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**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL DIVISION**



SCA 2 of 2024

ADRIAN FREDERICK SCALES

V.

R

Appearances: **Mr. Jonathon Hughes of Samson Law for the Appellant**
Mr. Andre Wedderburn Crown Counsel of the Office of the Director of Public Prosecutions for the Respondent

Before: **The Hon. Justice Cheryll Richards KC**

Submissions Heard: **27th September 2024**

Judgment: **15th October 2024**

Criminal Law – Section 181 of the Criminal Procedure Code (2021 Revision), Appeal Against Decisions of the Summary Court on Conviction and Sentence, Principles on Appeal, Absence of Record of Evidence.



SUMMARY COURT APPEAL JUDGMENT

- 1
- 2
- 3 1. By Notice of Appeal filed 20th February 2024 the appellant appeals his conviction after trial
- 4 and sentence for the offence of Importation of Fentanyl.
- 5
- 6 2. The grounds of appeal are:
 - 7 i. That the conviction is unsafe and unsatisfactory.
 - 8 ii. The sentence of 6.5 years for the importation of 0.09 grams of fentanyl was
 - 9 manifestly excessive. The Magistrate erred in concluding that the offence
 - 10 amounted to “trafficking in hard drugs” and applying a starting point of 8 years
 - 11 under the former Chief Justice’s 2002 sentencing guidelines.
 - 12

13 THE TRIAL PROCEEDINGS

- 14
- 15 3. The appellant is charged with Importation of a Controlled Drug contrary to s.3 (1) (a) of the
- 16 *Misuse of Drugs Act* (2017 Revision).
- 17
- 18 4. The particulars are that he on the 4th day of October 2022 in the vicinity of Owen Roberts
- 19 International Airport, George Town, Grand Cayman, Cayman Islands without lawful excuse or
- 20 without being authorised in that behalf, imported a controlled drug, namely 0.09 grams of
- 21 fentanyl.
- 22
- 23 5. The trial took place on the 31st July 2023, and a verdict was rendered on the 1st August 2023.
- 24 There are no notes of evidence provided and no verdict judgment.
- 25
- 26 6. There is a sentence judgment dated 13th February 2024. In that judgment the learned Magistrate
- 27 (“the Magistrate”) referred to the summary of facts of the prosecution as properly reflecting the
- 28 evidence heard during the trial.
- 29
- 30 7. The defendant arrived in the Cayman Islands from the United States on the stated date on an
- 31 American Airlines flight. His two suitcases and backpack were x-rayed at Customs and then
- 32 manually searched. In the front compartment of his backpack a white powdered substance was

1 found. This was confirmed to be fentanyl of the stated weight when it was subsequently tested.
2 The appellant was arrested and interviewed under caution on the 30th November 2022. He
3 exercised his legal right and answered no comment to all questions asked of him.
4

5 8. The appellant gave evidence at trial. The Magistrate stated that the principal issue for
6 determination was whether his case was accepted that he neither knew nor suspected or had
7 reason to suspect the presence of fentanyl in his backpack¹.
8

9 9. The Magistrate stated that all the evidence was considered including the appellant's evidence
10 that he had loaned his backpack to a friend after a baseball game. The Magistrate drew an
11 adverse inference from the appellant's failure to mention this fact during the interview.
12 Ultimately the Magistrate deemed his evidence to be untruthful and rejected his account. The
13 conclusion was that the prosecution satisfied the Court to the required standard that the offence
14 was made out in that the appellant had possession of the backpack and knew that it contained
15 fentanyl.
16

17 THE DECISION ON SENTENCE



18
19 10. The parties agreed a fact sheet and also produced a witness statement from Expert Forensic
20 Chemist Sasha Marie-Henry of the Cayman Islands Forensics Laboratory. This dealt with the
21 nature of fentanyl and included the following: -
22

- 23 i. Fentanyl is an opioid, which is a broad term used to describe a type of substance
24 that binds to receptors in the brain that control pain, pleasurable and addictive
25 behaviours.
- 26 ii. It is a synthetic substance.
- 27 iii. Clandestinely produced fentanyl is either as a powder or in counterfeit tablets.
- 28 iv. Fatal overdoses assisted with abuse of clandestinely produced fentanyl have
29 increased each year.

