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CAYMAN ISLANDS

IN THE COURT OF APPEAL

CAYMAN ISLANDS CRIMINAL APPEAL No. 1/84

BEFORE: The Hon. Mr. Justice Zacca, President
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Ross, J.A.

R. v. SANTIAGO J. FRANCO; ROBERTO BENITEZ;
FELIPE TORRES AND ESTEVEZ BISONO

Mr. H. Hamilton, Q.C., and Mr. W.K. Chin See, Q.C.

for the appellants.

Mr. T. Scarborough and Mr. H. Smellie

for the Crown.

June 12, 13, 14, 15; &
November 26, 1984

PRESIDENT:

On June 15, 1984, we dismissed this appeal, and affirmed the convictions and sentences. We promised to put our reasons into writing. This we now do.

The four appellants were convicted before the Court of Summary Jurisdiction of the offence of possession of ganja contrary to s. 3(1)(i)(k) of the Misuse of Drugs Law and the offence of importing ganja contrary to s. 3(1)(i)(a) of that law. From these convictions the appellants appealed to the Grand Court. Their appeals were dismissed and they now appeal from that decision.

Two main grounds of appeal were argued. Firstly, that the learned Chief Justice having found that the learned Magistrate misdirected himself on the use of the cautioned statement and drew wrong inferences from the facts proved,

and found facts not supported by the evidence, he erred in upholding the convictions. It was submitted that the learned Chief Justice erred in holding that s. 176 of the Criminal Procedure Code gave the court a right to apply the proviso.

Secondly, it was submitted that the learned Chief Justice erred in holding that the evidence supported the view that the boat had stopped at another country after leaving Miami and before going to the Cayman Islands. This inference led the Chief Justice to find that the appellants had knowledge of ganja being on board.

The facts may be briefly stated. The boat on which the ganja was discovered was a 49 foot fibreglass diesel powered fishing boat. It was named the Cowboy III. It was equipped for blue water fishing and with navigational and other equipment. The boat was registered in Florida, and in the Port of Miami.

The owner of the boat was one Mr. Juan Jose Calvo. However, it was on charter to Mr. Ramon Cortez who contacted the first appellant on the 18th May, 1983, and they arranged to meet. The first appellant was unknown to Cortez. They had their meeting on the 19th May and the first appellant was hired as Captain and Navigator of the vessel. The first appellant contended that the assignment was a fishing expedition intended to last 10-14 days. The first appellant took over the vessel on the morning of the 20th May. The crew numbering three, being the other appellants, was not hired by the first appellant. They were already on board when he took command and probably were hired by Cortez. Provisions were also on board and the vessel set sail with the four appellants on board. Cortez did not accompany them but was in radio contact with the first appellant from time to time.

On Sunday afternoon, 29th May, the vessel docked at George Town with the four appellants on board. They were processed on arrival by Customs and Immigration before going ashore. Acting on information received the Acting Deputy Commissioner of Police had the vessel searched later that evening but nothing was found. The following morning the vessel was again searched by several police officers. A green carpet found on deck was rolled back. One of the witnesses Detective Inspector Connor stated that he noticed that the deck was freshly painted and that it was light blue in colour. Several tins of paint of similar colour were found on board. A check of ^{the} fuel intakes indicated that they were patched. The patch on the starboard side was removed with a hammer and chisel. A manhole cover was then observed. The patch concealing the manhole cover was made of fibreglass. Unused fibreglass matting was found in a cabin occupied by the appellants. On lifting up the manhole cover a quantity of bales were seen in a secret compartment. A similar operation was conducted on the portside with similar results. Ninety-nine bales were taken from the secret compartment. The contents were analyzed and found to contain ganja. The weight of the ganja was 5,030 lbs.

