[1988–90 Gib LR 1]

IGNACIO v. CARUANA

SUPREME COURT (Alcantara, A.J.): January 15th, 1988

Criminal Procedure—appeals—appeals against conviction—notice of appeal—notice of appeal against conviction to state date of conviction and grounds of appeal—to assist respondent by informing him of case to answer at earliest possible stage—to assist court by directing it to areas of law for consideration

Criminal Procedure—charges—alternative charges—when particulars of lesser offence included within those of more serious charge prosecuted at same time, charges to be in alternative—conviction of possession of drugs with intent to supply precludes conviction of simple possession

Jurisprudence—justice—natural justice—notice of case to answer—notice of appeal to contain statement of grounds of appeal—to assist respondent by informing him of case to answer at earliest stage possible—to assist court by directing it to areas of law for consideration

Sentencing—drugs—mitigation—defendant to be given opportunity to enter plea in mitigation before sentencing

The appellant was charged in the magistrates' court with unlawful possession of cannabis with intent to supply, possession of cannabis, obstructing the police and dangerous driving.

The appellant was found to have been in possession of 186.8g. of cannabis resin, which he had thrown from his van while being chased by police, and more than £200 in cash. He was acquitted of dangerous driving, but was convicted of the other three charges, although all the ingredients of the lesser charge of possession of cannabis were contained within the charge of possessing the controlled drug with intent to supply. He appealed against conviction and sentence on both drugs charges.

On appeal against sentence, the appellant complained of two irregularities in the convictions: (a) that the drugs charges were in the alternative, and that he ought to have been convicted on only one of them, rather than both; and (b) that the Stipendiary Magistrate should have given him an opportunity to enter a plea in mitigation before passing sentence.

On appeal against conviction on the charge of possession with intent to supply, the appellant submitted that (a) he had not physically been in possession of the drugs, and, given that one of the police constables had

been found by the stipendiary magistrate to have been lying in his evidence, there was insufficient evidence to show that he had thrown them from the van, and (b) even if there had been enough evidence to show possession, insufficient evidence had been adduced to infer that he had an intent to supply the drugs; it was a conclusion to which the judge had come in the absence of evidence, which he was not entitled to do, as he lacked the experience of converting weight into doses or value that a police officer giving evidence would have possessed.

The respondent submitted in reply that (a) even though the drugs had not been found on the appellant's person or in his van, there was enough evidence to show that he had thrown them from the van, even taking into account the unreliable account of one of the prosecution witnesses, and (b) the items found in the van, together with the large quantity of cash that the appellant was carrying, could lead to the conclusion that he intended to supply the drugs.

Held, allowing the appeal:

(1) The appeal against the conviction of possession with intent to supply would be allowed, as there was not enough evidence to support it. While it was acceptable for a police officer, experienced in dealing with illegal drugs, to give evidence relating to a conversion of weight into doses or value, it was another matter for a judge, relying on the quantity of drugs found, to come to his own conclusions in the absence of such evidence. The prosecution should always give evidence on this point where intent to supply had to be proved. Here, no such evidence had been adduced, and in the light of the appellant's admission of drug use, the quantity of drugs involved—even when combined with the amount of money found—was not by itself enough to prove the appellant's guilt beyond all reasonable doubt (para. 3; paras. 16–17).

(2) There was sufficient evidence to support a conviction on the count of simple possession. If the conviction on the charge of possession with intent to supply had stood, the conviction on the lesser charge would have had to have been quashed, as when the elements of a lesser offence were contained within a more serious one being prosecuted at the same time, the charges should be in the alternative; however, as there had been no conviction for possession with intent to supply, a conviction for simple possession could stand. Although one of the prosecution witnesses had been lying, the remaining evidence was still strong enough to found a conviction (para. 3; para. 13; para. 15).

(3) The appeal against sentence would be allowed, on the two grounds that a conviction for a lesser offence had been substituted by the court, and that the judge had failed to present an opportunity for the appellant to enter a plea in mitigation before passing sentence, with the result that the appellant's mitigating circumstances had not been considered before sentencing (para. 4; para. 18).

(4) Notices of appeal should be completed fully, stating the date of

conviction and grounds of appeal, in order to assist the respondent by informing him at as early a stage as possible of the case which he has to meet, and the court by directing it to the areas of law that it is to consider (paras. 5–6).