¹ Paragraph 3 of the sentence judgment

1 v. It has been determined that two milligrams or 0.002g can be lethal to a person
2 depending on their size, tolerance and usage.
3

4 11. The Magistrate determined that the guidance of the Court of Appeal in the case of *Michael*
5 *Palmer v R*² should be followed. This is that the definitive guideline for the sentencing of drug
6 offences in this jurisdiction is the *Statement on Tariffs and Guidelines for Sentencing for*
7 *Certain Offences* dated 16th January 2002. The United Kingdom guidelines may be helpful in
8 determining culpability and harm.
9

10 12. The Magistrate considered that there was no evidence from which the defendant's role and
11 level of culpability could be determined. It was concluded that he should be afforded the benefit
12 of the doubt and thus his role was assessed to be at the level of low culpability.
13

14 13. As to the level of harm, the Magistrate stated: -
15

16 "As observed by Mr. Barbour in his sentence submissions and as Mr. Hughes agreed during
17 his oral submissions, the assessment of harm is difficult in this case given that the level of
18 harm in fentanyl is specific to its potency and not just to the weight of the drug."
19

20 14. The Magistrate observed that this difficulty is reflected in the *United Kingdom Sentencing*
21 *Council Guidelines* which provides

22 "Category of harm

23 Indicative quantities of some common drugs, upon which the starting point is to be based,
24 are given in the table below. Where a drug (such as fentanyl or its agonists) is not listed in
25 the table below, sentencers should expect to be provided with expert evidence to assist in
26 determining the potency of the particular drug and in equating the quantity in the case with
27 the quantities set out in the guidelines in terms of the harm caused. **There will often be no**
28 **precise calculation possible, but courts are reminded that in cases of particularly**
29 **potent drugs, even very small quantities may be held to be equivalent to large**
30 **quantities of the drugs listed.**" (Emphasis added.)

² CICA 23/2019 Unreported Judgment dated 25th November 2020





1
2 15. The Magistrate concluded from the agreed fact sheet that the quantity imported by the appellant
3 is potentially a fatal dose for up to forty-five naive adults and thus carried with it significant
4 lethality.

5
6 16. The Magistrate stated:

7
8 “17. I take judicial notice of the increasing prevalence of fentanyl, and the effects of
9 exposure to this highly lethal drug, whether accidental or otherwise. Thus, in assessing the
10 harm attributable to 0.09 grams of fentanyl, there can be no question that even with small
11 quantities, it is amongst the highest level of harm capable of being attributed to drug
12 offences. Whilst the quantity or weight was relatively low, it is undisputed that even the
13 small quantity of fentanyl nonetheless carries with it significant lethality.”

14
15 17. The defence argued that this offence was one of possession not linked to trafficking and was
16 similar to importing small quantities of marijuana where such importers are usually sentenced
17 on the basis of simple possession.

18
19 18. The Magistrate referred to s. 3 (1) (a) of the *Misuse of Drugs Act* which provides that: -

20
21 “drug trafficking” means doing or being concerned in any of the following, whether in the
22 Islands or elsewhere — ... (c) importing or exporting a controlled drug where the
23 importation or exportation is prohibited by paragraph (a) or (b) of section 3(1) or a
24 corresponding law;”

25
26 19. The conclusion of the Magistrate was that the importation of fentanyl, which is a hard drug
27 under schedule 1 of the *Act* is a drug trafficking offence as stated in s.3 of the *Act*.

