

IN THE CAYMAN ISLANDS COURT OF APPEAL

CICA (Criminal) No. 22, 23, 24, 25 & 29 of 2000
Summary Court Appeal No. 10 of 2000

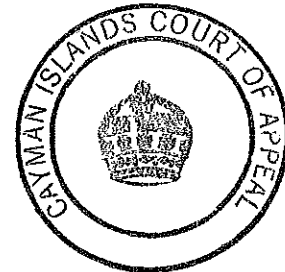
BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

GREGORY E. RIVERS
GEORGE I. DUFFELL
JOHN TODD RIVERS
ROBBIE RIVERS
JEAN ERIC SMITH



Appellants

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Rt. Honourable Mr. Justice P.T. Georges, J.A.
The Honourable Mr. Justice I. Rowe, J.A.

John Furniss instructed by Keith Collins & Co. for the Appellants John Todd Rivers and Robbie Rivers.
Appellants Gregory E. Rivers, George I. Duffell and Jean Eric Smith appearing in person.
Andrey Clarke, Crown Counsel, for the Respondent

August 7th and 17th 2000.

REASONS FOR JUDGMENT

ROWE, J.A.

All the appellants were convicted in the Summary Court on February 23rd 2000 after a very long trial. Gregory Rivers, John Todd Rivers and Robbie Rivers were convicted of being concerned in the possession of ganja with intent to supply and were each sentenced to two years imprisonment while George Duffell and Jean Smith were convicted of being concerned in the importation of ganja and were sentenced to three years imprisonment. Their appeals to the Grand Court were dismissed.

The case presented by the prosecution was that on December 8th 1998 a boat owned by appellant George Duffel, laden with twelve buckets and four sacks of ganja, amounting to 255.3 lbs., was captained by one Sidney Ebanks, a Caymanian, and there were two Jamaicans on board, to wit, Dwight Blake and Leroy Clarke. These three men unloaded the ganja and two other men John Webster and Justin Webster, who lived nearby, hid the ganja in some bushes (seven buckets of this ganja were later recovered by the Police). The five men proceeded to the house of the Websters. Mr. Ebanks left and contacted John Todd Rivers and George Duffell. He reported that the boat was sinking. John Todd Rivers drove the car of appellant Duffell, who was disqualified from driving, and together with Duffell and Robbie Rivers they went to the ironshore where the boat was endangered. Appellant Duffell's attempts to save the boat at that time failed. The two Jamaicans were taken from the home of the Websters to the home of John Todd Rivers and then were hidden in the bush by appellant Gregory Rivers, who also later brought them food.

Police investigations led to the arrest of appellant Duffell on December 9th 1998. The two Jamaicans were arrested in the bush off Watercourse Road, also on December 9th, and on that same day Robbie Rivers was arrested. Over the next four days Gregory Rivers, Jean Smith, John Webster and Justin Webster were arrested.

Plans for the importation of the ganja into Grand Cayman commenced in or about November 1998. The prosecution's evidence, which the Magistrate accepted, was that on

November 20th 1998 appellants Duffell and Smith flew to Jamaica on the same aircraft and sat beside each other during the trip. Duffell had paid for Smith's ticket to Jamaica. Duffell's boat was then in Jamaica in the custody of a man named Shaw who operated from Ferris, Westmoreland. The appellant Smith opened a cellphone account with Cable and Wireless, Jamaica and gave his address as Ferris, Westmoreland. He made calls to that number. As well, the cellphone was in the possession of Shaw, the custodian of Duffell's boat. It was on the basis that Smith and Duffell had been prime organisers of the importation that they were convicted of being concerned in the importation of ganja.

JOHN TODD RIVERS AND ROBBIE RIVERS

On behalf of the appellants John Todd Rivers and Robbie Rivers, Mr. Furniss filed five grounds of appeal. His first ground was that the learned Magistrate should have upheld the no-case submission and ought not to have ordered the amendment of the Information to change the charge from being concerned with the *importation* of ganja to one of being concerned with *possession* with intent to supply. He referred us to the decision of the Court of Criminal Appeal in R. v. West (1948) 32 Cr. App. R. 152, 160 where Humphreys J. said:

“The learned Judge, was in our opinion, entitled to exercise his discretion in directing the amendment, but he clearly should have invited the parties, and in particular the defence to express their views upon the matter before deciding to do so.”

In that case the Court held that the indictment charged three separate conspiracies in one count and was bad for duplicity on that ground.

Section 73 of the Criminal Procedure Code (1995) Revision, expressly provides for the amendment of charges and the procedure to be followed. Section 73 states, inter alia:-

“(1) Where, at any stage of a trial it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration or addition of a charge, as the court thinks necessary to meet the circumstances of the case.

