IN THE SUPREME COURT OF BELIZE, A.D. 2018

INFERIOR APPEAL NO. 20 of 2016

AUGUSTINE POTT **APPELLANT**

AND

W/CPL. 46 CHRISTINE AVILA **RESPONDENT**

BEFORE the Honourable Madam Justice Sonya Young

Written Submissions
23.1.2018 – Appellant
29.1.2018 – Respondent

Decision
18.5.2018

Mrs. Audrey Matura-Shepherd for the Appellant.
Mr. Rene Montero for the Respondent.

Keywords: Inferior Court – Criminal Appeal – Fresh Evidence - Illegal Search – Admissibility of Evidence – Unfair Trial –Assisting Unrepresented Defendant – Translator – Spanish Speaking Defendant –Plea in Mitigation – Sentence – Misuse of Drugs Act Cap. 103 – The Constitution Cap. 4

JUDGMENT

1. Mr. Pott was unrepresented when he was tried in the Magistrates' Court for trafficking 43.3 grams of crack cocaine. He was sentenced to a term of three years imprisonment and a fine of $10,000. In default of payment, he was ordered a further term of three years imprisonment.

2. He presented five grounds of appeal and asked that his conviction and sentence be quashed. His grounds are as follows:

> *"1. That the decision was unreasonable and the evidence did not sustain the charges brought against the Appellant, who was undefended and had no previous knowledge or understanding of the court process and proceedings and the gravity of the sentence he faced because of the language barrier.*
>
> *2. Evidence was wrongly rejected, as a result of the language barrier and the inability of the translator to property* (sic) *translate what the defendant conveyed to the court.*
>
> *3. That the Learned Trial Magistrate erred and was wrong in law when proceeding to impose the sentence of three(3) years imprisonment without taking into account the relevant considerations nor the relevant provisions of the law. Specifically "Laws of Belize – Chapter 103 Misuse of Drugs Section 18 (a).: Where the suspected crack cocaine weighed 43.3 grams less than "(ii) one kilogramme of cocaine;" that would require a mandatory custodial sentence but instead could have been given the alternative where the law states "the court may, for special reasons to be recorded in writing, refrain from imposing a mandatory custodial sentence and, instead, order the convicted person to pay a fine to the extent specified above and in default of such payment, to undergo imprisonment for a term specified above;"*
>
> *4. That the sentence was and is inordinately severe and not in keeping with the principles of sentencing for this kind of offence in this particular circumstance.*
>
> *5. That the Learned Trial Magistrate erred in law when he failed to allow the appellant time for mitigating plea but instead immediately upon pronouncing a verdict proceeded to hand down a sentence and then even failed to take into account the mitigating factors, the sentence for like crimes and the fact that the appellant had no history or any previous conviction or fines for any offence whatsoever."*

3. **The issues for the court to determine are:**

1. Whether the decision was unreasonable; was inadmissible evidence wrongly admitted (Ground 1).
2. Whether the Appellant received a fair hearing (Grounds 2 and 5).
3. Whether the sentence was inordinately severe and not in keeping with sentencing principles (Grounds 3 and 4).

Whether the decision was unreasonable; was inadmissible evidence wrongly admitted:

4. The Appellant raised that inadmissible evidence had been wrongly admitted. He sought to establish this ground on the allegation that no reasonable suspicion had existed for the search conducted on his person by the police. The search was without his consent and therefore illegal. He submits that any evidence derived from this search ought to be excluded as having been unlawfully obtained. He concludes that if this evidence had been rejected he would have had no case to answer.

5. On this ground I agree with counsel for the Respondent that this could and ought to have been raised at trial, as it was information available to the Defendant at that time. The mere fact that he was unrepresented then does not allow the court at this stage to admit fresh evidence of this nature – ***R v Parks 1 WLR 1484***.

