LUISA WAKEHAM v STATE

HIGH COURT — APPELLATE JURISDICTION

SHAMEEM J

13, 17 October 2002

[2003] FJHC 147

Criminal law — appeals — appeal against conviction — whether magistrate erred in fact and law — Criminal Procedure Code ss 154, 155 — Dangerous Drugs Act 114 ss 8(b), 41(2) — Penal Code s 4.

The Appellant was convicted and sentenced for possession of Dangerous Drugs. The decision to convict (called a "summary ruling" on the record) was undated but may have been delivered. The Appellant sought an appeal against her conviction upon the ground that the learned trial magistrate erred in law and in fact when convicting her.

Held — The learned magistrate failed to write a reasoned judgment and to record a significant part of the trial which lead to a miscarriage of justice. In her ruling, she failed to identify the points for determination. The first was whether the Appellant was "in possession" of the drugs on her version of the facts, and the second, whether she was "in possession" of the drugs on the version as given in evidence of Special Constable Niko and other police witnesses.

Appeal against conviction quashed. Retrial warranted before another magistrate.

Cases referred to

Land Transport Authority v Daya Shankar Sharma Crim App No HAA 34 of 2002; *R v McNamara* (1988) 87 Crim App Rep 246; *Tameshwar v R* [1957] AC 476; *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256, considered.

R v Lawrence (1968) 52 Cr App Rep 163; *R v Martin* (1872) LR 1 CCR 378, cited.

M. Raza for the Appellant.

L. Chandra for the State.

Shameem J. In August 2003, the Appellant/Respondent (to be referred to as the Appellant in this judgment) was convicted and sentenced to 18 months' imprisonment suspended for 3 years, on the following charge:

Statement of Offence

FOUND IN POSSESSION OF DANGEROUS DRUGS: Contrary to section 8(b) and 41(2) of the Dangerous Drugs Act 114 as amended by Dangerous Drugs Amendment Decree number 4 of 1990 and Dangerous Drugs Amendment Decree number 1 of 1991.

Particulars of Offence

LUISA WAKEHAM on the 13th day of March 2002 at Nasinu in the Central Division, was found in possession of 86.5 grams of Dangerous Drugs, namely Indian Hemp.

The decision to convict (called a "summary ruling" on the record) is undated but may have been delivered on the 29 July 2003.

The Appellant appeals against her conviction upon the ground that the learned trial magistrate erred in law and in fact when convicting her.

The state has also filed an appeal in this case, against sentence. The ground of appeal is that the learned magistrate imposed a sentence which was wrong in principle and manifestly lenient.

The evidence

The trial commenced on 23 June 2003, and continued on the 24 June. The prosecution called six witnesses. The evidence was that the police raided the Appellant's house at Votua Road on the 13 March 2002. They were searching for drugs and stolen property. On a search of the house a pink plastic bag containing 86.5 gm of Indian hemp, was found on the toilet seat.

During the search, Special Constable Niko Baleinoco was stationed at the back of the house. He saw the Appellant trying to throw the pink plastic bag out of the toilet window. When she saw the Constable, she took it back inside. He was standing 2 m away from her outside the fence.

The Appellant was interviewed under caution. She refused to answer a number of questions, but agreed that items had been seized from her house. She said she did not know who had brought the drugs to her house. It was suggested to her that she knew that the drugs were in her house, but she refused to comment.

The Appellant called five witnesses. She herself gave evidence. She said that she had been discharged from hospital on the 25 February and returned to her own home at Votua Road on the 11th of March. She said that when the police came to search her house, her son and one Michael Chandra (a known drug dealer) were at home. She denied going to the toilet or the bathroom during the 13 March. She said she had no idea how the drugs came to be in the house and said that she suspected that Michael Chandra had brought it there.

She said she had no idea that the packages were in her house and said that because she had previously informed on Michael Chandra to the police, she suspected that he had planted the drugs there for revenge. She said that the first time she saw the drugs was at the police station.

The Appellant's daughter gave evidence on the Appellant's illness. Her neighbour gave evidence that during the Appellant's absence from her house, Michael Chandra and some other boys were in her house smoking. She said that they threatened her and "were wrapping things up in silver things and there was so much money". A taxi-driver, Rakesh Lal gave evidence that he used to take passengers to the Appellant's house "to buy something" from one Michael, in February 2002.

In their closing addresses, the prosecution and defence summed up their cases. The defence case was that the drugs were found in the Appellant's house after a long absence from the house by her, due to illness. The defence said that Michael Chandra, a drug dealer had used the house to deal in drugs and that the Appellant knew nothing about it. The defence further said that the evidence of Special Constable Niko should be treated with caution because his view was obscured, and the window was five feet off the ground. The defence said that the drugs belonged to someone else and that the Appellant had no knowledge of the presence of drugs in her house.

