MONTSERRAT

IN THE COURT OF APPEAL

MAGISTERIAL CRIMINAL APPEAL NO. 4 OF 1997

BETWEEN:

KEMPSON RYAN

Appellant

and

THE COMMISSIONER OF POLICE

Respondent

Before:

The Hon. Mr. C.M. Dennis Byron	Chief Justice [Ag.]
The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Albert N.J. Matthew	Justice of Appeal [Ag.]

Appearances:

Mr. D. Brandt for the Appellant
Mr. C. Ekins, Attorney-General, for the Respondent

1998: May 5;
July 13.

Criminal Law – Conviction for possession of a controlled drug [cocaine], contrary to statute – Drug discovered on appellant's person as a result of a stop and search of vehicles on the highway – What appeared to be the drug sent to Antigua to a chemical analyst for analysis – Appellant claims he was framed – Certificate of analyst admitted into evidence, though analyst himself did not give evidence – Whether the certificate was rightly admitted as proof of the matters stated therein without the defendant being able to examine the analyst – Whether reliance on the certificate as proof of an essential ingredient of the charge in such circumstances was contrary to section 57[2][e] of the Constitution Order – Whether the relevant provision [section 29] of the Drugs [Prevention of Misuse] Ordinance is therefore unconstitutional and ultra vires the Constitution – Medical Evidence Ordinance No. 14 of 1965, sections 2 and 3, St. Lucia considered – Who should bear the costs of the analyst's being summoned to court to give evidence and be cross-examined by accused – Police v

Stehlin [Western Samoa CA 13/93] referred to. Appeal dismissed.

JUDGMENT

MATTHEW J. A. [AG.]

On Friday June 20, 1997 about 8.15 p.m. while a police party were carrying out a stop and search of vehicles at Runaway Ghaut for dangerous drugs, arms and ammunition the Appellant who was driving alone in his car was stopped and searched. In his right front small pocket two aluminum foil wrappings were found which when opened were seen to contain a creamish coloured substance which according to two of the officers appeared to be cocaine.

Later in the course of the investigations Coporal Brade took the wrappings and the contents to Antigua to Mr. Malverne Spencer, a chemical analyst employed by the governments of Antigua and Montserrat, for analysis and one week later he returned to Mr. Spencer who handed him a certificate which was admitted in evidence at the trial of the Appellant for having in his possession a controlled drug, to wit, .15 grams of cocaine, contrary to section 7[2] of the Drug [Prevention of Misuse] Ordinance 1989.

Mr. Spencer did not give evidence before the learned Magistrate who heard the matter. The Appellant contended before the Magistrate that he had been framed but the Magistrate rejected that contention and preferred to accept the evidence of the police witnesses to the effect that the Appellant did in fact have the drugs in his possession on the evening in question. He therefore convicted the Appellant on August 13, 1997 and fined him $3,000 to be paid in three weeks time or in default six months imprisonment.

On August 20, 1997 the Appellant filed a notice of appeal with one substantial ground, namely, that the findings of the learned Magistrate are against the weight of the evidence.

However in that notice he said he reserved the right to add to this ground of appeal when the Magistrate's memorandum of his reasons for his decision was delivered.

Whatever may be the effect of this reservation of right, the Appellant obtained the leave of the Court to argue another ground of appeal as follows:

> "The learned Magistrate erred in law when he admitted the certificate of the purported analyst as proof of the matters stated in the said certificate without the Defendant/Appellant being able to examine or have examined the said analyst whose certificate was relied upon to prove an essential ingredient of the charge contrary to section 57[2] [e] of the Montserrat Constitution Order, 1989."

So there are in effect two grounds of appeal. I can dispose of the first one very simply. It was not seriously pursued. The learned Magistrate heard two versions of an incident. In strong and clear language he said he did not believe the Appellant that he was framed and he went on to give his reasons for his disbelief. He said he rejected the Appellant's contention. On the other hand he accepted the evidence of the police witnesses. How can it then be said that the findings of the learned Magistrate are against the weight of the evidence? This ground of appeal fails.

The second ground of appeal in short is alleging that section 29 of the Drugs [Prevention of Misuse] Ordinance which provides for the admissibility of the certificate of the analyst without the need for him to give evidence in person, is unconstitutional and is ultra vires section 57[2] [e] of the Constitution of Montserrat.

Section 57[2] [e] is as follows:

> "Every person who is charged with a criminal offence-
> shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution."

