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BEFORE: The Hon. Mr. Justice Kerr, J.A. (Presiding)
The Hon. Mr. Justice Melville, J.A.
The Hon. Mr. Justice Robotham, J.A.

R. v. HEADLEY JOHNSON

Mr. H. Munroe, Q.C., and Mr. H. Harris
for the Appellant.

Mr. D. Hugh for the Crown.

November 24, 1978

KERR, J.A.

This is an application for leave to appeal against convictions and sentences in the Home Circuit Court on June 8, 1978, before the learned Chief Justice and a jury of the offences of importing cocaine and being in possession of cocaine.

On February 22, 1978, Norma Cammock, a Security Guard at the Norman Manley International Airport, whose duty it was to check the person of passengers by means of an electrical scanner, at about 1:30 p.m. on the day in question was checking the appellant, an intransit passenger about to resume his flight, when she discovered that he had two packages in his left foot socks and a similar in the right foot socks. She took possession of the three packages which the appellant said contained baby feed. She described the packages as being of transparent plastic with creamish tape over the plastic. In the appellant's presence she handed over the packages to Sergeant Palmer, the Immigration Officer. Later, at 3.00 p.m. she made another report to Corporal Walters of the Narcotic Squad.

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In a very limited cross-examination she admitted that the appellant was co-operative and that he handed over the packages to her when they were discovered. Webster Palmer, the Immigration Officer, said that the appellant was personally checked by him at about 1:20 p.m. He was an intransit passenger en route from Curacao to Nassau. He identified himself by a ticket and an American driver's Licence as an American citizen.

Sometime after 2:00 p.m., he was brought back to him by the Security Officer who, in his presence, made a report and handed over three packages. In answer to his questions, Palmer said the appellant told him a friend had strapped the packages to his left leg in Curacao and asked him to take them to Nassau.

On a further search Palmer found a fourth package similar to the other three. In the package was a whitish substance. Palmer described the socks as heel-less and toe-less. He contacted the Narcotic Squad and Corporal Walters came and the packages were delivered to him.

The brief cross-examination was limited to eliciting a reiteration by the appellant that a friend had strapped on the packages on to him.

Horace Walters of the Narcotic Squad said that in responding to information he received, he went to the Airport, arriving about 2:30 p.m., and in the Immigration Office he saw Cammock, Palmer and the packages. Palmer handed over the four packages and made a report. He opened the packages and saw a cream powdery substance. He told the appellant he was investigating a

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was acknowledged by Dr. Lee, an Assistant, who would then open the parcels to check that what was on the label corresponded with the contents. From Dr. Lee he so received the packages with information and identification.

The cross-examination was in the main concerned with changes in the substance and the analyst gave as his opinion that hydrolysis or change depends on with what chemical the drug was mixed.

The appellant gave evidence to the effect that he was Jamaican by his birth in Buckfield, St. Ann. Because of his job relations he resided both in Jamaica and the United States of America and he was a sales representatives for water purifiers; that in the course of his business he was in Curacao making his rounds when a man asked him to take the manathol which he said was in the packages to Nassau and to deliver them to somebody there.

He was cross-examined at some length in the course of which he said the man was a Leonard Harvey whom he met for the first time. Harvey said he would be met on arrival at Nassau but he didn't describe or name the person to accept delivery. When the packages were put to him he said that although the packages looked like the ones he got, their contents, when he got them were white. What is now exhibited was certainly not white but very close to brown. The packages were put in his socks at the suggestion and with the help of Leonard Harvey because his brief case was full and his trousers had no pockets. He had often carried his wallet in his socks and he wore socks of that size and make because they kept his calves and ankles tight and were specially good for doing exercises and other athletic acts. When Harvey told him it was manathol he didn't think anyone

would give him something to carry so that "If I was apprehended it couldn't be shown it was what he told me it is."

Of the grounds of appeal argued we propose to here deal with only the two grounds which we consider merit careful consideration. Ground one of the supplementary grounds reads:-

"The Crown failed to prove that the exhibits in Court were the exhibits that were allegedly taken from the accused."

In support Counsel contended that the progress of the exhibits embrace two segments of the evidence, one covered by the witnesses, Cammock, Palmer and Walters and the other by the analyst, Dr. Taylor.

In the first segment one witness described the contents of the packages as white and the other as creamish, while Dr. Taylor who had not actually received the parcels from the Police gave no description. The accused described the contents as being close to brown and in the judge's description to the jury he called it brown. Furthermore he said none of the witnesses for the Crown in evidence mentioned the colour of the contents of the exhibits in Court. Only the learned Trial Judge and the appellant did so - that there is nothing on the record to show that the jury's minds were adverted to the contents of the package as distinct from the outward appearance of it, and that the Prosecution was more concerned with the identification of the packages rather than their contents. Accordingly, in the absence of Dr. Lee and any evidence explaining the difference in colour between what was seen by the witness and what was produced in Court in relation to the contents of the packages there was a lacuna in the evidence and that gap could not be bridged by the Trial Judge leaving it as an issue to the jury.

Prosecution witnesses; no suggestion of any impropriety whatsoever nor was there any challenge as to the identification of the packages; no suggestion of any weakness or failure in the system by which exhibits were dealt with at the laboratory. The whole defence was centered around whether or not the appellant had knowledge of the contents of the package. It was only in cross-examination of the appellant that the question of the colour of the exhibits arose.

Notwithstanding, the Trial Judge left the issue for the determination of the jury in careful language in the following passage^s - page 8:-

"So it is for you to say whether you are satisfied that those packages, each one had a prohibited drug, that is to say, cocaine, which include a salt of cocaine, cocaine hydrochloride. If you are sure about that, then let's move on.