The prosecutor said that the evidence of Special Constable Niko showed that the Appellant knew that there were drugs in her house. Further, pursuant to s 4 of the Penal Code, the Appellant had custody of the drugs because it was in her house.

The case was then adjourned for judgment. There is no judgment on the record, but there is a "summary ruling" which is undated. The ruling reads as follows:

> I have heard both the Prosecution witnesses and Defence witnesses. I have considered the entire evidence of PW's and DW's. I have also visited the scene with the prosecution witnesses and accused and her counsel.

> Having considered the entire evidence, I have to say that the important relevant witness is SC 1981 Niko who stated he saw the accused from outside trying to put the pink bag of marijuana through the window. PW3 Manoa supports officer Niko's evidence in that he went into the bathroom area and saw the pink plastic bag containing the marijuana hidden in the wood and corrugated iron. PW4 2690 Donald went with SC Manoa and confirms PW3's evidence corroborating his story.
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> Cross-examination by counsel did not discredit the PW's. I find Prosecution has proved their case beyond reasonable doubt and convict the accused as charged.

The case was then called on the 8 August 2003, and then further adjourned to 11 August for mitigation and sentence. The learned magistrate then imposed a sentence of 18 months' imprisonment suspended for 3 years. There is no reference to the tariff for drug offences, no indication of any starting point or of any scaling for aggravating and mitigating circumstances.

Appeal against conviction

In the course of his submissions, counsel for the Appellant submitted that the form of the judgment was irregular, that it failed to identify the issues for determination, and failed to show that the learned magistrate had considered the defence case. He referred to ss 154 and 155 of the Criminal Procedure Code as to the statutory requirements of a judgment.

State counsel opposed the appeal saying that the case against the Appellant depended on the court's view of Special Constable Niko, and that the learned magistrate had clearly accepted his evidence. She conceded that the form of the "ruling" was irregular but said that this court was entitled to infer that the ruling was in fact the judgment of the court.

Unfortunately the form and contents of the decision of the court is not the only irregularity on the record. The learned magistrate appears to have relied on a visit to the scene conducted in the course of the trial. However, no such visit is recorded. On the 17 February 2003, the prosecution was ordered to arrange a visit to the scene. When it was conducted, and under what circumstances, is not known. I consider that this is an opportune occasion to set out the way in which a scene visit (a view of a locus in quo) should be conducted.

A scene visit can be conducted at any time during the trial. The application for the visit must be set out in the record, with the views of the other party. A ruling should then be written setting out the reasons for the view. The scene visit is a part of the trial and the accused must be present. His counsel must be present. The prosecution and any witness who might explain the scene should also be present. Anything said or done at the scene must be recorded by the magistrate, as such evidence may be the subject of cross-examination. The magistrate must ensure that no improper communications take place during the visit to him/her (*R v Martin* (1872) LR 1 CCR 388). The scene visit must take place before judgment is delivered and preferably before counsel deliver their closing speeches.

Irregularities in the way a scene visit is conducted can lead to the quashing of the conviction. Thus, in *Tameshwar v R* [1957] AC 476, the Privy Council quashed convictions for robbery when it was disclosed that the judge had failed to attend the scene visit.

In *Land Transport Authority v Daya Shankar Sharma* Crim App No HAA0034 of 2002, I said:

> A view of evidence such as a crime scene, can be of assistance to any court, particularly when the oral evidence creates confusion and uncertainty about the scene. It may be

> useful in traffic accident cases, or scenes of alleged homicide. However counsel (or the accused) must make the application, the prosecution must be heard, and ruling delivered. Further, a view of the locus in quo (which must be properly recorded and must include all parties) is used to supplement oral evidence. It is not intended to be a substitute for oral evidence … A failure to follow proper procedures in the inspection of a scene outside the courtroom, can result in a material irregularity which may lead to the setting aside of a conviction or acquittal (*R v Lawrence* (1968) 52 Crim App Rep 163).

In this case, no notes were taken of the view of the locus in quo and I am unable to determine, whether it was properly conducted. This is a matter of some concern because in her summary ruling, the learned magistrate appears to have relied on her findings during the visit. The failure to record the visit is an irregularity.