The appellants were informed that they were under arrest for the possession and importation of ganja. The appellants denied any knowledge of the ganja being on board the vessel. The learned Chief Justice accepted the observation that the ganja discovered was hidden in such a way that an innocent occupier would not have known of its presence, and could not have discovered it by the exercise of ordinary care and prudence. As the Chief Justice pointed out the first police search on Sunday evening did not result in the discovery of the secret compartment.

It will be necessary to set out the findings of the Magistrate and then to see how the learned Chief Justice dealt with them.

In his reasons for decision the learned Magistrate stated:

"Having weighed and evaluated the evidence and the demeanour of each witness, I found that the prosecution had discharged its burden of proof having proved much more than mere occupancy. The prosecution had adduced numerous facts from which could reasonably be inferred that all the accused were knowingly in control of the drug. I list below some of the proven facts and inferences drawn therefrom:

(1) Five thousand pounds of ganja loaded in aft section of a relatively small boat, 50 ft. in length. Reasonable inference drawn, that the Captain knew of its presence aboard.

(2) The minor fault with the sticking injector was not sufficient to necessitate a trip from the Mysterosa Banks to Grand Cayman. Having accepted Captain James Ebanks' evidence that they could have made it without coming in, the reasonable inference, the vessel came into Cayman for some other reason.

(3) The absence of any brush or rollers on board for painting purposes, although so much paint was provided and apparently some was used. Reasonable inference drawn, that the wet brushes or rollers had been discarded.

(4) The absence of any bait on board for the purpose of catching fish, the large amount of rotten fish aboard as testified to by Captain Ebanks who dumped over 100 lbs. and Alzee Walton who dumped over 800 lbs. The run down condition of all the fishing equipment which the court viewed. Reasonable inference, the fish aboard was a camouflage, a cover up for their main activity.

(5) The two large plastic containers placed on deck directly above the concealed man-holes. Reasonable inference that they were there to conceal any visible traces of the manhole covers.

(6) The fact that four men had been together on this boat from their departure from Miami, a relatively small vessel under the circumstances, reasonable inference, that they

"all knew of the ganja aboard and had control over it.

(7) I applied the principle of Law stated in Archbold's 39th Ed. Para. 1399 and again at Para 4077. I quote: 'The acts and declarations also of any of the conspirators in furtherance of a common design may be given in evidence against any other conspirator. R. v. Blake 6 Q.B. 126 and this principle applies when the charge is one of a crime committed in pursuance of a conspiracy whether the indictment contains a count for conspiracy or not, and it makes no difference as to the admissibility of the act or declaration against the defendant whether the former be indicted or not, as tried or not.' Reasonable inference drawn, that the boat with all four defendants stopped at an island immediately before coming to Cayman.

(8) The presence of four tins of blue paint, one already partly used and similar to the paint on deck with wet traces, the pieces of fibreglass similar to that laid on deck, the shears with fibreglass on its blades, all found lying in a berth in the cabin occupied by the four defendants. Also the container of resin on deck similar to that used on the fibreglass in laying down the covering on the deck to conceal the secret compartment. Reasonable inferences (1) That all four men were involved in, or had personal knowledge of the concealment of the ganja. (2) That it was done during the stop at the island."

In a cautioned statement the appellant Bisono stated, inter alia, "We went to an island, I don't know where it is or what the name of the island. We reached there about 6.30 in the evening. We tied to a dock of a medium size port. We left the boat until we returned. When we returned on board we went out to sea until we reached here."

The learned Chief Justice correctly held that the finding and inference in finding No. 7 was a misdirection and that the cautioned statement given by the appellant Bisono could not be evidence against the other three appellants. It was, however, evidence against appellant Bisono. As far as Bisono was concerned there was evidence which the Court was entitled to consider - 'that the boat had stopped at an island after leaving Miami.'

The learned Chief Justice in considering the submission with respect to the other findings stated at page 8 of his judgment:

"I turn now to the other points in the passage quoted. I need not go through them seriatim. The short answer is that I accept that the criticisms made by learned counsel for the appellants with regard to those facts and inferences are valid ones. In particular, some of the inferences were not justified on the facts from which they were purportedly drawn and others were not the only reasonable inferences to draw from the facts relied on. There were also some inaccuracies in the evidence relied on. "

Having arrived at those conclusions the learned Chief Justice then went on to consider the evidence and to draw inferences from the proved facts.

