1972)16 WIR 74

context as it relates to what circumstantial evidence would be sufficient to find a person guilty of possession of drugs.

- [8] The law as to what constitutes possession is well settled. In **DPP v Brooks**², it was stated that:

“In the ordinary use of the word “possession” one has in one’s possession whatever is, to one’s own knowledge, physically in one’s custody or under one’s physical control. This is obviously what was intended to be prohibited in the case of dangerous drugs;”

In **Faultin v Attorney General of Trinidad and Tobago**³ the Court of Appeal held that:

“On a charge of unlawful possession of firearm or ammunition ... on the proof that a person had custody or control of a vehicle that a firearm and ammunition were found inside it and in close proximity to him, the inference may properly be drawn that they were there with his knowledge and that he intended to retain or control them.”

At page 370, the Court said:

“On proof that the appellant had custody or control of the motor vehicle, it is reasonable to draw the inference that the firearm or ammunition found in it and in close proximity to him were there with his knowledge and that he intended to retain or control them. This inference, recognized by the common law is similar to the rational connection test.”

- [9] On the evidence presented by the prosecution, it is indubitable that the cocaine, firearm and ammunition and large sums of money were found in the car driven by the first appellant. They were found in conspicuous places. They were not hidden. The first appellant was in close proximity to the cocaine and firearm. Being in possession of the car the inference could properly be drawn that he was in possession of its contents with the requisite knowledge. Further, the learned magistrate correctly directed himself on the law. In conclusion, the appeal of the first appellant against conviction is dismissed.

²(1974) 21 WIR 411 at 415

³(1978) 30 WIR 351

- [10] The prosecution presented evidence of the presence of the second appellant in the motor car. He was seated in the back seat. He fled the car as the police approached. A package of cocaine fell from the back seat of the car as he fled. Two more packages of cocaine were found on the back seat where he was seated. A large amount of United States currency was also found on the back seat. The first appellant was the driver of the car. The magistrate accepted that evidence.
- [11] With respect to joint enterprise, the learned magistrate set out the relevant issue he had to consider, that is, whether the prosecution had established a joint enterprise in respect of the offences charged. The learned magistrate properly directed himself on the law.
- [12] A joint enterprise is not defeated by the fact that the vehicle in which the cocaine, firearm and ammunition was found did not belong to the second appellant. Likewise it is not impaired by the fact that the cocaine and firearm were not found on the second appellant. These factors do not by themselves affect the efficacy of a joint enterprise. A joint enterprise requires that the parties are in it together as part of a joint plan or agreement to commit the offence. Such an agreement can be inferred from the behaviour of the parties. The evidence was sufficient to infer a joint enterprise between the second appellant and the first appellant in respect of the offences charged.
- [13] I am of the view that critical factual disputes such as whether or not the second appellant was in the car should have been dealt with by the magistrate in a less simplistic manner. As indicated earlier, the magistrate simply stated that he preferred the evidence of the prosecution. I am however persuaded by the fact that the magistrate had the advantage of seeing and hearing the witnesses as they testified as well as hearing and seeing the defendants give their evidence. He was ideally placed to assess issues of credibility and reliability and draw the

relevant inferences from the facts. This court certainly does not have the advantage possessed by the magistrate.

[14] In **Watt v Thomas**⁴ Lord Thankerton said that where a question of fact has been tried by a judge without a jury and there is no question of his having misdirected himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion. In my judgment there has been no misdirection by the magistrate and it cannot be said that the magistrate has not taken proper advantage of his having seen and heard the witnesses; nor can it be said that he has misused that advantage. There is no basis to arrive at a different conclusion from the magistrate. In the premises, the second appellant was properly convicted of the offences on the basis of a joint enterprise. His appeal against conviction is accordingly dismissed.

[15] I now consider the appeal against sentence. The ground of appeal is that the sentence imposed is unduly severe.

In his written decision the learned magistrate adverted to the principles of sentencing which he was obliged to take into account in making a determination as to the appropriate sentence. He referred to the case of **Desmond Baptiste v The Queen**⁵, which sets out the principles of retribution, prevention, deterrence and rehabilitation. The learned magistrate also recognized the need to look at the mitigating and aggravating factors in imposing sentence.

[16] The maximum penalty for the offence of possession of cocaine with intent to sell is 5 years imprisonment and a fine of not less than \$50,000.00 and not exceeding \$500,000.00. The quantity of cocaine found was 3.3 kilos. The maximum custodial sentence of 5 years which the magistrate regarded as the threshold

⁴ (1947) AC 484, 487-488

⁵ Criminal Appeal No. 8 of 2003 (St. Vincent and the Grenadines)

sentence for that quantity of cocaine was not excessive in my view having regard to the offence and the large sum of money recovered with the cocaine. On page 134 of the Record it is stated that on the complaint of possession of cocaine with intent to supply the defendants are sentenced to 5 years imprisonment and fined \$100,000.00 each. Both appellants were given until 1st October 2008 to pay the fine. In default of payment a further period of 2 years imprisonment was imposed. The magistrate however had no power to sentence the appellants to 2 years imprisonment for non-payment of the fine because Section 116 of the **Magistrate's Code of Procedure Act**⁶ stipulates a maximum period of imprisonment of 6 months for any fine exceeding \$500.00. I would therefore vary the sentences for both appellants to the extent of substituting 6 months for non-payment of the fine.