Provided that where a charge is altered, added or submitted as aforesaid, the court shall thereupon call upon the accused person to plead to the altered or new charge.”

Mr. Furniss admitted that the learned Magistrate called upon his clients to plead to the substituted charge and that they entered pleas of not guilty. He stated further that he made no objection to the substitution of the new charge nor did he request the recalling of witnesses to be further examined or cross-examined. It is clear from the record and from the admissions of counsel for these two appellants that the learned Magistrate in exercising her discretion to substitute the charge of being concerned in the importation of ganja with intent to supply properly observed the statutory provisions and that she gave the appellants the opportunity to meet the substituted charge as is mandated by the statute.

It was argued as Grounds 2 through 5, that the learned Magistrate was wrong when she decided that the acts of taking charge of the two Jamaicans after the boat had swamped, giving them food and clothing and hiding them in the bush, necessarily implicated the appellants of being concerned in the possession of the ganja with intent to supply. There

was clear evidence that these appellants were awakened in the middle of the night and were certainly given information that Duffell's boat was sinking. They set out in Duffell's car to the ironshore. There is clear evidence that appellant John Todd Rivers then drove the two Jamaicans from the home of the Websters to his home, gave them clothes and food, awoke his brother Gregory Rivers and gave Gregory instructions to hide the men in the bushes. During the journey to his home John Todd Rivers told the two Jamaicans that "we lick the biggest shot here" and that they should not worry as there was a boat on the other side of the Island.

The learned Magistrate directed herself exhaustively on the issues of corroboration and of inherent unreliability of accomplice evidence which is not corroborated but decided that there was credible evidence from some portions of the evidence of the accomplice witnesses. Much of what she believed in relation to these two appellants came from the two Jamaicans who were hidden in the bushes and who gave full confession statements of their participation in the offence.

Applying the decision in Robinson & Hart v. R., SCA 161/90, the Magistrate held that the three ingredients which the prosecution had to prove on a charge of "being concerned" are:

- (a) that the substantive offence had been committed by another;
- (b) the defendant had knowledge of the nature of the offence; and
- (c) the defendant participated in the enterprise with such knowledge.

In our view the learned Magistrate was entitled to find that the evidence against John Todd Rivers satisfied the Robinson & Hart test set out above. His appeal was therefore dismissed.

Appellant Robbie Rivers went to the ironshore with Duffell and John Todd Rivers. There was evidence that at the Webster's home Robbie Rivers said to the boat Captain Ebanks that he was unable to "lick a good shot" on his own. However, in giving her reasons for judgment, the learned Magistrate was under the impression that Robbie Rivers was a passenger in the car which transported the two Jamaicans from the home of the Websters to the home of John Todd Rivers, that he would have been aware of the conversation between John Todd Rivers and the two Jamaicans and that he was present when the men were being given clothes and arrangements were being made to hide them. This was a misapprehension of the evidence. The record shows that Robbie Rivers was driven back to his home by John Webster. All the acts of Robbie Rivers could be explained on the basis of his interest in assisting Duffell to save his boat. No act on the part of Robbie Rivers subsequent to his arrival at the ironshore was proved by the prosecution to satisfy the ingredient of participation in the enterprise with knowledge of the completed offence by another. For these reasons we allowed the appeal of Robbie Rivers, quashed his conviction and set aside the sentence.

GREGORY RIVERS

This appellant filed a single ground of appeal in which he complained that the evidence against him was leading more towards a conviction of an immigration offence and the necessary ingredients for a conviction of being concerned in the possession of ganja with intent to supply were not proved by the Crown. The learned Magistrate considered a similar submission by the appellant and accepted that when this appellant was first awakened by his brother and given charge of the Jamaicans Blake and Clarke, the appellant had no knowledge that drugs were involved. She held however, that by hiding the men, the appellant realised that they were involved in something illegal. Then she found as a fact that by the time of his last visit to Blake and Clarke in the bushes to provide them with food, the appellant was aware that the illegal activity in which the men were engaged was importation of drugs into the Cayman Islands. Before us, this appellant contented himself in saying that he was not asked to take the men anywhere. He said he had been asked by the appellant John Todd Rivers to take the men alongside his house and he did so but the men were not hiding. He stated that he gave the men food on one occasion.

In our view there was no reason to interfere with the decision of the learned Magistrate in relation to this appellant. He had been given instructions to hide the men during the night and he did so. He visited the men where they were hiding in the bushes and brought them food. It was a pure question of fact for the determination of the magistrate and

there was evidence upon which the verdict was soundly based. We therefore dismissed his appeal.