28
29 20. The Magistrate distinguished the way that importing small amounts of marijuana is treated as
30 being primarily because marijuana is not a hard drug unlike fentanyl which is almost
31 universally illegal and understood to be a highly dangerous drug due to its lethality.
32



1 21. The Magistrate applied the *Statement of Tariffs and Guidelines* 2002 with an 8 year starting
2 point on the basis that the amount involved was less than 2 ounces drawing a parallel with less
3 than 2 ounces of cocaine.

4
5 22. From this starting point mitigating factors including the absence of previous convictions and
6 what was described as the appellant's previously exceptional good character led to a reduction
7 in sentence of 18 months. The final sentence was therefore 6 ½ years or 78 months custody.

8
9 **THE SUBMISSIONS ON APPEAL**

10
11 **Ground 1**

12
13 23. Counsel for the appellant's primary submission on Ground 1 is that in the absence of notes of
14 evidence the appellant is being denied effective access to constitutional protection and the
15 conviction ought therefore to be set aside as unsafe and unsatisfactory.

16
17 24. The response from the Summary Court on the 25th June 2024 to Counsel's request for the notes
18 of evidence was: -

19 "Magistrate ... advised that the sentence judgement in the Appeal bundle includes
20 summary of the trial evidence, there are no notes."

21
22 25. On the 27th September 2024, this Court made a further inquiry through the Registry and the
23 Registry again received the same response from the Summary Court.

24
25 26. Counsel for the appellant says that it is impossible to properly advance the necessary arguments
26 in the absence of notes particularly so where as here, there has been a change in Counsel at the
27 conclusion of the trial.

28
29 27. Counsel refers to the difficulties in challenging the findings without fuller notes and highlights
30 the fact that a crucial issue in the case which led to the finding of guilt was the failure of the
31 appellant to mention in interview facts which he later relied on at trial. Counsel said that the
32 Magistrate rejected the appellant's explanation but did not give reasons for this. Counsel



1 submits that given the maximum sentence under the *Act* of 15 years it is imperative that a
2 convicted person has the means to adequately challenge the merits of his conviction in the
3 exercise of his lawful and constitutional rights.

4
5 28. Counsel submits that the sentencing judgment of the Magistrate contains only a broad overview
6 of the allegations and details of four questions and answers from the evidence of the appellant.
7 This is not satisfactory for the purpose of advising on an appeal.

8
9 29. Counsel submits that by s.175 of the *Criminal Procedure Code* (2021 Revision), the Appellant
10 is entitled to copies of evidence. This section provides:

11
12 “175. On an appeal by motion, the appellant, on serving written notice on or giving oral
13 notice to the Summary Court of that person’s intention to appeal, and on entering into
14 recognisances as aforesaid **shall be entitled to receive with all convenient speed a copy**
15 **of the evidence taken by the court in the case,** and also a copy of the conviction, order
16 or judgment made or given. A copy of the evidence and of the conviction, order or judgment
17 shall also be supplied by the Summary Court to the respondent as soon as the appellant has
18 complied with the requirements of section 169.” (Emphasis added).

19
20 30. Counsel also notes that by s.26 of the *Summary Jurisdiction Act* (2023 Revision), the
21 Magistrate is obliged to maintain a proper record of all proceedings before the Court.

22
23 “26. (1) Subject to any other law, in all proceedings before the court at every stage thereof,
24 the magistrate shall be responsible for ensuring that a proper record is maintained of the
25 proceedings and that the oral evidence given before such court, or so much thereof as the
26 magistrate considers material, is taken down in writing either by that magistrate or by a
27 Clerk of the Court under the magistrate’s supervision. Any such record of the evidence
28 shall be signed by the magistrate when the magistrate is satisfied that it is an accurate and
29 faithful record.”

30
31 31. Counsel submits that there was additional evidence in this case of a DNA Expert, Christian
32 Taylor who gave evidence that a mixed sample was detected on the bag which contained the



1 drugs. This is evidence on which the appellant relied in an effort to rebut the allegation against
2 him. Mr. Taylor was cross-examined on the DNA evidence. Yet there is no reference by the
3 Magistrate to any other witness who gave evidence and the rationale for accepting or rejecting
4 that evidence and of the evidence which led to the decision made.