Perhaps it might be convenient to set out the impugned legislation in full. Section 29 of the Drugs [Prevention of Misuse] Ordinance is as follows:

> "[1] Subject to subsections [3] and [4], notwithstanding the provisions of any other law, a certificate of an analyst purporting to be signed by him stating that he has analysed or examined a substance and stating the result of such analysis or examination is admissible in evidence in any prosecution under this Ordinance of the matters stated therein if it is proved by other evidence that the seals or other fastenings of the container of the substance or thing analysed and in respect of which the certificate was given were intact at the time the container was delivered to him.
>
> [2] No evidence shall be required by the court as to the signature or qualifications of the person purporting to have signed the certificate.
>
> [3] No certificate shall be received in evidence unless the party intending to produce it has given to the other parties seven days notice of such intention and has furnished with such notice a copy of the certificate.
>
> [4] In any prosecution under this Ordinance either of the parties may require the attendance of an analyst to give evidence and in such case the costs of his attendance shall, unless the Judge or Magistrate orders otherwise, be payable by the party so requiring."

In support of his submissions learned Counsel for the Appellant referred to the approach taken by the Courts in the following cases: COLLYMORE AND ABRAHAM V THE ATTORNEY GENERAL [T&T] [1967] 12 WIR 5 at page 8.
SAN JOSE FARMERS' COOPERATIVE SOCIETY LTD V ATTORNEY GENERAL [BELIZE] [1991] 43 WIR 63, 68, 69,78.
Counsel also referred to an extract where a case from Western Samoa was reported, POLICE V STEHLIN. This case was more relevant to the present proceedings but it seems to me that a distinction can be made between the provisions of the legislation there and the legislation under review.

Section 57 [2][e] of the Constitution of Montserrat is in similar terms to the provisions of the other constitutions of the OECS

States and is part of the provisions to secure protection of law. The crucial provision for the purposes of this case pertains to the right to be afforded facilities to examine the prosecution witnesses. The Appellant in this case is to be afforded the facilities to examine either by himself or by his counsel the witnesses called by the prosecution before the court.

I do not think that one could seriously contend that because the analyst was not called by the prosecution before the Magistrates' court there is no necessity to afford facilities to the Appellant to cross-examine him. Indeed the enactment of section 29 [4] would tend to show otherwise.

Section 29[1] and [2] simply make the certificate of the analyst admissible in evidence and herein lies a fundamental difference between the provisions of the Montserrat legislation and that of Western Samoa which provided that a certified report of the Department of Scientific and Industrial Research in New Zealand on narcotic specimens or samples was conclusive proof of its contents without having to call the person who made the report to testify as to such report. As the learned Attorney General submitted, the learned Magistrate had the power to reject the admissibility of the certificate in this case. Section 29[1] does not make the certificate conclusive evidence.

Subsection [3] provides that no certificate shall be received unless the party intending to produce it has given to the other parties notice of such intention and has furnished with such notice a copy of the certificate. The learned Attorney General says of this section that it is to prevent trial by ambush.

Subsection [4] of section 29 then allows either of the parties to require the attendance of an analyst, and that in my view could include the analyst referred to in subsection [1], to give evidence. The only clog on that right is a risk that the Appellant may have to bear the costs of the attendance of the analyst who issued the certificate in the first place.

Before I deal with the constitutionality of section 29 of the Drugs (Prevention of Misuse) Ordinance one question that needs to be addressed is the effect on the conviction of the fact that no issue was raised at the trial about the identity or weight of the material certified to be cocaine. The case for the prosecution was built around the evidence of Corporal Lincoln Brade and P.C. Albert Williams, the two officers who stopped the Appellant on the night in question and found the substance in his pocket. When Corporal Brade told the Appellant that the substance appeared to be cocaine and cautioned him he made no reply. P.C. Williams stated that when later he formally charged and cautioned the Appellant at the Salem Police Station he replied:

"Remember ah me you find em upon not in the car". The trial was conducted on the basis that there was no dispute about the identity or quantity of the cocaine. The alleged area of unconstitutionality of the legislation did not have a bearing on the trial. The Appellant failed to take any such point before the Magistrate and it cannot be said in the circumstances of this case that his conviction was based on unconstitutional legislation.

For this reason alone I would dismiss this appeal.

I shall now proceed to deal with the Appellant's second ground of appeal.

As I intimated during the hearing section 29 is a provision designed to permit the certificate of the analyst to be admissible in evidence without calling him for the normal every day drug related case and this is not unlike the provisions that most Magistrates have become accustomed to in the minor wounding cases when the certificates of doctors are admitted in evidence. Sections 2 and 3 of the Medical Evidence Ordinance, No. 14 of 1965 of Saint Lucia are as follows:

> 2.-(1) Any document purporting to be a report under the hand of the government analytical chemist, government

assistant analytical chemist, government pathologist or government bacteriologist, upon any matter or thing duly submitted to him for examination or analysis and report, for the purposes of any preliminary inquiry before a magistrate in respect of any indictable offence, or in any proceeding in a summary jurisdiction court, or before a coroner, shall be receivable on that inquiry or proceeding as *prima facie* evidence of any matter or thing therein contained relating to the examination or analysis.

