IN THE CAYMAN ISLANDS COURT OF APPEAL

CRIMINAL APPEAL 2 of 2021
SCA# 0002/2020
SC#01697/2019

BETWEEN:

LYNDEN DWAYNE WALTON

Appellant

- and –

Her Majesty the Queen

Respondent

BEFORE:

The Rt. Hon Sir John Goldring, President
The Hon John Martin QC, Justice of Appeal
The Rt. Hon Sir Richard Field, Justice of Appeal

Appearances: Mr. Keith Myers for the Appellant
Mr. Kenneth Ferguson, Office of the DPP for the Respondent

Date of Hearing**:** 30th April 2021

Reasons Delivered: 6th May 2021

REASONS JUDGMENT

MARTIN JA:

1. On 30 April 2021 we dismissed an appeal by Lynden Walton against conviction and an application by him to appeal against his sentence. These are our reasons for doing so.

2. On 14 November 2019 the appellant was convicted after a trial in the Summary Court of possession of a controlled drug, namely cocaine, with intent to sell, and possession of criminal property, namely $1330 cash. He was sentenced to 8 years' imprisonment for each offence, the sentences to run concurrently.

3. The appellant appealed against his conviction to the Grand Court, and that appeal was dismissed on 6 April 2020.

4. The appellant's appeal to this Court was accordingly a second appeal. Such appeals are governed by section 29(1) of the *Court of Appeal Act (2011 Revision)*, which is in the following terms:

> *"Any person, including the prosecutor, aggrieved by any judgment given or made by the Grand Court in the exercise of its appellate or revisional jurisdiction, whether such judgment has been given or made upon appeal or revision from a court of summary jurisdiction or any other court, board committee or authority exercising judicial powers, and whether or not the proceedings are civil or criminal in nature, may appeal, subject to this Law, to the Court on any ground of appeal which involves a point of law alone, or against sentence but not upon any question of fact".*

This meant that the appellant was not entitled to appeal his conviction to this Court unless his appeal involved a point of law alone.

5. Mr Myers, who appeared for the appellant before us and in the Grand Court, but not in the Summary Court, identified the point of law on which he relied as being whether the Grand Court was entitled to dismiss the appeal from the Summary Court in the absence of the notes of evidence which the magistrate was by statute obliged to make.

6. In order to deal with this assertion, it is necessary to give a brief summary of the facts and of the course of the proceedings below.

7. On 5 August 2019 the appellant was stopped by police and searched. A small Crest mouthwash bottle was found containing 300 pieces of crack cocaine weighing in total 14.4g/0.5 ounces. Also found was $1330 in cash, consisting of thirteen $100 notes, one $25 note and five $1 notes. The appellant's defence at trial was that the cocaine was for his personal use, not for sale, and that the cash came from legitimate earnings.

8. The appellant was interviewed under caution on the following day. The interview was in evidence at the trial. The magistrate said this about it at paragraphs 11 and 12 of her ruling:

"*Acting Police Sgt. Kenval Bryan conducted the interview of the defendant. During the interview the salient matters from the defendant are:*

a) He was not shown the bottle of cocaine. Denied ever having the Crest bottle or seeing it before.

b) He had not consumed cocaine in a while, not in the last week. But had within the last month of July.

c) Over the years he has spent a lot of money on cocaine.

d) He did not have any cocaine on him when stopped.

e) He had more than $1300 on him.

f) He gets paid every two weeks.

g) Last pay was two weeks ago and he receives $200 every two weeks for culling.

h) Since October of last year he collected a lot of money.

i) He had a truck which he used to do other work, but not any more.

j) He does iguana culling now, or begs his mother.

k) "I am not selling cocaine. I didn't have no crack cocaine."

l) "I use powder or crack, however I get it to get high."

m) He gives his nephew who is seven years old, $300 to spend as he pleases.

...

Officer Bryan confirmed that the defendant did state that when he consumed cocaine, he "went all out." He only indicated two sources of income, his parents and culling."

