[1991–92 Gib LR 397]

TRINIDAD v. R.

COURT OF APPEAL (Fieldsend, P., Huggins and Davis, JJ.A.): October 12th, 1992

Evidence—prejudicial evidence—drugs-related items—ordinary household items may strengthen prosecution case if commonly used in supply and consumption of drugs and found in close proximity to controlled drugs—probative value greater than prejudicial effect

Evidence—character—previous convictions—Crown to obtain leave of court to question accused about previous convictions, even if evidence admissible under Criminal Procedure Ordinance, s.67—prima facie case for quashing conviction on appeal otherwise arises, as jury's assessment of accused may be influenced by raising issue

The appellant was charged with the possession of amphetamines and cocaine, and with possession of cocaine with intent to supply it to others.

In a search of the appellant's flat, police found 11g. of (40%) cocaine and some foil wrappers with traces of amphetamine on them in the pocket of the appellant's jeans in a bag of laundry. On a bedside table, a further 4.33g of (85%) cocaine was found in plastic wrappers, together with a metal container with traces of cocaine, various other wrappers, a steel cylinder and the stem of a ball-point pen with traces of an unidentified white powder, and a plastic cap bearing traces of bicarbonate of soda. In a chest of drawers, a mirror and a price list were found.

The appellant pleaded not guilty in the Supreme Court to the offences charged, stating that the drugs were not his, that a number of other people had access to the flat, and that damage to an internal door might indicate a break-in. He did not allege that the drugs had been "planted" by the police or anyone else.

During his cross-examination, Crown Counsel began to ask him whether he had any previous convictions. Counsel for the defence interrupted and objected that such a question was in breach of s.67 of the Criminal Procedure Ordinance. The jury was asked to withdraw, and the judge (Kneller, C.J.) disallowed the question. The proceedings are reported at 1991–92 Gib LR 354. During his summing-up to the jury, the judge referred to visitors to the appellant's flat as persons "known to the police," and outlined the appellant's explanation for the presence of the evidence in terms of a possible break-in or intrusion by other people with keys to the flat. The jury convicted the appellant on all three counts.

On appeal, the appellant submitted that (a) besides the cocaine itself, the various other items found on the bedside table and in the chest of drawers should not have been admitted into evidence by the trial judge, since they were more prejudicial than probative of the case against him; (b) the Crown should not have asked him about his previous convictions in the presence of the jury, since s.67 permitted such a question to be asked only in certain circumstances, *e.g.* when the accused had attacked the credibility of the prosecution, and in any event, leave should have been obtained to do so; (c) similarly, the judge's reference to his acquaintances as "known to the police" had been prejudicial, since the jury might have concluded that he associated with criminals; and (d) the judge had given too much emphasis to the possibility of break-in as an explanation for the presence of the drugs in the flat, and too little to the alternative, more likely, scenario that a person with a key had entered.

The Crown submitted in reply that (a) the close proximity of the miscellaneous items found to the drugs themselves meant that they were more probative of the prosecution case than prejudicial to the defence; (b) since Crown Counsel had been interrupted in asking about the appellant's criminal record, and no answer had been elicited, no prejudice had occurred; (c) the judge's reference to "persons known to the police" was not sufficiently prejudicial to substantially affect the jury's assessment of the appellant; and (d) since the appellant had offered no convincing explanation of the presence of drugs and other drug-related paraphernalia in his flat, the jury had properly convicted him.

Held, dismissing the appeal:

(1) Notwithstanding that most of the items found in the flat, besides the drugs themselves, were ordinary household objects, their location and proximity to the controlled drugs and their possible uses for mixing, wrapping and snorting cocaine made them sufficiently probative of the case against the appellant to outweigh their prejudicial effect. The trial judge had properly exercised his discretion to admit them as evidence. The defence's objection to their admission should have been made when they were tendered as evidence, not at the opening of the case (paras. 7–9; para. 23).

(2) The judge had correctly disallowed the Crown's question about previous convictions in cross-examination, on the basis of s.67(*f*) of the Criminal Procedure Ordinance. In practice, the leave of the court should always be obtained before putting such a question to the witness, since it had a discretion to exclude even admissible evidence. It was reasonable to assume that the jury, like the judge, had heard the offending question and been influenced by it. The necessary intervention of defence counsel and the subsequent request that the jury withdraw must have served to fix the issue in the minds of the jurors. Where such a question was put, a *prima facie* case arose for the quashing of the conviction (paras. 10–15).

