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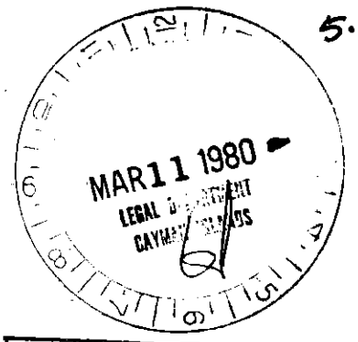


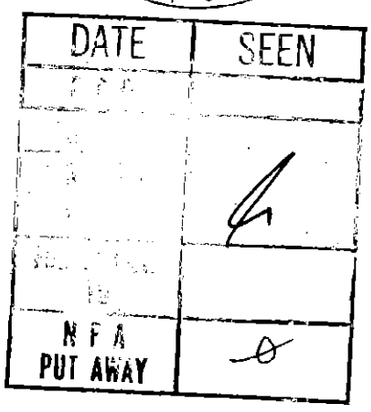


In the Grand Court of the Cayman Islands
Holden at George Town, Grand Cayman
On 26th February 1980
BEFORE THE HONOURABLE SIR JOHN SUMMERFIELD
Criminal Appeal No. 28 of 1979

TURLEY EBANKS
v
REGINA

Mr. Ritch for appellant
Mr. Martin for respondent

JUDGMENT

In this appeal against a conviction for the offence of burglary by a court of summary jurisdiction, the main ground of appeal is that the learned Magistrate did not comply with section 67 (1) of the Criminal Procedure Code. An affidavit setting out this irregularity has been filed.

Section 67 (1) is in the following terms:

"67. (1) At the close of the evidence in support of the charge, if it appears to the court that a prima facie case is made out against the accused person the court shall again where the case is not defended by Counsel explain the substance of the charge to the accused and shall inform him that he has a right to give evidence on oath from the witness box and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, in which case he will not be liable to cross-examination; and the court shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and shall then hear the accused and his witnesses (if any)."

The appellant was unrepresented at the trial. Learned counsel for the respondent conceded that, at the close of the prosecution case, the options set out in section 67 (1) were not explained to the appellant. He

was merely ordered into the witness box. He gave evidence and called witnesses.

Clearly the failure to observe the mandatory provisions of section 67 (1) amounts to a fundamental irregularity which is fatal to the conviction. Compliance with that provision is one of the cornerstones of a fair trial.

Section 168 of the Criminal Procedure Code provides:

> "168. On an appeal by motion, unless the Court considers the justice of the case required a re-hearing, the appellant shall begin, and unless he satisfies the Court that it is necessary to call on the respondent, the conviction, order or judgment shall be confirmed:
>
> Provided that, if the Court directs a re-hearing the respondent, if the issue is with him, shall begin and prove his case, and the Court may, if the justice of the case requires it, adjourn the hearing to some convenient day."

It is for consideration whether there should be a re-hearing pursuant to that section. It may be argued that if non observance of a procedural requirementresulted in a trial being less than fair then the proper solution is to re-try the case observing all the procedurial requirements.

In my view there is no power under section 172 to remit the matter to a court of summary jurisdiction for a re-trial. It would appear, however, that section 168 provides for a re-hearing before this court sitting without a jury.

Section 168 gives no indication of the circumstances in which such a re-hearing is appropriate, the procedure to be followed, the powers of the presiding Judge or other guidance as to the exercise of the power. It does not appear to give the appellant or respondent any right of election in the matter. As worded, it could be argued that the Judge determines whether there shall be a re-hearing without hearing either party. It provides that "... unless the court considers the justice of the case

required a re-hearing, the appellant shall begin.."

It is a singularly unhelpful provision for which I know of no precedent - the appellate court, at one and the same time, vacillating between being a true appellate court re-hearing on the record and a court of first instance. Formerly, in England there was an appeal from the decision of a Stipendiary Magistrate to Quarter Sessions. The appeal was a re-hearing in the full sense before a jury and there was no alternative (save in the special case of a case stated). That is quite a different matter.

However, one is obliged to give effect to the provisions of section 168 as best one can. I have, therefore, considered whether this case is one in which those provisions should be invoked.

Clearly there must be cases in which it is appropriate to invoke those provisions. I have concluded, however, that this is not such a case.

The case against the appellant depended on two accomplices. In fact only one of those accomplices gave evidence concerning a crucial element in the charge - entry as a trespasser. There was no corroboration. It is clear from the Magistrate's reasons for his decision that an element which influenced him was his disbelief of the appellant's evidence on account of his performance in the witness box. Had his rights been explained and he had elected not to go into the witness box that influencing factor would have been absent. Although not impossible, it would be difficult for the appellate Judge to disregard what the appellant stated in evidence. As it is, the Magistrate's finding could be said to have possibly come about as a direct result of the irregularity.

This is a "hybrid" offence, triable before a court of summary jurisdiction or on indictment. In the latter case it would be tried before a jury. It is not apparent from the record that the appellant was put to his election as to the forum for trying this offence. Learned counsel for the respondent assured the court that the appellant had elected summary trial and that is accepted. It should, however, have been recorded.

The appellant has already spent a month in custody in relation to this charge.

In all the circumstances, and without fettering the discretion of this court in any other case, I am of the opinion that it is not a proper case for the provisions of the proviso to section 168 to be invoked.

Accordingly, the appeal is allowed, the conviction is quashed and the sentence is set aside.

SIR JOHN SUMMERFIELD.

5th March 1980.