

19.11.93

1
IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

SCA #87/92

EARL DAVID SCOTT
COLEEN MARCIA WILLIAMS
and
JUDITH ANN KARR

v

REGINA

For Scott : Mrs. Priya Levers
and Mr. Graham Hampson
For Williams : Mr. Keith Collins
For Karr : Mr. John Furniss
For the Crown : Mr. Adam Roberts

HARRE C.J.

JUDGMENT

On 13th February 1992 Earl David Scott arrived from Jamaica by air accompanied by the two female appellants. The police here were waiting for him. The outcome of their activities that evening was that all three appellants were arrested and charged with possession of cocaine and possession with intent to supply. They were all tried and convicted and received lengthy terms of imprisonment. I confine myself to that short and cryptic account of the facts alleged, because I intend to order a new trial of all three appellants.

The original grounds of appeal filed by the appellant Scott deal with matters which are fully reflected in the additional grounds filed by his attorney on 21st June 1993. I will therefore deal with that appeal by reference to the submissions made on his behalf by Mrs. Levers, referring first, as she did, to Ground 3, which was as follows -

"That the refusal by the learned Senior Magistrate to grant an adjournment to the accused person on the first day of the scheduled trial, did in the circumstances, amount to a miscarriage of justice."

Dealing with that will lead me to my conclusion on all three appeals.

The record of the trial does reveal that following pleas of not guilty to all charges by all three defendants. Scott asked for an adjournment. He has deponed as to the circumstances in an affidavit. He says that it was only on the first day of the trial that he found out that Mr. Frank Phipps was not going to represent him and that Mr. Phipps had refused to make the journey from Jamaica until all his requested fees had been paid. As a result he could not properly prepare his defence and he was never advised of his right to apply for legal aid.

The learned Senior Magistrate's reasons for refusing an adjournment are recorded as follows -

"Scott applies for adjournment. Court rules matter being on list since 17th February. Witness here from overseas (UK) Counsel representing Karr also here from Jamaica."

The incident from which these charges arose took place on 13th February 1992. The matter was first mentioned on the 17th. On 9th March after two further mentions, the matter was set down for trial to begin on 19th May, and did in fact begin on that day. Mr. Blake, the attorney referred to in the passage which I have taken from the record as "representing Karr" is recorded as having, at the close of the prosecution case, made the following remarkable disclosure -

"I have been instructed to represent Scott but my work permit having restricted me I continue to operate under the terms of the work permit."

I shall have to address the question of Mr. Blake's equivocal position in relation to the defence of both Scott and Karr.

Several authorities on the question of the right of an accused person to be defended by an attorney were brought to my attention. In The State v Fitzpatrick Darrell 24 WIR (1976) p 211 the Court of Appeal of Guyana found that a guarantee provided in the Constitution of that country was but a restatement of the common law right referred to by Lord Maugham in Galos Hired v. R (1944) AC at p

"The importance of persons accused of a serious crime having the advantage of counsel to assist them before the courts cannot be doubted by anybody who remembers the long struggle which took place in this country and which ultimately resulted in such persons having the right to be represented by counsel".

The Guyana Court of Appeal remitted the case to the High Court for a new trial.

Galos Hired v. R was applied by the English Court of Criminal Appeal in Mary Kingston v. R (1948) CR 183, where an accused person who had briefed and paid for counsel found herself unrepresented at trial. The conviction was quashed, with observations by the court that it would have ordered a new trial if it had then had the power to do so.

I have referred only briefly to these cases because I propose to base my conclusion on a more detailed analysis of the principles enunciated by the majority of the Privy Council in Frank Robinson v R (1985) 1 AC 956, a case which went the other way and where the charge was murder and the sentence death. The decision turned on the interpretation of section 20 of the Constitution of Jamaica, the relevant part of which reads as follows -

"Every person who is charged with a criminal offence shall be permitted to defend himself in person or by a legal representative of his own choice."

Although we do not have that constitutional provision at present, it enshrines a fundamental human right which this court would wish to uphold by the application of the same principles.

