23.4.85

IN THE GRAND COURT OF THE CAYMAN ISLANDS (Criminal)
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
APPEAL NO: 16/85

BETWEEN:	KENNETH HURLSTON	APPELLANT
AND:	REUEL RICHARD PIXLEY	APPELLANT
AND:	REGINA	RESPONDENT

Mr. Boni for the appellant Kenneth Hurlston.
Mr. M. Alberga for the appellant Reuel Richard Pixley.
Miss. L. Dilbert for the Respondent

REASONS FOR DECISION

On 17th April, 1985, I varied the sentences imposed on the appellant Kenneth Hurlston as follows:

(a) On 393/85 (the charge relating to 218 lbs. of ganga) by substituting for the fine of $10,000 or 12 months imprisonment in default a fine of $5,000 or 6 months imprisonment in default;

(b) On 390/85 (the charge relating to firearms) by substituting for the period of 6 months in default of payment of the fine a period of 3 months.

In all other respects I dismissed the appeal and confirmed the sentences in the lower court. In particular the terms of imprisonment in default of payment of the fines are still to be consecutive.

Earlier on the same day I had said that I would dismiss the appeal by the appellant Reuel Pixley, but after hearing the appeal by Hurlston, I said I would amend my decision in respect of Pixley by varying the sentence to substitute for the fine of $8,000 or 12 months imprisonment in default a fine of $5,000 or 6 months imprisonment in default but otherwise dismissing the appeal and confirming the sentence of the lower court. Pixley's conviction related to the attempted exportation of 324 lbs. of ganga.

I said I would subsequently give written reasons.

The first matter I want to explain is the amendment of the decision in respect of Pixley. When the appeals first came on for hearing on 16th April, they were to be dealt with one after the other and in fact Hurlston's appeal began first. But as it became clear from Mr. Boni's submissions that

he was contending that Hurlston had no previous convictions, I drew his attention to a criminal record card that had been placed loose within my bundle. This purported to show that Hurlston had earlier convictions for drug offences. By the entries on the card the words "Appeal dismissed" had been written in longhand. Mr. Boni insisted that the convictions had been set aside on appeal (which the Crown in fact accepts). The upshot was that I offered Mr. Boni an adjournment until the following day and the option of having his appeal heard before another judge. I then heard Pixley's appeal, and gave my initial decision on it on 17th April before Hurlston's appeal came on again. At the time, it had occurred to me that it would have been better to reserve my decision until I heard the Hurlston appeal, and in the event, having done so and reached a view, I decided to amend my decision in respect of Pixley, which I did on the same day.

On this aspect of the matter, I should add that Hurlston was agreeable for me to hear his appeal, but Mr. Boni on his behalf asked that I should direct the Crown to investigate the circumstances in which the criminal record card had been submitted to the court. I did not think it was appropriate to give a direction as such but Miss Dilbert said that her Chambers would be prepared to act on my request that an investigation be carried out as to how criminal record cards are kept, amended and produced in criminal proceedings to prove antecedent convictions of convicted persons, and to establish who marked Hurlston's record card "Appeal dismissed", why it had not been destroyed, and who delivered it to the court. I also asked to know the outcome of the investigation. I am inclined to think now that the request was too widely framed; my own interest is really in this particular occurrence.

Turning to the grounds of appeal, Mr. Boni submitted for Hurlston in relation to the firearm conviction that the learned Magistrate had imposed the maximum sentence, thereby infringing principles of sentencing by leaving himself no margin for more serious cases. He referred to the possibility of a person being found in possession of a rocket launcher to illustrate his argument. It is a colourful comparison but I do not think it is a sound one. The answer is that the unlawful possession of either weapon would be a grave matter. It was also argued that in passing sentence the Magistrate had indicated that he felt the firearms penalties were too light and that he accordingly "topped up" the sentences for the other offences but this was not substantiated. Mr. Boni also sought to dispute the Crown's statement that the weapon had been found with the silencer on it in a bag, which he said was physically not possible, and he further submitted that by imposing the maximum penalty the Magistrate had shown that he had not taken into account in mitigation the facts that these are Hurlston's first offences and that he readily pleaded guilty, that he showed contrition, and that he had a young family and had lost his job.

I cannot agree with these submissions. Accepting that the silencer was unfitted, and also that the fact that the appellant could on the same evidence have been charged with a more serious offence under the Firearms Law is irrelevant, the circumstances of this offence are themselves very serious and disturbing. They relate to a .45 calibre sub-machine gun, 114 rounds of live ammunition, a magazine and a silencer. It it not disputed that the magazine was loaded into the gun with 24 rounds when it was found. It is true that, usually, the facts that a person is a first offender and pleads guilty are mitigatory, but some offences are such serious instances of their kind that a severe, deterrent sentence is unavoidable. This is in my view such a case. The conviction has to be considered in the context of the other convictions before me (though without confusing the respective sentences). It would be naive to suppose that the existence of this loaded weapon and its accoutrements in the possession of a man also convicted of possession of a substantial quantity of ganga was anything less than sinister and disturbing. In my view the learned Magistrate correctly imposed a salutary sentence, and I will not interfere with it, except in the very minor respect of bringing the period of imprisonment in default of payment into line with that imposed in the charge 391/85.

In relation to the charge of possession of 218 lbs. of ganga, Mr. Boni relied on the mitigating factors to which I have already referred and submitted that the appellant was not a trafficker. He also drew my attention to a number of cases involving larger quantities of ganga, from which he argued that the fine was excessive and that the period of imprisonment in default amounted to an additional term of imprisonment.

Mr. Boni contended that 218 lbs. is at the bottom of the scale, but this is really to some extent a variation on the "rocket launcher" argument. Possession of 200 lbs. of ganga and of 16,000 lbs. are both serious offences. Of course the latter is more so but neither can be described as a minor offence.

I agree in principle that the fine should bear some reasonable proportion to the offender's means so that the period of imprisonment in default is not in reality merely an additional jail term, but is directed towards deterring a person who can reasonably be expected to pay the fine from not doing so.

However, the legislature has provided for substantial fines for drug offenders, in addition to imprisonment, to prevent persons from deriving illegal profits from their activities. Although the conviction is not for supplying as such, the court is in my view entitled to have regard to the quantity and to draw reasonable inferences from it as to the likely means of the appellant.

Balancing these considerations and the mitigating factors, I consider that the term of imprisonment of four years in respect of the larger quantity and the three-month concurrent term for the smaller quantity were in the circumstances not excessive. Having regard to the other cases to which I was referred, particularly "Sally Mae", "Cowboy III" and "Jernigan", I consider that the fine in the case of the sentence for the larger quantity and the period of imprisonment in default were excessive, and I therefore varied them accordingly.

I reached my decision in the case of Pixley for the same reasons. Mr. Alberga did not seek to challenge the sentence of imprisonment for four years. He argued that it had to be shown that the appellant Pixley had sufficient means to meet the fine, but by his own admissions he was paid for his assignment and I prefer the approach put forward by Miss Dilbert which is reflected in my reasoning given above.

The result of the appeals is that Pixley, whose conviction related to a larger quantity than Hurlston, has only to pay the same fine. The reasons for that are that the two quantities are more or less in the same "band", as it were, and that setting Hurlston's conviction in the context of all the circumstances of his arrest and prosecution, I think these two cases are of the same category really.

D. Ahern.

Puisne Judge

23rd April, 1985