The next step is that the Prosecution must prove what Dr. Taylor found was in the possession of the accused in one case, or he had brought it into the island in the other case. And, of course, both of those things are the same."

Further on -

"Now you bear in mind that the accused had admitted that he brought four packages in but when those four in Court were put to him you remember what happened. He said outwardly they looked like the four that he brought in. He isn't saying that they are but the substance that he sees in these four packages in Court are not like the substance of what he brought in because what he brought in was white powdery stuff and this is a brown colour.

So the next thing you are going to have to decide is, do you feel sure or not, and the Prosecution must make you feel sure, that what is in those - well first of all, that those very packages in Court, together with what is now contained in them, which Dr. Taylor examined, are the identical ones that the accused had."

Then at page 12 -

"So you will have to trace this now and say whether you are satisfied on the evidence that in fact what is now in those packages is the same substance that was in the packages which these witnesses said that the accused had on his person. You will have to say whether you are satisfied and you feel sure

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that what is in those packages - well first of all that those packages contained - are the packages that the accused admittedly had on his person and that they contained the substance - the same substance which were in them when he had them on his person. And it is for you to say whether you believe and feel sure about that."

Again, at page 13 -

"If for any reason you believe that those exhibits in Court were not the exact ones that were on the person of the accused or if you are not satisfied, you don't feel sure that what is in them now is what was in them when the accused had it on his person, then you must acquit him. You must feel sure not only that the packages in Court are the same ones that he brought in, but that the substance which are now in them which Dr. Taylor examined and said was cocaine hydrochloride, that that substance was in them when they were brought in. So if you don't feel sure about any of them you must acquit the accused."

Finally at page 22 -

"If you find that, as I said, and feel sure about those four packages and their contents that they were the very packages and the very contents which the accused had on his person, and you remember I have said if you either believe that they were not or you are not sure for any reason that they are, you must acquit him."

We regard the directions in this regard as impeccable and hold that the issue was properly left to the jury for their determination.

Now the other ground is supplementary ground 4:-

"The learned Trial Judge misdirected the jury in stating that the applicant had admitted the packages were brought on his person."

This ground rested on an interpretation of one sentence on page 22 which is included in the extract quoted above.

When one takes all the passages in the summing-up dealing with this aspect of the matter, it is clear that what the Judge was leaving for the jury's determination is whether the packages which the accused admitted he had on him were the same packages which were delivered to the analyst and whether the substance which was analysed by Dr. Taylor was the same as that in the packages which were found on him.

In that regard, we are of the view that both grounds of appeal fail and that there is no real merit in the other ground argued.

For these reasons the application which involves points of law is treated as an appeal and the appeal is dismissed.

On sentence the Attorney for the appellant submitted inter alia that although the appellant was properly convicted on both counts, it was really one activity and in the circumstances of the case the charges were inescapable incidental to each other, that he was an intransit passenger and that the Trial Judge, in sentencing thought the amount was twice what it in fact was. Accordingly, the appeal against sentence is allowed. The sentence is varied to three years' imprisonment with hard labour on each count; sentences to run concurrently as from date of conviction.

case of cocaine and cautioned him. The officer said the accused said, "It's baby feed." He told him that the substance was cocaine and arrested him on these charges. He took the exhibit to the Narcotics Office and labelled the packages A, B, C, D. He wrapped them separately in brown paper making four parcels which he sealed and labelled. He took them to the Forensic Laboratory. On the 21st of February he delivered them to the clerk there. He returned on the 23rd and received back the parcels which he identified in Court, in particular, by his handwriting on them.

Again, the cross-examination was very limited and elicited that the appellant had given him the same explanation that the packages were strapped to his body by a man in Curacao, who asked him to take them to Nassau.

Dr. Taylor, the Analyst, after giving the scientific definition of cocaine, said that on February 24, 1978, he analysed the contents of the packages marked A,B,C,D, and found that the contents contained the drug cocaine hydrochloride. The mixing of cocaine with sugar, and other comparatively harmless substances called excipients was for dilution purposes. He gave the weight of each parcel: (A) - 210 grams, (B) - 150 grams, (C) - 190 grams and (D) - 180 grams. He said the mixture in each had 20 percent cocaine hydrochloride and that the mixture that is usually peddled on the street was between four to eight percent and it cost between \$25 - \$40 per dose of a few grams.

He said in accordance with the system in the Forensic Laboratory the exhibits were entered by the clerk and given a number for identification purposes. The receipt of the parcels

To these submissions, presented with commendable skill, we gave anxious consideration. In so doing we note that at page 9 of the transcript of the evidence in relation to the evidence of the witness, Cammock, after the packages were put in evidence the learned Trial Judge gave the following directions:

"Now tell me now, looking at them now, you see, as you pointed them out or identified them, do they have the cream plastic thing over them now?"

A: - Yes sir.

His lordship: - Pass one for me. Show it to the member of the jury, please."

And again during the evidence of Corporal Walters, that after he identified the packages A to D, His lordship -

"His lordship: - Now Sergeant, will you show them in turn with the paper to the jury one at a time, to the Foreman? 'A' first."

It is also clear from the record that the jury had as much opportunity as the judge in observing the contents of the parcel and perhaps more than the appellant did as there was no record of it being passed to him.

Accordingly, whatever colour the contents were, the reasonable assumption was that they, the jury, were aware of it. We notice also that in the evidence Dr. Taylor said at page 20, referring to cocaine - "It would be in the form of a powder. Its colour depends on the purity."

In fact the substance in the packages examined by the analyst was far from pure. Eighty percent were of excipients which included sugar. To ascertain whether or not Dr. Lee ought to have been called regard must be had to the nature and conduct of the defence. There was no challenge as to the handling of the exhibits by the