In Robinson v. R the defendant was arrested and charged in August 1978. He did not apply for legal aid. The main prosecution witness having disappeared, the case was adjourned on 19 occasions. On 6 of these a trial date had been fixed, and the defendant was usually represented by two counsel who were on the

In January 1981 the trial was definitely fixed for a date in March of that year with consent of the defendant's counsel. When the trial began the Crown's principal witness was presented but the defendant's counsel were absent. Inquiries revealed that they intended to be there the following day and the judge started the trial. In the event the trial continued without the defendant being legally represented at all. It was held, in dismissing the appeal (Lord Scarman and Lord Edmund Davies dissenting) that the right, under the provisions of the Constitution of Jamaica to legal representation of choice was not an absolute right in that it was not necessary for an adjournment always to be granted in order to ensure that any defendant in a criminal matter who desired legal representation was duly represented; that in exercising his discretion whether or not to grant an adjournment for that purpose the judge had to consider other relevant matters including the present and future availability of witnesses, and since the absence of legal representation was caused by the conduct of the defendant's counsel and also by the defendant's failure to ensure that they were paid within reasonable time before trial or otherwise to apply in advance for legal aid, the judge's refusal to adjourn the trial to enable the defendant to instruct an alternative legal representative did not deprive the defendant of his fundamental right under section 20(6)(c) of the Constitution to be permitted to defend himself by a legal representative of his own choice, even though as a result he was unrepresented at his trial for a capital offence; and that in all the circumstances, no miscarriage of justice had occurred and the defendant had been properly convicted of murder.

In the present case the defendants had been apprehended and were in custody outside their own country, and a little over two months elapsed between the setting of a date for trial and the trial itself. There are difficulties over arranging legal representation inherent in that. By contrast with the Robinson case there were no elusive witnesses, although one police officer had had to be brought from England. An adjournment, though likely to be inconvenient and expensive, would not in my judgment have precluded the possibility of

a proper trial. The question which now has to be asked in the light of all the circumstances of the case is whether as a result of lack of proper representation at the trial a miscarriage of justice has occurred in respect of all or any of the defendants. One of those circumstances directly affects not only Scott but the other two defendants also. It is this. Mr. Blake, who acknowledges that he received instructions (from whom I do not know) to defend Scott, was, as appears from the official record in fact instructed and proposed for admission to the Caymanian Bar, for the specific purpose of defending Karr, by the local attorney who was himself defending Williams, the other female accused.

The relevant passage of the learned senior magistrate's judgment reads as follows -

"I must at this point mention Defence Counsel Mr. Blake allegations, that he was not permitted to ask questions concerning Scott. For the first three days of this protracted trial Counsel spent most of his time asking such questions. When requested by Court to explain why he was acting on Scott's behalf his reply was that his client's case stands or falls with Scott's. It was not until sometime on Monday the fourth day of the trial that he admitted, though inadvertently, that he had been briefed to defend Scott, but due to restrictions of his work permit he was representing Karr. It was then that he was restricted from asking any further questions on behalf of Scott."

There is obvious conflict of interest in this entire situation. The interests of none of the defendants coincide. Indeed, towards the beginning of Scott's evidence Mr. Blake submitted, on behalf of Karr, that he wished "to make a no case submission before his client is implicated." And to make confusion worse confounded there is Mr. Collins instructing Mr. Blake on behalf of Karr and himself defending Williams. At the appeal before me by Karr (conducted on a different occasion from that of Scott by Mr. Furniss, who was not involved in the original trial) he questioned the reason why Karr was not advised to give evidence. Was it in her own interest or was it to protect Scott from the giving of evidence which might have been damaging to him? The mere fact that such a question can credibly be asked sufficiently shows the necessity for a retrial

of both Scott and Karr, and I so order. The case of Williams is different. The evidence against her rests on what she said to police officers, the voluntariness of which was challenged. I do not propose, in view of what I am about to do, to say more than that I was unable to conclude that the Magistrate's finding that Williams' statement was voluntary was manifestly wrong and interfere with her conviction on that ground. On the other hand, it would be manifestly unjust, in my view, because of the extraordinary nature of the trial in which she and the two other defendants were embroiled, not to give her the opportunity of a new trial also.

There were other grounds of appeal relating to the admissibility of evidence, particularly that contained on tape, and the burden of proof. In view of the fact that there is to be a new trial in which these matters may or may not be in issue I will say no more now than that I have considered them and having done so have found no grounds for going beyond the order which I now make, for the reasons which I have described, for a retrial of all three appellants.

The matter should proceed with expedition, and I direct that it should be for mention in the Summary Court next Monday 22nd November.



G. E. Harre
Chief Justice

19th November 1993.