

CIRCULATE

4/3/2003

OPEN COURT
IN THE GRAND COURT OF THE CAYMAN ISLANDS

~~CONFIDENTIAL~~ SIDE

BEFORE: The Hon. Mr. Justice Edwards

INDICTMENT NO: 39/02

REGINA

vs

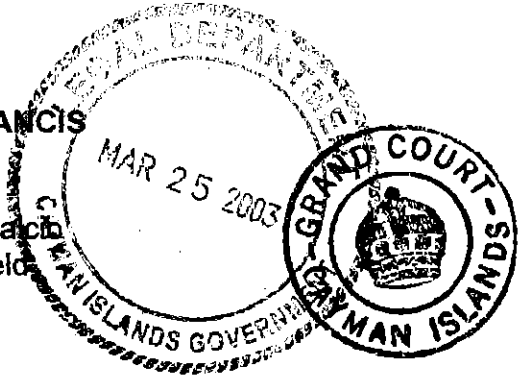
HERON FRANCIS

APPEARANCES:

Counsel for the Crown: Marlene Smith-Andatch

Counsel for the Defendant: Douglas Schofield

Heard: March 3 & 4, 2003



ERRATA

Edwards J.

1. The final sentence in paragraph 23 should read: "Clearly, although no evidence was found, neither Pablo nor Pablo's apparent willingness to take delivery of the cocaine were figments of the defendant's imagination."
2. The Reasons for Judgment are amended accordingly.

Dated this 11th day of March 2003

Judge of the Grand Court

OPEN COURT

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CRIMINAL SIDE

BEFORE: The Hon. Mr. Justice Edwards

INDICTMENT NO: 39/02

REGINA

VS

HERON FRANCIS

APPEARANCES:

Counsel for the Crown: Marlene Smith-Andalcio

Counsel for the Defendant: Douglas Schofield

Heard: March 3 & 4, 2003



REASONS

Edwards J.

1. The defendant is charged with doing an act tending to pervert the course of public justice. The particulars alleged in the indictment are as follows:

"HERON FRANCIS between the 8th day of November 2000, and the 16th day of November 2000, at George Town, Grand Cayman did an act tending and intended to pervert the course of public justice, in that he made false statements implicating OSNEY HENRY BUSH in being concerned in the importation of cocaine on the 01.10.99 and the 07.11.00,

intending the course of public justice should thereby be perverted.”

2. At the end of the Crown's case the defence brought an application for dismissal on the basis there was “no case”, based on the analysis in *R. v. Galbraith* [1981] 2 All ER 1060 at 1062f.
3. I granted the application and dismissed the charge indicating I would provide written reasons. These are those reasons.
4. The accused was apprehended November 7, 2000, by customs officials at Owen Roberts International Airport on suspicion of importing narcotics. When he refused an X-ray, he was detained until he defecated 37 pellets of cocaine. When officials discovered these in his cell there was an altercation.
5. The defendant was subdued and “hog-tied” with his arms handcuffed behind his back and a second set of handcuffs connecting with leg shackles while he lay face down on the floor for about an hour before being taken to hospital.
6. Photos show lacerations to the defendant's wrist. He claims the cuffs were so tight he lost the feeling in his hand for months. Photos show bruising to the defendant's neck. He claims he was kicked in the face and

that a foot was applied to his wind-pipe choking him while he lay face down.

7. Customs officials deny the defendant's allegations of excessive force. They testified that he struggled with them in an attempt to grab and dispose of the pellets they had discovered behind a partially removed baseboard in the cell and resisted when they tried to loosen the handcuffs when the defendant complained they were too tight.
8. In a number of cautioned statements ("the statements") the defendant told investigators he brought the cocaine to Cayman for delivery to Osney Henry "Pablo" Bush. He provided considerable detail of meeting Pablo on an earlier visit in 1999, and of the importation scheme in November 2000.
9. The defendant pleaded guilty to a charge of importing cocaine and was sentenced to nine years.
10. Pablo was charged on the strength of the defendant's statements. The defendant testified at Pablo's trial in the Summary Court on February 12, 2002, stating:

"a lot of things were not true" (in the statements)
"I now say that some of what I said to the police is not true"

"I realized that Pablo could get into trouble based on the statement"

"I was trying to help myself in giving the statement. I was trying to help myself by telling lies on him. That's why I am telling the truth now."

and

"I told untruths against Pablo"

according to the Magistrate's notes of the hearing.

