In the Grand Court of the Cayman Islands
Holden at George Town

On 26th February 1980

Before The Honourable Sir John Summerfield

Criminal Appeal No. 25 of 1979

5-03-80

Hank Barnes
Shirley Kendal Ebanks
and
Clifford Rex Ebanks

v

REGINA

Mr. Harding for appellant
Mr. Martin for respondent

JUDGMENT

The appellants were convicted of attempted burglary. They were unrepresented at their trial before a court of summary jurisdiction.

One ground of appeal, supported by affidavits, was that the learned Magistrate failed to comply with section 67 (1) of the Criminal Procedure Code. Learned counsel for the respondent concedes that this was so.

The effects of such an irregularity was considered in the case of Turley Ebanks v Regina Cr. Appeal 28 of 1979 and I need only repeat here that it goes to the root of a fair trial and is fatal to the conviction. As in that case, the only question here is whether there should be a re-hearing pursuant to section 168 of the Criminal Procedure Code. In the Turley Ebanks case the unsatisfactory features of this provision were examined. There, nevertheless, remains a duty on the court to decide whether in the particular circumstances of a case that section should be invoked.

Before the court of summary jurisdiction the trial initially proceeded to the point where the first defendant had completed his evidence. The case for the prosecution had rested almost exclusively on alleged confessions by the three appellants in statements to a Police officer. In the course of his evidence the first appellant repudiated his statement. He said in effect that he gave no such statement.

At that stage the trial magistrate aborted the trial and ordered the trial to commence de novo for the admissibility of the statements to be determined.

In passing one should observe that a repudiation is different from a challenge to the admissibility of a statement i. e. a challenge that it was not a voluntary statement. The voluntary nature of the statement was never put in issue during the prosecution case.

In the first place, therefore, it seems to me that it was inappropriate to order a retrial at that stage. Whether or not the statement had been given and were correctly recorded was a question of fact for the trial magistrate to determine. The voluntary nature, which was not challenged, went to the admissibility only of the statements and all three had been admitted during the course of the prosecution case.

The trial was commenced de novo on a later date and in the course of the evidence in chief of the first witness (the officer who took the statement) a "trial within a trial" was commenced. There had, at that stage, been no challenge to the <u>voluntary nature</u> of the statements. There was merely an allegation that the appellant had been fooled into believing he was signing a a bail bond. For this reason alone a "trial within a trial" appears to have been inappropriate - if it is ever appropriate before a court of summary jurisdiction sitting, as it does, without a jury. The procedure of a "trial within a trial" appears to be designed to protect a jury from hearing evidence relating to the admissibility or otherwise of a statement which has to be determined by the Judge as a matter of law. In the court of summary jurisdiction the trial magistrate is judge of both fact and law.

Be that as it may be the trial proceeded to its conclusion. At neither the first trial nor the second trial were the mandatory provisions of section 67 (1) of the Criminal Procedure Code observed. The appellants gave evidence and called a witness.

There have, therefore, been two trials already. That alone appears to me to be a sufficient reason for not invoking the provisions of section 168 which would, in effect, amount to a third trial.

There are other unsatisfactory features about this case. The case against the appellants rested entirely on their alleged confessions. Bearing in mind that the statement of each appellant is evidence against him alone and not evidence against either co-accused, each statement had to be examined separately in relation to each appellant to determine whether it amounted

to a confession of the offence charged. The learned magistrate, in his reasons, makes no mention of the fact that this was his approach. There were some conflicts in those statements which also required careful consideration. On a full analysis of those statements I am not altogether convinced that they do in each case amount to an unequivocal admission of all the ingredients of the offence charged. In the absence of evidence from the occupant of the premises negativing consent to enter those premises to which, on the evidence, the appellants appeared to have free access a conviction would be unsafe on those statements alone.

All in all, I take the view that this is not a proper case to invoke the provisions for a re-hearing under section 168.

Accordingly, the appeals are allowed, the convictions are quashed and the sentences are set aside.

SIR JOHN SUMMERFIELD.

5th March 1980.