(3) However, the appeal would be dismissed under the proviso to s.14(1) of the Court of Appeal Ordinance, since no miscarriage of justice

had occurred. Although the trial judge's reference to persons "known to the police" was unfortunate in its implication, it was not a sufficient ground for setting aside the convictions. Furthermore, he had mentioned both of the appellant's suggested explanations for the presence of the drugs in his summing-up, and the jury had obviously found neither convincing. Whilst the possibility that the appellant had offended previously might have influenced their view of his credibility, the evidence against him was virtually uncontradicted and the likelihood that the items belonged to another person who had placed them where they were found was very small (para. 16; paras. 18–22; para. 24).

Cases cited:

(1) *Barker* v. *Arnold*, [1911] 2 K.B. 120; (1911), 80 L.J.K.B. 820, *dicta* of Lord Alverstone, C.J. applied.
(2) *R.* v. *Brown* (1971), 55 Cr. App. R. 478; 115 Sol. Jo. 708, referred to.
(3) *R.* v. *Hammond*, [1941] 3 All E.R. 318; (1941), 28 Cr. App. R. 84, applied.
(4) *R.* v. *List*, [1966] 1 W.L.R. 9; [1965] 3 All E.R. 710, applied.
(5) *R.* v. *Pilcher* (1974), 60 Cr. App. R. 1; [1974] Crim. L.R. 613, referred to.
(6) *R.* v. *Sang*, [1980] A.C. 402; [1979] 2 All E.R. 1222, referred to.

Legislation construed:

Court of Appeal Ordinance (1984 Edition), s.14(1):

> "Upon the hearing of an appeal under paragraph (*a*) or (*b*) of section 9(1), the Court of Appeal shall, subject to the provisions of section 16, allow the appeal . . .
>
> Provided that the court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred."

Criminal Procedure Ordinance (1984 Edition), s.67:

> "A person charged with an offence . . . shall be a competent witness for the defence at every stage of the proceedings . . . :
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> Provided that—
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> . . .
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> (*f*) a person charged and called as a witness in pursuance of this part shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of . . . any offence other than that wherewith he is then charged, or is of bad character . . ."

K. Azopardi for the appellant;
A.A. Trinidad, Crown Counsel, for the Crown.

1 **DAVIS, J.A.,** delivering the judgment of the court: The appellant appeals against his convictions on an indictment containing three counts:

one of unlawful possession of an amphetamine; one of unlawful possession of cocaine; and one of unlawful possession of the same cocaine with intent to supply. The jury returned verdicts of guilty on all three counts, although one would have expected the last two counts to be treated as alternatives.

2 Unfortunately the mechanical recording device used at the trial malfunctioned, and we have before us a record prepared from the material available. We have no criticism of that record but obviously it is less satisfactory than a verbatim record, and where a dispute has arisen as to what actually transpired during the trial we have felt obliged to adopt a version which is the more favourable to the appellant.

3 The police suspected that the appellant was involved in dealing with drugs, and they obtained a warrant to search his flat at the Gibraltar Beach Hotel. They did not proceed immediately to the flat but kept it under observation from 10.30 p.m. on May 31st, 1991. About an hour later a man went to the door of the flat, knocked and whistled. There was no reply and he waited, although not always in the view of the watchers.

4 A few minutes later the appellant was seen to draw up on a motorcycle and dismount with a plastic bag in his hand. The appellant says he returned in a taxi. He waited and was soon joined by the first man. The appellant went into the next-door flat and then came out, still carrying the plastic bag, and both men entered the appellant's flat. The first man came out after some six or seven minutes and disappeared. Ten minutes after that a third man was admitted to the appellant's flat, but left shortly afterwards. The appellant then came out and went into his neighbour's flat. Later he came out, checked that his own door was locked and left the area with his neighbour.

5 Some 3½ hours later the appellant returned to his flat and the police moved in. As they approached, the appellant came out and was arrested. The police proceeded to execute their warrant with the assistance of a dog and his handler. The dog, which was trained to sniff out and locate cocaine, amphetamines, heroin and cannabis, went into the bedroom of the flat with its handler where it indicated the presence of drugs at the bedside table and also inside the wardrobe.

(a) In the front pocket of a pair of the appellant's jeans taken from a bag of dirty clothes in the wardrobe, the police found two plastic bags; one containing 11g. of powder which proved to contain 40% cocaine, and the other containing five metal foil wrappers, three of which had traces of amphetamines weighing 1.26g. The two bags and their contents were Exhibit JHA1 in the lower court.

(b) On a bedside table there were found three plastic wrappers (Exhibit CBA2 in the lower court) containing 4.33g. of powder, which proved to

contain 85% cocaine, and a set of keys which included a small metal container (Exhibit CBA1) containing traces of cocaine.