Cases cited:
(1) *Dine* v. *Olivera*, C.A., Crim. App. No. 7 of 1987, unreported, applied.
(2) *Parody* v. *Golt*, [1987] LRC (Crim) 110, applied.

Legislation construed:
Criminal Procedure Ordinance (1984 Edition), s.287:

> "The Supreme Court shall have the following powers in relation to an appeal, other than an appeal upon a case stated—
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> (a) on an appeal against conviction, or against conviction and sentence, the power—
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> . . .
>
> (iii) to substitute a conviction for any other offence of which the appellant could have been lawfully convicted if he had been tried in the first instance upon an indictment for the offence with which he was charged or of which he could have been lawfully convicted by the magistrates' court; [or]
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> (iv) . . . to affirm the sentence passed by the magistrates' court or to substitute therefor any other sentence, whether more or less severe and whether of the same nature or not, which that court would have had power to pass . . .
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> and in any such case the Chief Justice may make any consequential or incidental order which may appear just and proper."

s.288: The relevant terms of this section are set out at para. 5.

C. Finch for the appellant;
J.M.P. Nuñez for the respondent.

1 **ALCANTARA, A.J.:** The appellant appeared before the magistrates' court charged with four offences: (a) possession of a controlled Class B drug with intent to supply; (b) possession of a controlled Class B drug; (c) obstructing the police under the Drugs (Misuse) Ordinance; and (d) dangerous driving. He pleaded not guilty to all charges. He was acquitted on the charge of dangerous driving, but was convicted on all the other charges. He now appeals against conviction and sentence on the drugs charges.

2 Mr. Finch complains of two irregularities. First, that the charges relating to the drugs were in the alternative and the appellant was convicted on both. This was wrong and Mr. Nuñez agrees with him. The authority for this is the Gibraltar Court of Appeal's decision in *Parody* v. *Golt* (2), where Blair-Kerr, J.A. had this to say ([1987] LRC (Crim) at 120):

> "[A]ll the ingredients of the simple possession charge were present in the more serious charge. As regards the latter, there was the additional ingredient of 'intent to supply'. Having found the appellant guilty of possessing the cannabis resin with intent to supply, no verdict should have been recorded on the simple possession charge."

3 In the present case, the appellant was convicted of being in possession of 186.8g. of cannabis resin with intent to supply and was sentenced to six months' imprisonment. On the charge of simple possession for the same amount he was also convicted and was given an absolute discharge. The lower court should not have recorded a conviction. The conviction of simple possession must be quashed.

4 The second irregularity complained of is that the learned stipendiary magistrate proceeded to sentence the appellant without giving counsel an opportunity to mitigate. This is accepted by counsel for the respondent, and it is obvious on perusing the record of appeal. This irregularity is sufficient ground to allow an appeal against sentence, though not against conviction.

5 Before I proceed to deal with the appeal against conviction on the charge of possession of a controlled Class B drug with intent to supply, I would like to say something about the notice of appeal. In the present case, the notice of appeal is most uninformative. Apart from not even giving the date of conviction, it does not state the grounds of appeal. The Criminal Appeal Rules are silent on this point, but s.288 of the Criminal Procedure Ordinance reads as follows:

> "(1) The Supreme Court upon the hearing of an appeal against conviction shall allow the appeal if it thinks—
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> (a) that the verdict should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or
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> (b) that the judgment of the magistrates' court should be set aside on the ground of a wrong decision of any question of law; or
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> (c) that on any ground there was a material irregularity in the course of the trial."

6 The notice of appeal should state whether the appeal is under sub-s. (a), (b), or (c), or a combination of any of them. Secondly, if the appeal is under (a), it should specify the circumstances; if under (b), identify the questions of law; and if under (c), spell out the irregularities. The respondent should be made aware of the case that he has to meet at an early stage, and the court should have its mind directed to the issues involved even before argument.

7 The relevant facts of the case are these. On the night of April 10th, 1987, the Police Drug Squad mounted an operation against the appellant. They found the appellant's van, G 51435, parked east of the Saccone & Speed building in North Front, and kept observation. One of the police officers was Det. Const. Golt. They saw the appellant getting into the van and driving off. The police followed. The van proceeded towards the Sun Dial, onwards towards Referendum House in Glacis, and into a car park. There were more policemen there. At that stage, the police tried to stop the van and one of the officers opened the driver's door. The appellant was informed that they were police officers, although not in uniform. The appellant paid no attention and drove off regardless at speed towards St. Anne's Road. One policeman had to get out of the way to avoid an accident.