5
6 32. Counsel submitted that on the basis of the decision in *Hamdi-Romanica v R*³ and s.7 of the
7 Bill of Rights, this conviction should be overturned as unsafe and unsatisfactory.

8
9 33. Counsel for the Respondent submitted in response that the conviction is safe and satisfactory
10 given the nature of the issues in the case and the notes which are available from the Magistrate
11 as recorded in the sentence judgment.

12
13 34. Counsel said that the starting point is s.7 (3) of the Bill of Rights of the *Cayman Islands*
14 *Constitution Order* 2009 which provides that: -

15
16 (3) When a person is tried for any criminal offence, the accused person or any person
17 authorised by him or her shall, if he or she so requires and subject to payment of such
18 reasonable fee as may be prescribed by law, **be given within a reasonable time after**
19 **judgment a copy for the use of the accused person of any record of the proceedings**
20 made by or on behalf of the court.

21
22 35. Counsel adverted to the provisions of the *Criminal Procedure Code* and the *Summary*
23 *Jurisdiction Act* detailed above and submitted that it is accepted that there is a positive duty
24 placed on the Magistrate to ensure that a record is made and that this is provided to an appellant
25 when requested.

26
27 36. Counsel said however that by reference to the decision of the Grand Court in the case of *Hamdi-*
28 *Romanica v R*⁴, the absence of a record is not fatal to a conviction but that each case must be
29 decided on its own particular facts based on the principle of natural justice.

30

³ [2021 (1) CILR 728

⁴ [2021 (1) CILR 728



- 1 37. In that case the Grand Court held that the absence of a proper record of the proceedings in the
2 Summary Court placed the appellate court in difficulty in considering an appeal. The Court
3 quashed the convictions and remitted the case to the Summary Court for retrial.
4
- 5 38. Counsel submitted that the instant case can be distinguished from *Hamdi-Romanica* in three
6 ways:
7
- 8 i. There appears to have been several material discrepancies in the case for the
9 prosecution which were not properly considered by the Magistrate. There are no
10 such issues in the instant case.
11
 - 12 ii. In *Hamdi-Romanica* the issue was credibility, while in this case the appellant had
13 the reverse burden to disprove knowledge of the contents of the backpack.
14
 - 15 iii. There is no difficulty with resolving inconsistencies in the instant case.
16
- 17 39. Counsel produced an affidavit from Counsel for the prosecution who had conduct of the trial.
18 Attached to this is a note of the oral verdict judgment delivered by the Magistrate.
19
- 20 40. Counsel accepted that there is no reference in the sentence judgment to the fact of the DNA
21 evidence but submitted that this does not affect this Court's ability to assess the evidence and
22 reasons of the Magistrate. Counsel submits that the basis on which the Magistrate found the
23 appellant guilty of the offence charged is clear. The reason for not accepting the appellant's
24 case was clearly stated.
25
- 26 41. Counsel submits that the notes which are provided within the sentence judgment contain so
27 much of the evidence as the Magistrate considered material and do place this Court in a position
28 to assess the reasoning of the Magistrate in a fulsome manner.
29
- 30 42. In this Court's view the circumstance of the absence of notes of evidence in this case is beyond
31 unfortunate. While there is no evidence of inconsistency between witnesses as obtained in the
32 case of *Hamdi-Romanica*, the appellant's Counsel points to the issue of the drawing of an

1 adverse inference, the absence of detailed reasons surrounding this and the difficulty in
2 advancing the necessary arguments on appeal.



