

SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 1 of 1991

BETWEEN:

CHIEF OF POLICE
SENIOR MAGISTRATE
DIRECTOR OF PUBLIC PROSECUTIONS - Appellants
and
SAMUEL LOCKER - Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Moe
The Honourable Mr. Justice Byron

Appearances: Director of Public Prosecutions for the Appellants
Emile Ferdinand and H. Benjamin for the Respondent

1991; March 11,
Oct. 7.

JUDGMENT

ROBOTHAM, C.J.

On 22nd November, 1990, Satrohan Singh J. granted an application for an Order of Mandamus to issue directed to John Lynch Wade, Senior Magistrate for the State of St. Christopher and Nevis directing him to exercise the jurisdiction and powers conferred on him by section 76 of the Magistrate's Code of Procedure Act, Cap. 45 (hereinafter referred to as the Code) which required him to put the accused to his election as to whether he wished to be tried summarily or by a Jury, in respect of charges of being in possession of cocaine.

Against this Order, the learned Director of Public Prosecutions appealed to the Court on the following ground:

- (1) The learned trial Judge erred in his interpretation of section 27(5) of The Drugs (Prevention of Misuse) Act 1986.
 - (2) The learned trial Judge was wrong in holding that the learned Magistrate has no jurisdiction to hear and determine offences under the Drugs (Prevention of Misuse) Act 1986 unless and until the respondent makes an election under section 76 of the Magistrate Code of Procedure Act Chapter 45
- /of the:....

of the Revised Edition 1961 of the Laws of St. Christopher and Nevis.

- (3) The learned Judge was wrong in holding that the Magistrate has no jurisdiction to try summarily any offence under the Drugs (Prevention of Misuse) Act 1986 unless and until the respondent elects to be tried summarily.
- (4) The learned Judge was wrong in holding that section 27(5) of the Drugs (Prevention of Misuse) Act 1986 amends section 75 of the said Magistrate's Code of Procedure Act Chapter 46 but does not repeal section 76 of the said Magistrate's Code of Procedure Act Chapter 46.
- (5) The learned Judge was wrong in holding that section 76 of the Magistrate's Code of Procedure act applies to drug offences despite section 27(5) of the Drug (Prevention of Misuse) Act 1986.
- (6) The learned Judge was wrong in holding that in the circumstances of this case Mandamus lies against the learned Magistrate.
- (7) The learned Judge was wrong in holding that the respondent has a right to trial by Jury.
- (8) The learned trial Judge was wrong in entertaining the originating Notice of Motion filed in this case when the respondent had failed to comply with Order 44 Rule 4 of the Supreme Court Rules 1970.

Ground 8 was not pursued on the hearing of the appeal.

The appellant was charged under section 7(2) of the Drugs (Prevention of Misuse) Act 11/86 (hereinafter referred to as the Drugs Act) with unlawfully being in possession of a controlled drug namely cocaine, and also under section 16(1) of the said Act with being in possession of a controlled drug for the purpose of drug trafficking.

The penalty for the offence created by section 7(2) of the Drugs Act is to be found in the third schedule of the Act and is (a) on summary conviction, 3 years or a fine of \$100,000, and (b) upon conviction on indictment, 7 years or a fine of \$200,000.

The penalty for drug trafficking under section 16(1) of the Drugs Act is provided in that section and is (a) on summary conviction, to a fine of \$100,000 or 3 times the street value of the drug whichever is greater, and to imprisonment for not less than 5 years, and not more than 10 years; and (b) upon conviction on indictment to imprisonment for life.

/Grounds 1,2,5.....

Grounds 1,4,5

It was the contention of the learned Director that section 27(5) of the Drugs Act 11/86 by altering the limitation period in section 75 of the Code effectively repealed by implication all the provisions of the Code dealing with the necessity for the Magistrate to follow the procedures laid down in section 76 thereof in respect of the summary trial of offences.

Section 27(5) of the Drugs Act reads:

"Notwithstanding the provisions of the Magistrate's Code of Procedure Act a Magistrate may try on information or by complaint an offence under this Act if the information or complaint was laid, or, as the case may be, made at any time within twelve months from the commission of the offence, triable by way of summary procedure under this Act."

Section 75 of the Code reads:

"In all cases where no time is specifically limited for making any charge in the Act or law relating to the particular case such charge shall be laid within six months from the time when the matter of the charge arose."

It was difficult to understand the rationale of the submission of the learned Director on the point. It seems to be beyond doubt that both of those sections independently deal with periods of limitation only.

Section 75 of the Code is a section of general application and but for any contrary provision in any other law would limit the time within which to institute proceedings under the Drugs Act to six months from the commission of the alleged offence. Section 27(5) of the Drugs Act however shows such a contrary intention and is saving that notwithstanding the provision of the Code in fixing the limitation period of 6 months within which to lay the information or complaint, for the purposes of the Drugs Act No. 11/1986, the period of limitation shall be 12 months. The word notwithstanding is defined in the Oxford reference dictionary as "In spite of", "without prevention by". There is therefore nothing inconsistent in these 2 sections, and it is quite possible for them to co-exist. The learned Judge therefore was quite right in rejecting the submissions of the learned Director on this.