9. The trial in the Summary Court was conducted over three days by Magistrate Hernandez. At the end of the trial, she gave a written ruling, of which the following parts are relevant for present purposes:

(1) At paragraphs 17 and 18, she set out the defence case as follows:

"*17. In relation to the cocaine, the defendant stated that when he was stopped they told him they had a warrant for his arrest. He was searched and "they found a bottle in my right pants pocket. They said all kinds of things at the time. They did say it looked like cocaine. I said it was mine, for my personal use."*
He also said, "I had that bottle like an hour or so before I was stopped by the police. I wasn't shown it by the police. But I knew I had purchased a rock."
He said he had purchased the rock for $75 from "regular".

Later in his evidence he explained: "People buy a big rock and then chip it. I chip the rock about an hour before I was caught. We buy by size, could be an ounce rock or gram rock. It is easy and safe. It was not intended for resale." During Cross-examination, the defendant stated:

a) *"I did deny in the interview that the police took the bottle from me because I was upset."*
b) *"They took the bottle from me. I told them it was mine. He didn't show me what was in the bottle. I be so high sometimes, only the Good Lord know."*
c) *"I was high during the interview."*
d) *"He showed me something when I was arrested. It didn't look like crack cocaine."*
e) *"I purchased the cocaine in Savannah area and break it up into crack cocaine and put it in the Crest bottle."*
f) *That area is not where he would normally get his supply.*
g) *This amount would last him two to three months.*

In answer to the Court he admitted that he had purchased a similar size just weeks before.

18. *In relation to the cash found on him the defendant stated the following:*
    a) *He did Iguana culling.*
    b) *He sold coconut water to Fosters. Evidence was provided which indicated that between June 4 and July 13 he earned close to $500 from Fosters with the last payment being on July 13 for $26.84. The average payment at any given time was $25.*
    c) *He is an "employer" hiring people to work for him.*
    d) *He had a truck and was doing landscaping, although he admitted that was months before.*
    e) *He is a "9 to 5 hard-working guy."*
    f) *He would go and change his small dollar amounts to large bills.*
    g) *His bank was his wallet.*
    h) *His expenses were minimum as he has been supported by Needs Assessment Unit since 2012. His rent was paid and he had a Fosters Food Fare card which was topped up regularly.*

When asked why he only mentioned iguana culling in his interview he said:

"I was too high and frustrated. They abusing me. Plus I had my mother's breakfast which they should pay for. I was catching iguanas on my bicycle.""

(2) At paragraphs 20 and 21 the magistrate said this:

"*20. In this case there are two salient undisputed facts in relation to the arrest of the defendant by the police on an outstanding warrant:*

a) He had a crest bottle with 300 rocks/crack cocaine in it with a weight of ½ ounce or 14.4 grams.

b) He had CI$1330 cash on his person.

21. The defendant's case is that the cocaine was all for his personal use, and that the cash was all from legal means."

(3) At paragraphs 23-25 she set out her findings in the following terms:

"*23. In relation to the cocaine I make the following findings:*

a) I accept that the lowest estimated street value of $3000 is if the rocks were sold individually.

b) I do not accept that he purchased the rock, which he may have split up, for only $75.

c) He was inconsistent in his evidence as to where he purchased, from a regular or not from his normal place.

d) His denial and failure to acknowledge the finding of the Crest bottle with the cocaine in the interview is contradicted by his own evidence and how his case was presented.

e) His attempts to explain his inconsistencies that he was "so high" is rejected as coming very late in the trial and on cross-examination. Further the Court had an opportunity to view the interview and he was not obviously "high" to the court.

f) He was incapable of keeping up with his different versions e.g. he stated he had not had cocaine since July, yet he was "so high" when he was arrested.

g) *Another example of his inconsistencies was when he said he purchased in bulk and that this amount would have lasted him two to three months, yet he told the Court that he last purchased a rock like this just weeks before.*

h) *I reject the position that the entirety of the ½ oz/300 plus rocks was for his personal use. I accept that he was a user but I find that he was also a supplier.*

i) *I find that the quantity alone in this case would have been sufficient to find possession with intent to supply.*