3
4 43. In the case of *Hamdi-Romanica* Chapple J stated: -

5
6 “33. As was said by Collett, C.J. in *Smith v. R.* (1), referring to a magistrate’s duty, under
7 s.26 of the Summary Jurisdiction Law as it then was (the wording has not changed), to take
8 a note of the evidence (1998-89 CILR at 167):

9
10 “One reason for this is that an appeal is not by way of re-hearing, unless the Grand
11 Court so directs, is decided from the record. It follows that if the Grand Court is
12 to be able to determine what led the magistrate to his verdict, not only must the
13 record be complete but some form of reasoned judgement is desirable. Without a
14 proper record of proceedings and without a record which led the magistrate to his
15 decision it is extremely difficult for the court charged with hearing an appeal to
16 determine whether the decision of the magistrate was arrived at properly.”

17
18 34. In *Smith*, there was no record of the proceedings beyond the bald verdict and sentence.
19 I make clear that here there is very much more assistance provided by the magistrate in her
20 ruling. That said, given the absence of any reference to two clear and obvious points
21 supporting the defence case, this court finds itself in the same position as Collett, C.J., that
22 is to say (*ibid.*) “it is extremely difficult for the court charged with hearing an appeal to
23 determine whether the decision of the magistrate was arrived at properly.

24
25 35. In the 30 years or so since *Smith*, practice and requirements have moved on
26 substantially. It is a principle of natural and open justice that a party to proceedings is
27 entitled to know why evidence apparently supporting their case had been rejected.”

28
29 44. In the instant case in the absence of a full record of what had been said about the appellant’s
30 statements or absence of statements, it is noted that the appellant asserts an inability to properly
31 present an appeal.

1 45. I accept as the appellants' Counsel submits that this is a serious case with possibly high
2 penalties, the appellant must therefore have the means to adequately challenge the merits of the
3 conviction.

4
5 46. The issue is whether what has been provided allows for this to occur. I am mindful that a breach
6 of the duty to provide notes of evidence does not of itself mean that the conviction is unsafe
7 and unsatisfactory. The real question is what is the import of the breach?
8

9 47. The Magistrate did not believe the appellant and drew an adverse inference. It appears from
10 the note of the verdict judgment from Crown Counsel who prosecuted the case that the
11 Magistrate did discuss this in some detail.

12
13 48. In the sentence judgment the Magistrate did say this: -



14
15 “6. In coming to this decision, I drew an adverse inference from the Defendant’s failure
16 during the interview some 8 weeks following the discovery of the drugs at ORIA, to
17 mention any of the facts he later relied on during trial. Despite the Defendant’s evidence
18 during the trial that he gave a no-comment” interview on the advice of his attorney, I was
19 not satisfied that the defendant genuinely or reasonably relied on the advice- *R v Beckles*
20 [2005] 1 WLR 2829 (“*Beckles*”) Even if it was arguable that the Defendant genuinely
21 relied on the advice, I did not accept that the advice given was the true explanation for his
22 silence.”
23

24 49. There is no detail explaining the reason for not accepting that the appellant did not genuinely
25 rely on the advice of his attorney. If this was the end of the matter, very likely it could be said
26 that the Magistrate simply did not believe the appellant and as the tribunal of fact this was
27 within her discretion. However, the absence of reference to the DNA evidence adds another
28 layer. It is difficult to be able to properly assess how this was resolved in the absence of notes
29 of evidence or reasons for decision. As was the Court in the case of *Handi-Romanica*, this
30 Court is in difficulty and cannot properly assess the matter.
31
32
33



1 **GROUND 2- SENTENCE**

2
3 50. The appellant’s submission is that if the Court finds that the conviction should be set aside, the
4 Court should not order a retrial in circumstances where the sentence imposed is manifestly
5 excessive and where the defendant has already served some 64 months. Three grounds are
6 advanced: -

7
8 i. The learned Magistrate was wrong to assess this as a case of “*trafficking in hard*
9 *drugs*” warranting the highest level of harm categorisation. A more nuanced
10 approach was required.

11
12 ii. The learned Magistrate was wrong to take judicial notice of the “*increasing*
13 *prevalence of fentanyl*” and to rely on it in the way she did in arriving at her
14 sentence.

15
16 iii. The factors above led the learned Magistrate to arrive at a sentence that was
17 manifestly excessive in a case involving 0.09g of the drug.