11. The prosecution offered no further evidence and Pablo was acquitted.

12. The Crown bears the onus of proving that the statements given by the defendant "implicating [Pablo] in being concerned with the importation of cocaine on the 01.10.99 and 07.11.00" were false and made with the "intent that the course of justice should thereby be perverted."

13. It is clear that the statements are inconsistent with the defendant's testimony in the Summary Court at Pablo's trial, leading to the inference that either the statements or the testimony was false.

14. The Crown could not charge the defendant with perjury respecting the statements because they are not sworn.

15. Although the statements met the requirements of s. 26(1)(a) and (b) of the **Evidence Law**, the Crown could not charge the defendant under s. 26(8) because the statements were not "tendered in evidence" at Pablo's trial.

16. The Crown could not charge the defendant with perjury alleging the testimony he gave at Pablo's trial was false, in light of s 100 of the **Penal Code** which precludes a conviction for perjury "solely on the evidence of one witness". The only evidence that the defendant's testimony at Pablo's trial was false was defendant's own statements.
17. The Crown's submission was that the defendant's testimony at Pablo's trial to the effect that the statements were false should be accepted as proof of that fact for the purposes of the present charge.
18. In other words, the Crown asks the court to find the falsity of the statements proved to the criminal burden of proof on the testimony of the very person the Crown alleges gave false statements with the caution and therefore in the knowledge that he could be prosecuted for doing so.
19. Applying the analysis in **Galbraith**, defence counsel characterized the Crown's evidence as "tenuous". I agree. It is also "vague". The defendant's testimony at Pablo's trial does not specify in what respects the statements were lies or untruths about Pablo. In contrast, the statements give abundant details of Pablo's involvement in importing cocaine. These have a ring of credibility to them, as evidenced by the Crown's decision to prosecute Pablo on the strength of the statements alone.

20. Further, the Crown's evidence in this case, that is the defendant's testimony at Pablo's trial that he lied to implicate Pablo in the importation of cocaine, is "inconsistent with other evidence".

21. Jeff Jackson, the senior customs official involved in the investigation, testified that authorities knew or suspected Pablo was involved in the illegal drug trade. He further testified that the defendant supplied Pablo's telephone number and telephoned Pablo in a "sting" operation to report he had arrived with the cocaine.

22. Although equipment failure precluded the recording of this conversation, Mr. Jackson overheard the defendant's end of the conversation and understood from the defendant that Pablo asked him to deliver the cocaine to his home.

23. Mr. Jackson did not send the defendant to do so because he did not trust him, but he sent officers to search Pablo's home and arrest him. Clearly, although no evidence was found, neither Pablo nor Pablo's apparent willingness to take delivery of the cocaine were not figments of the defendant's imagination.

24. Although the defendant testified at Pablo's trial that he implicated Pablo to help himself, customs officers' statements and testimony are all to the

effect that the defendant's statements were all made voluntarily and without inducements or threats.

25. All of this inconsistent evidence leads to the inference that Pablo was indeed involved in the importation of cocaine and that the statements the defendant made to that effect are more likely true than is his testimony at Pablo's trial.

26. For these reasons I conclude that the submission of no case to answer must succeed because the prosecution evidence taken at its highest is such that a jury properly directed could not convict on it. Accordingly, the defendant is entitled to be acquitted.

Dated this 4th day of March 2003



Judge of the Grand Court