The Criminal Procedure Code, Law 13/75 provides in s.170:

"On an appeal by motion the court may draw inferences of fact from the evidence given before a summary court, and it may decide the appeal with reference both to matters of fact and to matters of law."

The learned Chief Justice was entitled to draw inferences from proven facts before the Summary Court and to say whether those proven facts and inferences were such as to warrant a conviction of the offences charged.

At page 11 of his judgment the learned Chief Justice stated:

"One can take judicial knowledge of the fact that the traffic in ganja is not from Miami to this part of the world and places to the south. It is the other way round. Clearly, the boat with the concealed ganja was destined for Miami. The four appellants admit that the boat was destined, next stop, for Miami both in their statements and on their immigration forms (Form 11) where they specify that they are in transit to Miami. Of course, they give a reason for being here on their way to Miami, following a fishing expedition to the Mysteriosa Bank, which will be examined.

"As to the fishing expedition part of the prosecution case was that it was camouflage for the main purpose. Points were made about the absence of bait, ineffective fishing gear, rotting fish to be discarded and the economics of the venture. However, the fact remains that a considerable quantity of fish was caught. The absence of bait and some other factors relied on are open to a variety of explanations. "

Was fishing the main purpose of the expedition as far as the appellants were concerned?

The learned Chief Justice having made the above observations came to the following conclusions at page 12 of his judgment:

"Bearing in mind the quantity, the value and the expert concealment there can be no doubt that the prime purpose of that venture was to carry the concealed ganja to Miami. The fishing was secondary, either as camouflage or additional remuneration - probably the former as it could dispel suspicion if the vessel were to be stopped by the Coast Guard and, on a mission of this nature, it is doubtful if penny pinching measures to remunerate the crew with a proportion of the fish caught is necessary or credible."

In my view the learned Chief Justice was entitled to draw the above inferences based on the evidence of proven facts before the Summary Court.

Some of the proven facts could be said to be:

- (1) 5,030 lbs. of ganja was concealed on the boat.
- (2) Four tins of blue paint similar in colour to that used on the boat found on board.
- (3) The shears with traces of fibreglass on its blades found in a cabin occupied by the appellants.
- (4) Pieces of fibreglass found on board.
- (5) The patch concealing the manhole cover was made of fibreglass.
- (6) The boat was destined for Miami.

The argument that the boat may have left Miami with the ganja is an unrealistic one. The inference and finding that the boat left Miami without any ganja being concealed in the secret compartment is a reasonable inference and finding that could be made having regard to the evidence in the case. If the boat left Miami minus the ganja, then it follows that it would be reasonable to infer that the ganja was loaded on the high seas or that it stopped at some place or country where the ganja was loaded and concealed.

The learned Chief Justice was entitled to say that notwithstanding his rejection of some of the inferences and findings of the learned Magistrate, there still remained facts and inferences to be drawn from the evidence which would lead him to the conclusion that the four appellants had knowledge of the ganja being loaded on board and concealed in the secret compartment.

In the circumstances the conclusions of the learned Chief Justice were reasonable and justified and ought not to be disturbed.

It was submitted that the reference by the learned Chief Justice to s. 176 of the Criminal Procedure Code and his statement that there is no miscarriage of justice suggested that the learned Chief Justice was applying the proviso in dismissing the appeal. There is no reference to the proviso and on a careful examination of the judgment of the learned Chief Justice it cannot be said that there was any application of the proviso.

The learned Chief Justice stated that there was the clear inference that this was a joint venture to run ganja into Miami and that all appellants had knowledge of this venture. With this we concur.

It is for these reasons that the appeals were dismissed and the convictions and sentences affirmed.