18
19 51. Counsel submits that the 2002 **Guidelines** do not deal with substances other than ganja and
20 cocaine. Fentanyl is a novel drug to the Cayman Islands. Guidance should therefore be sought
21 from the United Kingdom Sentencing Council Guidelines. Counsel argues that even if those
22 **Guidelines** were to apply, given the small quantity involved it is clearly for personal use and
23 cannot be categorised as “trafficking in hard drugs”.

24
25 52. Counsel’s additional submission is that in sentencing the Magistrate stated that judicial notice
26 was taken of the increasing prevalence of fentanyl and the effects of exposure to this highly
27 lethal drug where accidental or otherwise. Counsel submits that taking judicial notice was
28 wrong in circumstances where this appears to be the first case of the importation of this drug
29 into the Cayman Islands. It could not therefore be a matter of such notoriety to permit the taking
30 of judicial notice (see paragraph 10-34 of Archbold 2024 Ed.). Counsel also submits that it was
31 inappropriate for this not to have been raised in discussions with Counsel before reliance was
32 placed on it and that no evidence of prevalence was led during the hearing.

1 53. As to whether this is a drug trafficking offence, Counsel submitted that notwithstanding the
2 definition in the *Misuse of Drugs Act* “the Court must step back to ensure that it is operating
3 in the real world”. Counsel said that drug trafficking is defined by the United Nations Office
4 of Drug and Crime as

5
6 “A global illicit trade involving the cultivation, manufacture, distribution and sale of
7 substances which are subject to drug prohibition laws.”
8

9 54. Counsel submits that in this case, there is no evidence of trading, all that there is, is a young
10 man of exemplary character with a small bag of powder and this can only have been for
11 personal use.
12

13 55. Counsel says that when the criteria in *Comrie v R*⁵ is applied of role, quantity and character,
14 the sentence in this case, should be towards the lower end of the spectrum.
15

16 56. Counsel for the Respondent in reply submitted that the Magistrate properly and correctly
17 considered the relevant sentencing principles and correctly applied the guidance and the 2002
18 *Guidelines* which provide for a starting point of 8 years.
19

20 57. Counsel submits that there was an abundance of evidence before the Magistrate in order to
21 properly assess the level of harm and that the Magistrate given her role in the criminal justice
22 system was best placed to know the types of drug offences before the Court and to take judicial
23 notice of them.
24

25 58. In this Court’s view this was importation of a hard drug of an amount which had the potential
26 to cause the death of forty-five people. I cannot see how this could properly be treated as one
27 of simple possession. Moreover, the guidance provided in the United Kingdom *Guidelines*
28 suggest that in assessing harm there should be expert evidence as to the potency and on equating
29 the quantity in the case with the quantities set out in the *Guidelines*. In other words, a small

⁵ [2012] (1) CILR Note 3



1 quantity of a potent drug may equate to a larger quantity of another hard drug and thus fall into
2 the higher categories.

3
4 59. In the Cayman Islands this is clearly a Class A drug. The expert evidence which was before
5 the Court is that fentanyl is one hundred times more potent than morphine and fifty times more
6 potent than heroin.

7
8 60. My view is that it was open to the Magistrate to apply the starting point of 8 years imprisonment
9 on the basis of the expert evidence before the Court and the class of drugs. The next step
10 thereafter was to consider the mitigating factors and to apply an appropriate discount. It is not
11 accepted as defence Counsel submits that the appropriate sentence would be one of 9-12
12 months custody.

13
14 61. The submissions of the appellant with respect to Ground 1 of the appeal are accepted. The
15 conviction is set aside as unsafe and unsatisfactory for the reasons given above.

16
17 62. Given the conclusions reached as to sentence, the matter is remitted to the Summary Court for
18 retrial.

19
20 **Dated this the 15th day of October 2024**



21
22 **The Hon. Justice Cheryll Richards KC**
23 **Judge of the Grand Court**