8 The van then headed towards the Mediterranean Club. On reaching Elio Garcia Supermarkets, two police officers saw a yellow bag being thrown out of the window of the van. The appellant was driving. It landed against the side of a parked van. One of the police officers in the vicinity, Det. Const. Caruana, picked it up, and found it to contain two thin slabs and some small pieces of cannabis resin. The appellant's van then left the area and the police lost sight of it.

9 The appellant's van was later found near Sacarello's Garage in Corral Road. Two members of the Drug Squad requested the appellant to come out of the van, identifying themselves, but the appellant paid no attention. The appellant only came out of the van when a uniformed police officer, P.C. McGrail, arrived at the scene. By this time, the other members of the Drug Squad were at the scene. When the appellant came out, Det. Const. Caruana showed him the bag and its contents and informed him that he had seen it thrown out of the vehicle. The appellant's reply was: "It is not mine; I ran away because I did not know you were police officers."

10 The van was searched in the appellant's presence. No drugs were discovered, but the following items were found: five cut plastic bags; a box containing cuttings from cigarette boxes; a pipette; a roll of cellophane paper; a bag containing plastic bags; and a packet of Rizla papers. The appellant was later searched. No drugs were found on him, but he had a pouch containing £192 and 6,000 pesetas.

11 The appellant went into the witness-box and explained the presence of the items found on the van as either being for domestic use or consistent with him being a smoker of cannabis. The van is the appellant's home. He is separated from his wife and lives in the van with his girlfriend.

12 Counsel for the appellant based his argument against conviction on two grounds. First, that the appellant was never in possession of the drugs and, secondly, that the evidence adduced in the lower court is insufficient

to draw the inference that there was an intent to supply. Insofar as the first ground is concerned, counsel's contention is that the prosecution evidence is unreliable, taking very much into account that the learned stipendiary magistrate found as a fact that one of the police officers who gave evidence was lying. This is what the record of appeal says: "I agree that the bag was seen flying out. Golt is guilty of lying but the evidence of the other two is credible. I convict of possession and possession of 186g. with intent to supply."

13 In the same way as the learned stipendiary magistrate, who saw and heard the witnesses, came to the conclusion that one of the prosecution witnesses was a liar, he also came to the conclusion that the appellant was in possession of the drugs found. I am not prepared to go against this finding; indeed, I go further—there is more than sufficient evidence to convict on the charge of simple possession.

14 Mr. Finch then argues that even if there is sufficient evidence on the charge of possession, the evidence adduced is insufficient to draw the inference that there was an intent to supply. Mr. Nuñez argues that the items found in the van could lead to that conclusion, along with the fact that the appellant had over £200 on him.

15 Mr. Finch, having very much in mind what the President of the Gibraltar Court of Appeal said in *Dine* v. *Olivera* (1) on the conversion of weights of drugs into numbers of doses by a judge using forensic knowledge, argues that there is no evidence as to what 186g. represents: whether one dose, a number of doses, or supply for a finite period. Taking into account that the appellant was, on his own admission, a user of cannabis, the lower court or this court would not be entitled in the absence of other evidence to draw the inference that the amount in itself was sufficient to draw the conclusion that there was an intention to supply.

16 Taking into account the *dicta* of the Court of Appeal, I agree with him. There should be no difficulty in a police officer, experienced in offences relating to drugs, giving to the court a conversion of weights into doses or value. This should be done in all cases of offence where the intent to supply has to be proved.

17 I have come to the conclusion that I should allow the appeal on the grounds that, in all the circumstances of the case, the conviction of possession with intent to supply is unsafe and unsatisfactory. Pursuant to the Criminal Procedure Ordinance, s.287(a)(iii), I substitute a conviction for simple possession.

18 I have already allowed the appeal against sentence on the ground of irregularity, but, pursuant to s.287(a)(iv), I impose a sentence of three months' imprisonment. This I do for two reasons. First, because the appellant is now convicted of a lesser offence, and, secondly, because I

have been given his antecedents by his counsel; he is a man without previous convictions, who was working at the time and who was contributing towards the maintenance of his child.

Appeal allowed.