[17] The magistrate credited the first appellant with the 8 months he spent on remand and also stated that he would credit him with 1/3 off in respect of both imprisonment and fine in recognition of the fact that he was a first time offender. The magistrate took the mitigating factors into account. Essentially the first appellant would have been sentenced to 2 years and 10 months imprisonment and the fine would have been reduced to \$67,333.00. I note that the first appellant was not on bail pending his appeal. Section 169 of the **Magistrate's Code of Procedure Act** states that an appeal has the effect of suspending the sentence. In the circumstances in computing the period of imprisonment, the period of remand from 20th August 2008 when the Notice of Appeal was filed in the Magistrate's Court to today's date should be deemed to be time already served. The varied sentence of 6 months for non payment of the fine is also regarded as time already served.

[18] The **Firearms Act**⁷ imposes a maximum penalty of 2 years imprisonment respectively for the firearm and ammunition charges. For each offence the Magistrate imposed a sentence of 12 months imprisonment and a fine of

⁶ CAP 255 of the Revised Laws of Antigua and Barbuda

⁷ CAP. 171 of the revised Laws of Antigua and Barbuda

\$20,000.00. The firearm in question was a 9mm semi-automatic pistol loaded with 7 rounds. Although no use was made of the firearm, it was in a state ready for use. Considering that it was found in addition to 3.3 kilos of cocaine and large sums of currency, the inference is strong that it was a lethal component of criminal activity. Offences of such a nature inevitably attract a term of incarceration. In the circumstances, the term of 12 months imprisonment imposed could not be considered excessive. In addition to imprisonment, the magistrate also imposed a fine of \$20,000.00. Mr. Benjamin, counsel for the first appellant, pointed out that the law provides for imprisonment or a fine, not both. The appellants were charged under Sections 6(1) and 6(3) of the **Firearms Act**. Section 6(3) states:

“Any person who contravenes any of the provisions of this section is guilty of an offence and liable in the case of –

- (a) an offence under subsection (1)(ii) on summary conviction to a fine of each of ten thousand dollars or to imprisonment for two years.”

In view of that provision there was no jurisdiction to impose a term of imprisonment and a fine. I therefore quash the fine that was imposed.

- [19] With respect to the second appellant the magistrate remarked that his antecedents denied him any reprieve. Mr. Cumberbatch stated that the second appellant hitherto had no convictions in the past 10 years and submitted that the sentence was excessive in the circumstances. The Director of Public Prosecutions pointed out that the second appellant had previous convictions for a similar offence and subsequently made his antecedents available to the court which showed that on 25th March 1999 he was convicted of the offences of possession of cocaine, possession of a firearm and possession of ammunition which are similar to the offences for which he was convicted in 2008. He is clearly a repeat offender. The magistrate did not err when he took into account these previous convictions as they were not spent. He was convicted on 1st August 2008 and those convictions would have been spent on 25th March 2009.

- [20] The court takes a very serious view of the offence of possession of cocaine with intent to sell and does not consider there to be any mitigating factor in favour of the second appellant. The sentence of 5 years imprisonment is affirmed so also is the fine of \$100,000.00. This fine is to be paid on or before 30th August 2010. In default of payment the second appellant will serve a further 6 months imprisonment to run concurrently with the 5 years.
- [21] For the same reason advanced in respect of the first appellant, the terms of imprisonment imposed for possession of a firearm without a user's licence and possession of ammunition should be affirmed. The fines imposed should be quashed.
- [22] In conclusion, the appeals of both appellants against conviction are dismissed. Their appeals against sentence are allowed to the extent that the sentence imposed in default of payment of the fine on the charge of possession of cocaine with intent to sell is varied to 6 months. The fines imposed in respect of the firearm and ammunition charges are quashed. The 12 months imprisonment imposed for possession of a firearm without a user's licence is affirmed, so also is the 12 months imprisonment for possession of ammunition. The prison sentence and fines imposed in respect of the offence of possession of cocaine with intent to sell are also affirmed. All sentences are to run concurrently. In computing the period of imprisonment for the first appellant the period of remand from 20th August 2008 when the Notice of Appeal was filed in the Magistrate's Court to the date of delivery of this judgment must be deemed to be time already served.
- [23] I now deal with a matter which is of concern to this court. It relates to recognizance or security to prosecute an appeal. The relevant law in Antigua and Barbuda is Section 172(1) of the **Magistrate's Code of Procedure Act**, which states:
- "The appellant shall within three days after the day on which he served notice of his intention to appeal enter into a recognizance before a Magistrate with or without sureties as the Magistrate may direct conditioned to appear before the Court of Appeal and try the appeal and

to abide the judgment thereon of the Court of Appeal and to pay such costs as may be awarded by the said Court, or if the Magistrate thinks it expedient he may instead of entering into recognizances give such other security by payment of money into Court or otherwise as the Magistrate deems sufficient.”

This court has observed that in some jurisdictions recognizances are entered into or security is given in extremely large sums. Considering that entering into a recognizance or the giving of security is a condition precedent to prosecute an appeal, the appeal of the intended appellant can easily be thwarted by an inability to satisfy the recognizance or security if it is too large.

- [24] In deciding upon the amount of recognizance or security, magistrates should keep in mind the purposes for which a recognizance is entered into or security is given. A recognizance or security is given as a condition to appear before the Court of Appeal and try the appeal; to abide by the judgment of the Court of Appeal; and to pay such costs as may be awarded by the Court of Appeal. In the circumstances magistrates ought not to impose extravagant or unreasonable sums. Not only because such sums bear no relation to the purposes for which a recognizance or security is required but there is a danger that they may inhibit one’s ability to exercise their right to appeal. I may just add that a recognizance to prosecute an appeal is not the same thing as bail and ought not to be so treated.

Davidson K. Baptiste
Justice of Appeal [Ag]

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Janice George-Creque
Justice of Appeal