

IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS
CRIMINAL DIVISION

BETWEEN:

CYRIL SMITH

APPELLANT

-V-

THE CROWN

RESPONDENT

Hearing Date: 7th April 2014
Date of Decision: 17th September 2014

Mr. Cyril Smith Snr. in person
Miss. Oreika Selver for the Crown

DECISION ON APPEAL

BEFORE GOLDSBROUGH CJ

1. This is an appeal against conviction and sentence following a trial in the Magistrates' Court for various offences relating to the possession and supply of drugs. The Appellant faced a total of four charges, two concerning cannabis and two concerning cocaine. Two informations alleged simple possession and two alleged possession with intent to supply. The Appellant was convicted of two simple possession charges and of possessing cannabis with intent to supply, the fourth charge of possession of cocaine with intent to supply having been dismissed.
2. The allegation arose from information received by the police that the Appellant was supplying drugs from his home. As a result of this information they arranged for the

house to be placed under surveillance, eventually having watched the house obtained a search warrant and on execution of the search warrant found both Mr. Smith and a woman with whom he had a child or children within the same premises.

3. During the ensuing search drugs and drug related paraphernalia was found. Described as an attempt by the female to delay entry into a room described as a bedroom, the female spoke with police officers before they entered a bedroom from which Mr. Smith subsequently emerged. It was later within that bedroom that the cannabis and cocaine were found together with other items, some from a rubbish bin and some from around the room, for example from on top of a wardrobe.
4. "It is not in issue in this appeal that the substances found were indeed drugs. There is in fact no issue on this appeal that when confronted Mr. Smith said to police officers "I don't have any illegal drugs in my house, I threw it outside."
5. The issues raised in this appeal are whether the magistrate was too involved in the conduct of the proceedings, whether the Appellant could be said to be in possession of the illegal drugs as according to him he did not live there and generally whether the evidence of the police officer could be believed for various reasons put forward during cross examination in the trial at first instance.
6. Ownership of the house is immaterial to any of these charges. Many people inhabit houses that they do not own and still call them home and are in possession of all of their household goods within the meaning of possession within that house that does not belong to them. During the trial and on appeal the Appellant insisted that he did not live there, and called evidence at trial from a son who said the same. Yet he was there when the police decided to execute the search warrant and indeed was in the same room where the items were found.

7. Evidence was led that the surveillance evidence was unreliable because the house had no power supply, having been disconnected at some time. Although the defence witness also said this in evidence that evidence came after the same witness had described how the house was fitted with both internal and external lights.

8. A great deal of the case for the Appellant on appeal rested on the notion that he was unable to present a defence case properly as he lacked representation in the magistrates' court. It is evidence from the record that he was not represented at or during that trial, but it is equally evident that he was offered an abundance of opportunities to be so represented and failed to arrange that representation prior to the trial. On several occasions the trial was adjourned and further undertakings were given, in total three different lawyers in private practice were referred to by the Appellant, the first having been with him in the police station for the warned and cautioned statement. The other two were both contacted to ascertain if they were unavailable as asserted by the Appellant and several adjournments granted to secure their attendance.

9. As the magistrate said in the course of reasons Mr. Smith was not reticent about putting his case nor incapable of formulating questions of the witnesses. What he had to say about the case he said through his questions. So even if he was disadvantaged in not being represented and that lack of representation was not to be attributed to his own actions, he still was able to ensure that what he wanted the court to know about his defence was put before the court.

10. Indeed during the hearing of the appeal the Appellant demonstrated his knowledge of how to present a case. He was able to tell the court on his appeal that he had previously been able to admit possession in a lower court and then subsequently deny possession in a higher court and still be successful on appeal. He appeared to be quite proud of that achievement.

11. Throughout the hearing there were interventions by the magistrate. I do not find that any of these interventions demonstrated at all that the magistrate was interfering with the proceedings other than to clarify misunderstanding and to assist what was then an unrepresented litigant. That is part of the duty of the court where persons appear without the benefit of legal representation.
12. Failing as he did to arrange legal representation prior to the trial when he had been given ample opportunity to arrange the same is not a valid ground of appeal. If no time had been offered or if he had evidence of some insurmountable difficulty the position may be different but where it is clear that lack of representation was a result of his own culpable failure to arrange the same that position cannot then be used on appeal to further his own case.
13. Whilst it should not be necessary to do so I point out that the matter was adjourned from 2 April 2012 to 27 June 2012 to allow for the Appellant to obtain representation, thereafter from 23 July 2012 to 18 September 2012 to allow the Appellant to fully instruct his lawyer, from 11 October 2012 to 27 November 2012 when the Appellant told the court that his lawyer, now Mr. O Smith, was not available. By 12 December when the adjourned hearing resumed the Appellant indicated that his lawyer was to be a Mr. Chapman, but that Mr. Chapman was not available on that date. When counsel Mr. Chapman did not attend the resumed hearing on 29 January 2013 he advised the Court that he had not been retained.
14. It is also clear that throughout the trial the magistrate was alert to the proper requirements of possession and after finding the Appellant to be in possession then properly turned his mind to what was necessary to find intent to supply.
15. There were five witnesses called for the prosecution. The Appellant did not give evidence on his own behalf but called a son who testified that his father did not often live at the address where the illegal drugs were found. He further testified that he was