24. *In relation to the $1330 found on the defendant, in large bills thirteen one hundred bills, I have reminded myself that the Crown must prove to the requisite standard that the money was the proceeds of criminal conduct and no other reasonable explanation is possible. I find as follows:*

a) *I accept that the defendant was involved with Iguana culling and with selling to Fosters. However, I reject that the defendant did nothing but save his money in his wallet and changed out the small amount of cheques or cash to large bills.*

b) *I accept that his living expenses were virtually nil being a recipient of the state's generosity with his rent.*

c) *I reject that he has any other legitimate business enterprises whereby he is an "employer" as he states.*

d) *I note his inconsistencies with his interview, what he said under caution when first arrested and then at the trial, which expanded under cross-examination. It started out as begging his parents and iguana culling up to the interview. At Court it went from that to include selling produce, and in cross-examination being a legitimate employer and working really hard from 9 to 5.*

e) *I find that the defendant had no income shown since at least the 13th of July which was approximately $200. On his own evidence he had purchased a "rock" about this size just weeks before. He gives large amounts of money to his seven year old nephew.*

f) *The evidence is inconsistent and is difficult to follow or grasp.*

g) *Accordingly, I find that at least a portion of the money were the proceeds of his criminal conduct and I have generously apportioned it half of the amount found on him being $750.*

25. *When everything is considered, I have reminded myself that the defendant must be given any doubt which I may have as to the charges. At the end of the trial I have found nothing which has provided any doubt. Accordingly, I find beyond a reasonable doubt that the Defendant is guilty of the offences:*

    a. *I find that the quantity alone in this case would have been sufficient to find possession with intent to supply. However, the cash found on him also supports my findings.*

    b. *I find that there is no reasonable explanation to support the large quantity of cash found on him. Accordingly, I find a portion of it as being the proceeds of his criminal conduct of selling cocaine*."

10. The appellant's appeal to the Grand Court came before Acting Justice Carter, who dismissed it. The key paragraphs of her judgment are at paragraphs 24 and 25, which are in the following terms:

> *"24. I find no fault with the Magistrate's instruction to herself on the applicable law. The Magistrate was entitled to find the facts that she did from the evidence presented by the Prosecution and from the Appellant's own evidence. There is nothing in the record to cause this court to have concerns about the Magistrate's assessment [of] the evidence of the Crown's witnesses or of the appellant. In this case, where much turned on the Learned Magistrate's observations of the demeanour of the appellant and her conclusions on his credibility, the degree of deference to be given to the Magistrate by this Court cannot be understated.*
>
> *25. The Magistrate was best placed and, in law, entitled to make the inferences that she did in this case. The inferences drawn from the facts were proper and followed from a fair and balanced assessment of the facts presented in this case. Having rejected the Appellant's evidence, the Magistrate was satisfied that the charges were proved on the Crown's evidence to the requisite standard beyond a reasonable doubt.*"

11. As we have indicated, the appellant's case in this Court is that Justice Carter was not in a position to reach the conclusion set out in those paragraphs, and in particular the conclusion expressed in paragraph 25 that the magistrate was "*entitled to make the inferences that she did in this case*", in the absence of a full note of the evidence taken in the Summary Court. It is said that, without that note, the appellant was deprived of the opportunity to challenge the inferences and Justice Carter was deprived of the opportunity to assess their validity. As Mr Myers put it in his written submissions, "*in fact without the said trial notes all that was happening was one Judge was confirming what was said by another Judge in the Summary Court Ruling*". In the circumstances, the conviction is said to be unsafe.