/Grounds 2,3....

Grounds 2,3,6,7

Section 76 of the Code, Cap. 46 reads:

"When a person is charged with any offence punishable on summary conviction with imprisonment for a period exceeding six months the Magistrate shall address him to the effect following -

You are charged with an offence in respect to the commission of which you are entitled if you desire it instead of being dealt with summarily to be tried by a jury. Do you desire to be tried by a jury? And he shall add a statement if necessary of the meaning of being dealt with summarily and of the probable time at which such person would be tried at the Circuit Court. And if such person shall elect to be tried by a jury the Magistrate shall deal with the case as though such person had been charged with an indictable offence not triable summarily and the offence with which he is charged shall be deemed to be an indictable offence.

Provided that this section shall not apply to a child unless the parent or guardian of such child is present the Magistrate shall address the above question to such parent or guardian:

Provided also that nothing in this section or Act contained shall in any way interfere with or curtail the summary jurisdiction of Magistrates in trial of offences:

- (a) Under the Small Charges Act;
- (b) Under the Obeah Act;
- (c) Where the Magistrate himself is given a discretion to try the case summarily or commit the offender for trial for an indictable offence;
- (d) Under the Sedition and Undesirable Publications Act."

I quote this fully because it is the substance of the appeal in that the Magistrate refused to comply with the provision of this section despite the fact that Counsel appearing for the defendant brought it to his attention. The Magistrate though not unaware of this provision persisted in his resolve to proceed with a summary trial. At this stage the matter was adjourned for Mandamus proceedings to be brought.

In our view, the election of the accused under section 76 of the Code is a mandatory requirement in all cases where an offence is triable either summarily or by a jury.

The marginal note to section 27(1) of the Drugs Act reads:

"Prosecution and punishment of offences."

/It is....

It is recognized that this is not an aid to construction but the section reads as follows:

- "27(1) Except where expressly otherwise provided the Fourth Schedule shall have effect, in accordance with subsection (2), with respect to the way in which offences under this Act are punishable on conviction.
- (2) In relation to an offence under a provision of this Act specified in the first column of the Third Schedule (the general nature of the offence being described in the second column) -
- (a) the third column shows whether the offence is punishable on summary conviction or on indictment or in either way."

In the third schedule under the heading mode of prosecution in respect of an offence under section 7(2) it reads .

- (a) Summary - 3 years or \$100,000
- (b) on indictment - 7 years or \$200,000.

It seems clear therefore that the offence of possession of cocaine in the Third Schedule, is triable either summarily or by a Jury on indictment.

Equally clear is the fact that the offence of drug trafficking under section 16(1) is triable either summarily or on indictment. That section so stipulates.

Those being the equating positions, it clearly shows that it was a mandatory requirement of the Magistrate to comply with the provisions of section 76 of the Code by putting the appellant to his election as to whether he wished to be tried summarily or by a Jury. The exercise of the discretion rested with the accused and the Magistrate was obliged to put him to his election. Singh J. therefore acted quite properly in granting the Order for Mandamus, and the appeal must be dismissed with the directions that the Magistrate observe the provisions of the Code in all cases of this nature.

Before finally parting with this appeal, there is one further matter on which the directions of this Court is sought and it relates to the requirement of the Code for an appellant to enter into a recognizance to prosecute his appeal.

Section 167 of the Code, Cap. 46 reads:

"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 to prosecute

/the appeal....

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 the recognizances give such other security by payment of money into Court or otherwise as the Magistrate deems sufficient."

Under section 169 an appellant on entering into the recognizance is released from custody pending the hearing of the appeal. Not infrequently and more so in drug cases this provision serves to defeat the ends of justice when the appellant absconds without pursuing his appeal. It is our view that the Magistrate should be allowed a discretion as to whether or not bail should be granted in a particular case.

In an effort to avoid the ends of justice being thus defeated, some Magistrates have arrogated unto themselves the practice of requiring the appellant to deposit the amount of the bond in cash. This practice on the part of the Magistrate is wrong.

If cash is to be deposited in lieu of the recognizance a critical reading of the section shows that it is the appellant who has that right and it does not rest with the Magistrate to initiate it.

If the appellant elects to offer security by way of the payment of the cash into Court, it then becomes the duty of the Magistrate to say whether he considers that a suitable alternative to the recognizance, and to allow the payment into Court of such sum as he deems sufficient.

Magistrates are therefore enjoined to follow this procedure in the future.

L.L. ROTHAM,
Chief Justice

G.C.R. MOE,
Justice of Appeal

C.M.D. BYRON,
Justice of appeal