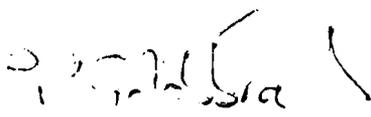
not often at home himself, being occupied with playing music. That evidence gave rise to the suggestion that if he was not himself at the premises for most of the time how he could proffer an opinion as to who was there most of the time.

16. The magistrate noted that the search was conducted during daylight hours when the Appellant was indeed present at the premises and was inside the bedroom where the items were found immediately prior to the search.
17. After a careful analysis of the relevant evidence and application of the law to the facts he found the Magistrate was of the opinion that the Crown had both proved its case and negative any potential defence that the tenor of the Appellant's cross examination had suggested, given that the Appellant himself did not give evidence.
18. In giving his reason the magistrate also set out as to why he did not feel that the prosecution had made out all of the necessary elements of intent to supply cocaine, noting that the evidence of packaging of the cocaine left him in doubt. He acquitted the Appellant of that specific fourth offence.
19. Given the time allowed for the Appellant to obtain the service of counsel and his failure to secure such services, taken together with the assertions he made that he had indeed instructed counsel which assertions were not true assertions, it is not a proper ground of appeal to submit that the Appellant was deprived by the magistrate of a fair trial. A trial can be fair whether or not a person is represented. It is the opportunity to instruct a lawyer that is important, for no one other than the client can give instructions. Provided sufficient time and opportunity has been afforded to instruct the lawyer, as appears and was the case here, there can be no subsequent complaint on appeal that the defendant was unrepresented through his own failure.
20. When dealing with an unrepresented accused it is incumbent on the presiding officer to take a greater part in a trial than when the accused has his or her own representation.

Again it is wrong on appeal to complain of the same when it is a necessary consequence of being unrepresented.

21. It is not a valid ground of appeal that other people might have been equally in possession of the same drug and drug paraphernalia as the Appellant. The judicial officer must assess the evidence as it is presented against each accused separately and determine as against each accused whether a charge of charges has or have been made out. It is not determinative of anything whether another person may concurrently be guilty of the same or similar offences.
22. It should be recorded for completeness that the Appellant sought and was granted adjournments of this appeal to allow for him to obtain representation. In the event he did not obtain such representation and the appeal was heard at his own request after numerous adjournment without him being represented. Other adjournments occurred when he failed to attend citing illness.
23. In the event the appeals against conviction are dismissed. There is an appeal against sentence although there were no substantial submissions on that aspect of the appeal, understandably given that the thrust of the appeal was against conviction.
24. The Appellant was sentenced to a period of imprisonment for the offence of possession of cannabis with intent to supply and ordered to pay fines of \$1000 for each of the two simple possession offences. Imprisonment in default of payment was also ordered. The Appellant has twelve convictions for offences ranging from theft and burglary to possession of cannabis. Included amongst those convictions are two earlier convictions for possession with intent to supply. In July 1996 he was sentenced to 18 months imprisonment for possession with intent to supply cannabis and in October of the same year 2 years for a similar offence. By 2006 he was sentenced to five years for the same offence although it appears that this sentence was reduced on appeal.

25. Given the three convictions here and the previous appearances for similar offences in the past, a sentence of six months is well within the range of available sentences. The sentencing magistrate took into account the guidelines set out in *de Freitas* in the Supreme Court and determined accordingly the sentence of six months. It may well not have been appropriate at the same time to impose two separate fines, which, unless the offender has the money to pay them immediately would only result in eventual imprisonment following the six month sentence.
26. The Appellant was released on bail shortly after conviction, indeed the same day. He has not as a result served any of his sentence. The order of this court is that the convictions and sentence of six months imprisonment for possession with intent to supply are confirmed and that sentence is to put into immediate effect. The sentence of \$1000 for possession of cannabis and \$1000 for possession of cocaine are altered to reflect a period of imprisonment of 30 days for each offence such imprisonment to be served concurrent to the sentence of six months. This is to allow the offender to be released without danger of being returned to custody in default of payment of the fines. It also reflects the fact that there could not have been possession with intent to supply the cannabis without the simple possession and therefore it would be wrong in principle to impose to separate sentences for effectively the same transaction.
27. In the event the appeal against conviction is dismissed, the sentence of six months for possession of cannabis with intent to supply confirmed and two concurrent sentences of 30 days each for the two offence of possession substituted for the \$2000 of fines previously imposed.


GOLDSBROUGH CJ