(c) In addition, the police took from the bedside table and put in as exhibits in the court below: (i) a foil wrapper; (ii) a paper wrapper; (iii) a red plastic cap; (iv) a stainless steel cylinder; (v) the stem of a ball-point pen.

(d) From a chest of drawers they took a mirror and a cardboard price list. All these items, except for the price list, had traces of a white powder, unidentified save that the traces of powder in the red plastic cap (Exhibit CBA5) were bicarbonate of soda.

6 On being shown the drugs found in the wardrobe, the appellant said: "They are not mine. I have never seen them before." On being shown the drugs from the bedside table, the set of keys with a metal container, the foil wrapper and the plastic wrapper, the appellant said: "That's not mine." He said the same on being shown the mirror from the chest of drawers. He made no comment on being shown the red plastic cap and the stainless steel cylinder. The appellant's defence was that the drugs were not his and that he had no knowledge of how they came to be in his flat. He suggested that someone else must have put them there, but he made no firm allegation as to who it was.

7 Mr. Azopardi, who appeared for the appellant, put forward a comprehensive and well-constructed argument on his behalf. A main ground of appeal was that the learned Chief Justice had, in the exercise of his discretion, wrongly allowed to be put in evidence the items in (c) and (d), above. Objection was taken at the outset of the trial to the admission of these exhibits, and it was agreed between counsel that the issue should be decided on the basis of the evidence contained in what has been described as "the docket" (which was a collection of witness statements prepared by the police) and to notices of additional evidence. That procedure opened the way for some of the arguments addressed to us on the appeal, and we would mention that, save in exceptional circumstances, the proper time to hear argument as to the admissibility of evidence is when such evidence is tendered and not at the opening of the case: *R.* v. *Hammond* (3).

8 The basis of the objection taken was a contention that the prejudicial effect of the evidence outweighed its probative value. It was an objection which was reasonably taken, but, it having been decided against the appellant, we see no ground for interference with the discretion of the judge. We are not persuaded that the learned Chief Justice misunderstood the scope of his discretion, for at the outset of his ruling he stated that both counsel were agreed that it was "a general discretion to exclude admissible evidence including, of course, exhibits tendered by the Crown if, in his opinion, its prejudicial effect outweighs its probative value" and

he cited *R.* v. *Sang* (6). His subsequent reference to *R.* v. *List* (4) and his decision that—

> "they are admissible, prejudicial and probative but in my judgment their prejudicial value does not outweigh their probative value and nor will their admission make them virtually impossible for a dispassionate view of the case to be taken thereafter by the jury,"

do not show that he applied the wrong test.

9 It is true that most of the items were articles which would ordinarily be found in a residence, but it was the locations in which they were found, the fact that controlled drugs were found nearby, and that one of them bore traces of white powder which, on analysis, indicated cocaine or a related compound that gave them relevance to the charges against the appellant. The fact that the white powder on most of the other articles was not, at that stage, shown to be in any way related to the possible abuse of controlled drugs did not of itself make the evidence inadmissible. As to the price list, there was evidence from which a jury might conclude that it related to an amphetamine.

10 Of more substance was the second point taken on behalf of the appellant, that he had in cross-examination been asked a question in breach of s.67 of the Criminal Procedure Ordinance. That question does not appear in the notes of evidence but in his ruling on admissibility the Chief Justice said (1991–92 Gib LR 354, at para. 13): "[Crown Counsel] also asked the defendant if he had previous convictions. Before doing that he should have asked the court for leave . . ."

11 It is common ground between counsel that the question was started and that counsel for the appellant intervened in an attempt to prevent its completion. Mr. Trinidad, for the Crown, believes that he did not complete the question, but the judge appears to have heard it and we were bound to assume in the appellant's favour that it was completed and that the jury heard it. Mr. Trinidad fairly concedes that that is right.

12 The section itself does not provide for the obtaining of leave, but it is established practice that leave should be obtained, as the judge has a discretion to exclude even admissible evidence. In the present case, upon objection taken, the judge did in fact decide to exercise his discretion in favour of exclusion. We should add that the Chief Justice was taken by surprise at the question, because he had not (as he ought to have) been supplied with a copy of the appellant's criminal record, and there had been no outright attack by the appellant on the conduct of the police.

13 The question was not answered, but it is contended that the damage had been done. Moreover, not only did the nature of the objection taken and the fact that the jury was immediately asked to withdraw tend to fix

the question in the minds of the jurors, but the judge did not at any time try to cure the irregularity. We doubt whether this was one of those cases where the damage could best be cured by saying nothing more about it.