JEAN SMITH

Although the Grounds of Appeal were filed by attorneys Samson Murray Jackson, the appellant appeared in person. The thrust of the grounds filed and relied upon before us, was that the conviction was unreasonable having regard to the evidence which was so flawed that the learned Magistrate was not entitled to believe parts and reject other parts thereof. The appellant complained that evidence which showed that he travelled to Jamaica on November 20th 1998 and sat next to appellant Duffell, that there was a telephone subscription in the name of Tiffany Smith in Jamaica, with No. 945-9136 as well as a telephone subscription in Jamaica in the name of Jean Smith of a Ferris, Westmoreland address and bearing No. 876-770-9696 when taken together fell short of the requisite standard of proof for an offence of being concerned in the importation of ganja in this case. In addition he complained that the evidence of Sidney Ebanks in connection with the arrangements for the shipment of ganja was contradictory and unreasonable and that the evidence of the Websters was similarly unreasonable.

The Magistrate has unchallenged evidence that appellants Duffell and Smith travelled to Montego Bay on November 20th 1998. Appellant Smith stated on his Immigration Card that he intended to stay at the Holiday Inn in Montego Bay. That was not true but appellant Smith explained that he did so as a matter of convenience, as he did not know

exactly where he was going to stay that night. Appellant Duffell testified that he and appellant Smith went to the home of Bernard Shaw in Savanna-la-Mar for the week-end. Appellant Smith denied this. The Magistrate accepted that appellant Duffell testified truthfully on this point and rejected the evidence of appellant Smith and his witness that the appellant could not have been at Shaw's house on this weekend. The only significant portion of the evidence of the boat captain Ebanks which the Magistrate accepted is that appellant Smith telephoned Shaw in Jamaica just before the boat left for Grand Cayman and that Ebanks had a brief conversation with appellant Smith on that occasion.

In our view the Magistrate was entitled to find that it was entirely too much of a coincidence that the appellant Smith activated a cellphone with an address in Ferris, Westmoreland; that Shaw who had custody of Duffell's boat was from Ferris, Westmoreland; that Ebanks would know of a telephone call by appellant Smith to that particular telephone number on the day when the boat left from Jamaica to Grand Cayman and that the appellant Smith turned up at Webster's premises the day after the arrival of the boat in Grand Cayman. With excellent exercise of discretion, the learned Magistrate rejected the evidence of the accomplices wherever there was no supporting evidence. Notwithstanding the spirited manner in which the appellant Smith presented his appeal, we found no merit in his submissions and dismissed his appeal.

GEORGE DUFFELL

Appellant Duffell was convicted of being concerned in the importation of ganja (255.3 pounds) with intent to supply. He was sentenced to a term of three years imprisonment with a reduction of time spent in custody. An order was entered for the forfeiture of the appellant's boat (which had been refloated by the Government) and his Honda motor car in which he and others had driven to the ironshore on December 8th 1998 from the house of the appellant John Todd Rivers. He did not appeal against his conviction nor against the forfeiture of the boat and engine. His only appeal was against the forfeiture of the motor car.

Mr. Duffell submitted that the money which he had used to purchase the Honda motor car was legally obtained by him and had nothing whatever to do with a drug offence. The Court explained to Mr. Duffell that forfeiture under Section 24 (2) of the Misuse of Drugs Law (1995) Revision, was not conditioned upon a showing that drug money had been used wholly or partially in the acquisition of the vessel the subject of the forfeiture. That section mandatorily provides that where a person is convicted for an offence under the Misuse of Drugs Law, the Court shall enter an order of forfeiture where it is satisfied that any vessel in the possession or under the control of the convicted person has been used in connection with or for the purpose of committing or facilitating the commission of such offence.

It was submitted to us that John Todd Rivers had no permission to drive the appellant's motor car. That submission runs entirely counter to the mass of evidence provided in the case. John Todd Rivers was operating the car in which the appellant was a passenger for the reason that the appellant was disqualified and could not drive. The two Jamaicans, inter alia, were transported in that car to the home of appellant John Todd Rivers. In those circumstances, the Court could properly conclude that the Honda motor car was subject to forfeiture under the Act. In the circumstances of this case where Mr. Duffell was not appealing against his conviction, this appeal was bound to fail.

Mr. Duffell was very concerned that both his boat and the car had been sold by government agents prior to the hearing of his appeal. Crown counsel assured us that it is not the policy of the Government for such sales to take place until the convicted person has exhausted his local remedies. Government's official policy in matters of sales of forfeited property should be adhered to strictly. This appeal was dismissed and the order for forfeiture affirmed.

These then are the reasons for affirming the convictions and sentences of all the appellants, except Robbie Rivers, whose conviction was quashed and his sentence was set aside.