Further, the "ruling" itself is brief, and fails to identify either the defence case, or the issues which were relevant in the trial. Section 155 of the Criminal Procedure Code provides as follows:

> (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the court in English, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it:

In her ruling, the learned magistrate failed to identify the points for determination. The first was whether the Appellant was "in possession" of the drugs on her version of the facts, and the second, whether she was "in possession" of the drugs on the version as given in evidence of Special Constable Niko and other police witnesses. The words "found in possession" have a legal meaning. They are defined in s 4 of the Penal Code as follows:

> (a) "be in possession of" or "have in possession" includes not only having in one's personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;
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> (b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.

The words "in possession" mean far more than simply having something in one's custody and under one's control. Although the House of Lords in *Warner v Metropolitan Police Commissioner* (1969) 2 AC 256, said that an offence of being in possession of drugs under the English Misuse of Drugs Act was an absolute offence, the speeches of their lordships defined the mental element which must be proved. Lord Pearce (at 305) said:

> I think the term "possession" is satisfied by a knowledge only of the existence of the thing itself and not its qualities and that ignorance or mistake as to its qualities will not excuse. This would comply with the general understanding of the word "possess" … The situation with regard to containers presents further problems. If a man is in possession of the contents of a package, prima facie his possession of the package leads to the strong inference that he is in possession of its contents. But can this be rebutted by evidence that he was mistaken as to its contents? As is in the case of goods that have been "planted" in his pocket without his knowledge, so I do not think that he is in possession of contents which are quite different in kind from what he believed.

Lord Wilberforce said, at 310:

> The question, to which an answer is required, and in the end a jury must answer it, is whether in the circumstances the accused should be held to have possession of the substance rather than mere control. In order to decide between these two the jury should be invited to consider all the circumstances … the "modes or events" by which the custody commences and the legal incident in which it is held. By these I mean, relating them to typical situations, that they must consider the manner and circumstances in which the substance, or something which contains it, has been received, what knowledge or means of knowledge or guilty knowledge as to the presence of the substance, or as to the nature of what has been received, the accused had at the time of receipt or thereafter up to the moment when he is found with it, his legal relation to the substance or package (including his right of access to it). On such matters as these … they must make the decision whether, in addition to physical control, he has, or ought to have imputed to him, the intention to possess, or knowledge that he does possess, what is in fact a prohibited substance. If he has this intention or knowledge, it is not additionally necessary that he should know the nature of the substance.

This definition conforms with the definition of "possession" in the Penal Code. It requires proof of knowledge of the presence of the receptacle that holds the drugs. It does not require proof of knowledge of the contents of the receptacle.

In *R v McNamara* 87 Crim App Rep 246, the Court of Appeal summarised the definition of "possession" thus (Archbold 2003, para 26-59):

1. A man does not have possession of something which has been put into his pocket or house without his knowledge.
2. A mistake as to the quality of the thing under the accused's control is not a defence.
3. If the accused thought that the thing in his possession was for instance, clothing or jewellery, then he is not in possession of it.
4. If the accused is in custody of a package or box, then the inference is that he is in possession of the contents. It is for the accused to prove otherwise and he must prove that he was a servant or bailee with instructions not to open the package and that he had no reason to suspect that its contents were drugs or he had no knowledge of the nature of the contents and that he had received the package in innocence.

The learned magistrate should have asked, and answered the following questions:

1. Was the plastic package under the Appellant's physical control?
2. Did she know of the existence of the package?
3. Did she therefore "knowingly" possess the drugs?

On the Appellant's version of the facts, she did not know that the package was in the house. If that version was accepted, she could not have been found guilty of the offence. If, however the magistrate accepted that she did know (on Special Constable Niko's evidence) then she should have asked herself whether the Appellant knew or believed that the contents were not illicit drugs. On the evidence of Special Constable Niko, she could have inferred guilty knowledge from the alleged attempt to throw the package out of the window.

The learned Magistrate did not ask herself these questions although counsel had made lengthy submissions on the meaning of the words "in possession." In failing to refer to the mens rea for the offence, she failed also to consider the defence case. A judgment, especially in the magistrates' Courts, does not need to be lengthy to deal with the issues which require determination. However there must be some indication that those issues have been considered, and decided upon.

The failure of the learned magistrate to write a reasoned judgment, and her failure to record a significant part of the trial, lead me to the conclusion that there has been a miscarriage of justice. The conviction cannot stand and must be quashed. It follows that the appeal against sentence need not be considered.

Result

The conviction and sentence are quashed. The offence is dated the 13 March 2002 and the Appellant has been on bail from the date the case was first called. She is alleged to have been in possession of a substantial amount of drugs. In all the circumstances a retrial is warranted. The Appellant must be retried before another magistrate.

Appeal against conviction quashed. Retrial warranted before another magistrate.