14 In *Baker* v. *Arnold* (1), a case on appeal by way of case stated from magistrates, Lord Alverstone, C.J. said ([1911] 2 K.B. at 122):

> "The question, therefore, is an improper one forbidden by the Act, and undoubtedly if such a question is put a prima facie case arises for quashing the conviction, because this Court cannot say whether the minds of the justices may not have been affected thereby."

In that case the magistrates disallowed the question, and said that they had disregarded both it and an observation by the prosecutor that he had a certified copy of the conviction. The Divisional Court emphasized the fact that the justices were sitting without a jury and were able to indicate that they had not been influenced by the irregularity: a jury is unable to give any such indication.

15 It follows that where there is a jury an appellate court must assume that the irregularity may have influenced the verdict, unless the evidence for the prosecution was overwhelming. That is to say, there is a material irregularity, but no miscarriage of justice may have occurred and the proviso may be applied: see *R.* v. *Brown* (2), followed in *R.* v. *Pilcher* (5).

16 Finally, it was complained that the judge had misdirected, or not sufficiently directed, the jury on a number of points. These included, first, that the judge referred to two visitors to the appellant's flat as persons "known to" the police. This was unfortunate, because it might be misinterpreted by the jury as indicating that these persons were convicted criminals and thus have prejudiced the appellant by reason of his associating with known criminals or persons known to use drugs. This would not of itself have been a sufficient ground for setting aside the conviction.

17 Secondly, it was submitted that the judge had failed adequately to direct the jury as to the opportunities for someone to place the drugs in the appellant's flat without his knowledge. Mr. Azopardi submitted that excessive emphasis was given in the summing-up to the question of a possible break-in and insufficient reference was made to the fact that other people with keys had access to the flat. He contended that the judge should have reminded the jury in relation to both these possibilities that it was for the Crown to prove beyond reasonable doubt that the defendant was knowingly in possession of the drugs found in his flat.

18 While we accept that the judge appears to have given greater emphasis to the possibility of a break-in suggested by the appellant, he clearly drew to the attention of the jury the fact that hotel staff and the

appellant's neighbour had keys to the appellant's flat, and we are not persuaded that there is any merit in this complaint.

19 So far as the jury were concerned, the case boiled down to the question whether, in the light of the appellant's contention that he did not know of the presence of the drugs in his flat, they were satisfied that the Crown had proved its case. The appellant's credibility was the vital issue and the possibility that he had previous convictions, raised by the Crown's improper question in cross-examination, might therefore have influenced the jury in deciding whether to believe him.

20 The police evidence was virtually uncontradicted. The appellant could himself offer no firm explanation for the presence of the drugs in his flat. He said that the chambermaid, the housekeeper, the receptionist and the manager of the hotel all had access to his room with their pass keys; he said that when he went out on the morning of May 31st, he had handed his key to his neighbour. He also pointed to certain damage to an internal door and a chipped louvre pane as indicating a possible break-in, but the situation and nature of this damage was not consistent with a break-in.

21 The drugs were found in two places: in the pocket of the appellant's jeans, found in a bag in the wardrobe; and on the appellant's bedside table. The appellant said that on the morning of May 31st he had cleaned out the pockets of his jeans, he had then rolled up the jeans and put them in a bag with other laundry. The unlikelihood of a person wishing to secrete drugs choosing this as a hiding-place, considering the risk that the jeans might be taken away for washing before the drugs had been retrieved, and the further unlikelihood that anyone would simply put three wrappers containing cocaine on the bedside table, must, we think, have been present in the minds of the jury.

22 Similarly, we think that the jury must have appreciated that if the purpose of putting the drugs in the appellant's flat was to incriminate him it is unlikely that drugs to the value (according to the summing-up) of £3,000 would be risked by "planting" them there, and it was not alleged that the police had done this.

23 These factors are very strong in themselves but they are given added weight by the combined presence of a number of admittedly commonplace items which are associated with the use of drugs, namely: foil and plastic wrappers commonly used to wrap up doses of drugs; a holder of a ball-point pen which can be used for sniffing up (or "snorting") drugs; a mirror which can be used as a surface from which to sniff up drugs through a tube; a red plastic cap containing traces of bicarbonate of soda which can be, and is, used for mixing with cocaine.

24 We are satisfied that despite the material irregularity of the question as to his previous convictions put to the appellant in cross-examination

and despite the features in the evidence and the summing-up to which we have referred, the jury properly directed could have come to no other conclusion but that the appellant was guilty. Accordingly, we are satisfied that no miscarriage of justice has actually occurred in this case and, in accordance with the proviso to s.14(1) of the Court of Appeal Ordinance, we dismiss this appeal.

Appeal dismissed.