(2) If, on any enquiry or proceeding aforesaid, any one of those experts is called as a witness to give evidence on the subject matter of his report, the Magistrate or the Coroner may in his discretion order the person calling such expert to pay the cost of the expert having been so called.

3.-(1) The provisions of this Ordinance, other than with regard to a preliminary inquiry shall with the necessary modifications, apply in the case of a document purporting to be a report by a duly registered medical practitioner on any injuries received by a person or his parent or guardian or by the police in any case involving a charge of injury to the person:

Provided that the report purports to have been written on the same day as, or on the day following, that on which the examination was made by the medical practitioner.

(2) The experts mentioned in subsection (1) of section 2 of this Ordinance may be persons either in the service of the government of this Colony or that of any other Colony, territory or other country within the Commonwealth."

The safeguard in the drug cases is found in sub-section [4], that is in the rare case when the evidence of the analyst may need to be examined or to be tested by cross-examination. The legislation in its wisdom leaves it to the discretion of the Judge or Magistrate to determine whether a party should in the circumstances be called upon to pay the costs of the attendance of the analyst.

There does not appear to be a requirement that the party requiring the attendance of the analyst to give evidence must meet the costs before the hearing of the case for if that were so the Judge or Magistrate could hardly be in a position to make an order.

I can understand the uneasiness in certain quarters about an accused person even running the risk of having to meet the costs of the attendance of the analyst who examined the substance relative

to the charge in his defence to a criminal action. But in reality the accused should have no such apprehensions if he genuinely needs the presence of the analyst in court. It is only if his motives for having the analyst present were questionable that he could be asked to pay the costs thrown away to adopt a term more commonly used in civil litigation and as the learned Attorney General has observed any wrongful exercise of the discretion by the Judge or Magistrate can be set right on appeal.

Section 29 [4] ensures that the Appellant is afforded the facilities to examine the analyst who issues the certificate by virtue of subsection [1] albeit at a possible cost. The provision is wide enough to admit of the possibility of the Crown being called upon to pay the costs of any analyst employed by an Accused to give evidence on his behalf. Learned Counsel for the Appellant produced a copy of a judgment of the Court of Appeal of Western Samoa held at Apia CA13/93 between Sonny Stehlin and The Police heard on March 23, 1993 in which the judgment of the Court was delivered by Sir Robin Cooke. The case was related to another one dealing with the constitutional issues but it deal with the question of arrest without warrant and the main issue was the defence of necessity to a charge of possession of 10,247.5 kilograms of cannabis plant material.

At page 11 of his judgment Sir Robin Cooke stated –

> "An additional point made for the appellant relates to the contribution of £500 ordered by the Chief Justice to be made by him towards the costs of the prosecution in bringing from New Zealand an expert analyst to give evidence of the cannabis content of the material. Such an order is not one lightly to be made for it may add markedly to the punishment of a defendant and may in some cases operate hardly on his family. But in the present case we find it difficult to understand why the defence put in issue whether the material was cannabis. The main defence was the alleged defence of necessity and it is hardly consistent to argue that what the accused grew has not been proved to be cannabis anyway."

There was the further circumstance that the Prosecution had written to the Appellant asking whether there would be agreement

to dispensing with the need to bring an analyst from New Zealand and that request met with no response. The Court found the order was fully justified.

The order made by the Chief Justice mentioned above is similar to the kind of provision in section 29[4] that could be regulated by the Judge or Magistrate according to the circumstances of the case. When this Appellant was searched on the night of June 29, 1997 and the drugs found, Corporal Brade drew this to his attention and cautioned him. He made no reply. At his trial in August by which time he had already received a copy of the analyst's certificate he was alleging that he was framed. His defence was rejected and he was fined.

Since then he seems to be indicating that the absence of the analyst in the Magistrates' Court affected his defence.

One of the principles that pervades constitutional interpretation is the principle of reasonableness. On the one hand every opportunity must be given to a person charged with a criminal offence to establish his innocence and set up his defence in the most effective manner. On the other hand justice must not be unduly delayed or made more burdensome on those responsible for its administration.

Section 29 of the Drugs [Prevention of Misuse] Ordinance 1989 is closely similar to section 29 of the Drugs [Prevention of Misuse] Act of Dominica Chap. 40:07 and identical to the Drugs [Prevention of Misuse] Act No. 22 of 1988 of Saint Lucia.

I am not persuaded that section 29 of the Drugs [Prevention of Misuse] Ordinance is unconstitutional. This ground of appeal also fails.

The appeal is therefore dismissed and the conviction and sentence are affirmed.

A. N. J. MATTHEW
Justice of Appeal [Ag.]

I agree that the appeal should be dismissed.

C.M.D. BYRON
Chief Justice [Ag.]

I also agree.

A.J. REDHEAD
Justice of Appeal

"Use of report of official analysis as prima facie evidence.

A report of a medical practitioner admissible in a summary jurisdiction court.