12. Section 26 (1) of the *Summary Jurisdiction Act (2019 Revision)* is in the following terms:

> "*Subject to any other law, in all proceedings before the court at every stage thereof, the magistrate shall be responsible for ensuring that a proper record is maintained of the proceedings and that the oral evidence given before such court, or so much thereof as he considers material, is taken down in writing either by himself or by a Clerk of the Court under his supervision. Any such record of the evidence should be signed by the magistrate when he has satisfied himself that it is an accurate and faithful record.*"

13. Section 175 of the *Criminal Procedure Code (2019 Revision)* gives an appellant from a decision of the Summary Court an entitlement to receive with all convenient speed a copy of the evidence taken by the court in the case.

14. It seems likely that the magistrate in the present case will have taken some notes of the evidence. It was her obligation to ensure that oral evidence she considered material was taken down in writing. She quoted parts of the evidence in her ruling; and that, and perhaps also the fact of the length of the hearing, suggests that she complied with her obligation to record the evidence. If a record was indeed made, as it should have been, the appellant was entitled to a copy of it.

15. The question is, however, whether the unavailability of any record meant that the Grand Court was handicapped in its consideration of the appeal from the magistrate. In our view, it was not. That is for the following reasons.

16. In the first place, the extracts from the magistrate's ruling state those parts of the evidence which she considered material. Whether or not those parts of the evidence existed also in a separate record, the evidential considerations that the magistrate took into account were clearly stated by her and were available to Justice Carter from the ruling. The magistrate was under no obligation to record parts of the evidence that she considered immaterial, and the appellant was not entitled to trawl through immaterial evidence in an attempt to show that the magistrate might have come to a different conclusion.

17. Secondly, and crucially, the issues before the magistrate were very limited. There was no dispute that the appellant was in possession of 300 small pieces of crack cocaine and $1330 in cash. The question for the magistrate was whether the Crown had proved to the requisite standard that the appellant's possession of the cocaine was with intent to sell it (and not, as he said, for his personal use) and that the cash was criminal property (and not, as the appellant said, money that he had come by legitimately). In the absence of any acceptance by the appellant that he intended to sell the cocaine and that the money was not legitimately obtained, the Crown's case necessarily depended upon inference. It suggested that inferences contrary to the appellant's case could be drawn from the amount (both in terms of weight and number) of the cocaine pieces, and from the quantity of money found on the appellant when set against his known earning capacity. Those inferences depended on primary facts - possession of the cocaine and the cash - which were not in dispute. Rebutting the inferences depended upon acceptance of the appellant's version of events, and it was only in connection with that version that the oral evidence was important. The magistrate heard the appellant's evidence and rejected it, on grounds that she clearly set out in her ruling. There can be no criticism of those grounds. Once the appellant's explanations were rejected, there was no obstacle to a finding by the magistrate that the uncontested primary facts justified the inferences contended for by the Crown. In making that finding, the magistrate properly directed herself as to where the burden of proof lay. Nothing in the evidential record would have been capable of casting doubt on the primary facts on which the inferences were based, and neither Justice Carter nor the appellant was in any way handicapped in assessing the validity of those inferences by the absence of any record that existed separate from that set out in the magistrate's ruling.

18. In essence, the appellant's argument comes down to a contention that an examination of a full record of the evidence would or might indicate that the magistrate should have accepted the appellant's version of events. That contention falls foul of the prohibition in section 29(1) of the *Court of Appeal Act* on second appeals on questions of fact; and it is in any event no part of the

function of an appellate court to form its own view of facts properly determined by the original tribunal. As Justice Carter remarked, due deference is to be given to the magistrate's factual assessment.

19. In the circumstances, we concluded that the appeal was not on a point of law alone. We were in any event satisfied that the decision of Justice Carter was unimpeachable. The appeal on conviction was accordingly dismissed.

20. As we have indicated, there was also an application for leave to appeal against sentence. In the written material before the court, the basis of that application was that the sentence was said to be manifestly excessive. In the event, however, Mr Myers accepted that he could not succeed in relation to sentence if he failed in relation to conviction; and the application was accordingly refused.

FIELD, JA

21. I agree.

GOLDRING, President

22. I also agree.