6. In any event, even where the search may have been illegal, and this court can make no such finding, the evidence derived therefrom is still admissible. Counsel for the respondent presented ***Donald Phipps v R (2010) JMCA Criminal 48 at paragraph 120-12***1 where ***R v Sang [1980] AC 402*** was applied and explained that it"

"confirmed after full argument that a judge has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means and that the court is not concerned with how evidence is obtained (see the judgment of Lord Diplock, at page 436). Earlier still, in **King v R,** *a decision of the Privy Council on appeal from this court, it had been held that the fact that evidence was obtained in breach of a right enshrined in the Constitution did not render the evidence inadmissible, the Board expressly approving its own even earlier decision in* ***Kuruma Son of Kaniu v R [1955] AC 197, 203****, in which Lord Goddard had observed that "the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue … the court is not concerned with how the evidence was obtained". (See also the decision of this court, applying* ***King, in R v Howard (1970) 16 WIR 67****; and, more recently, the decision of the House of Lords in* ***R v Sargent [2001] UKHL 54, para. 17****,*

in which Lord Hope observed that "the general rule [is] that the test of admissibility is whether the evidence is relevant. The fact that it was obtained illegally does not render it inadmissible if the evidence is relevant").

7. The court accepts this as the state of the law here in Belize and not as urged by counsel for the Appellant when she relied on ***Weeks v The United States (1914) 232 US 383*** and the *"principle of the poisoned pen"*. This ground is without merit.

Whether the Appellant received a fair hearing:

8. Counsel for the Appellant launched her attack from section 6(3) of the Constitution:

'Every person who is charged with a criminal offence –

(b) … shall be informed … in a language that he understands… the nature and particulars of the offence charged

(e) shall be afforded facilities to examine …the witnesses called by the prosecution before the Court …

(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial."

9. She emphasized that Mr. Pott was unrepresented (as was his right) when he was tried and he was deprived of his liberty. She quoted from ***Akeem Thurton v The Queen (2017) BCA*** where Awich JA stated:

"The objective of criminal case proceedings is to reach a verdict by a fair trial. That is the requirement in s. 6 of the Constitution. It is the duty of the trial judge to achieve that objective, whether the accused is represented by counsel or not. Where the accused is unrepresented, the duty of the trial judge is more demanding; it imposes on him responsibilities to: assist the accused by informing him of his relevant rights, explaining the relevant procedures, assisting the accused in putting questions to witnesses, especially in cross-examination, and generally putting forward the defense that the unrepresented accused wishes the court to consider."

10. The Appellant relied on his own affidavit and the notes of evidence. He averred that he is primarily Spanish speaking and there was a significant language barrier during trial. The translator, when present, was unable to properly translate what he said and what was being said in court. He stated

that the first and most important prosecution witness was examined solely in English. As he could not understand her testimony, he was denied the opportunity to cross-examine her. The notes of evidence show he declined an invitation to do so.

11. He adds that it was only half way through the trial that he was provided with a translator who was not certified or competent and whom he recognized as a police officer and a member of the Prosecution Branch. He does not provide any evidence in support of the very serious allegations as to the translator's competencies. Except, he alleges, that the translator informed him that he was only allowed to ask three questions in cross-examination and at one point during the proceedings he mentioned underwear and it was translated as footwear. He says he realized this error only when preparing his appeal and reviewing the notes of evidence. He also questions the impartiality of the interpreter.

12. Finally, he explained that he was never invited to give a plea in mitigation before he was sentenced. The notes of evidence reflect this omission. All these, he urged, conspired to ensure that he was denied a fair hearing.

13. In response, the Respondent provided an affidavit by the court prosecutor. He attested that the Defendant throughout all his prior appearances in the matter was spoken to and spoke in English. Before trial commenced the Magistrate asked the Defendant if he "*knew English*". Receiving an answer in the affirmative, the Magistrate commenced the trial in English. The Defendant gave his name, address, age and date of birth, all in English, when questioned by the Magistrate at the start of the trial.

14. He further recalls that it was very early in the testimony of the first prosecution witness that Mr. Pott expressed that he was experiencing difficulty. The prosecutor says he immediately stopped his examination-in-chief. A translator was called and was sworn in on arrival. The prosecutor restarted his evidence-in-chief and asked all his previous questions again. In their submissions the Crown declared that a "*translator was present at all material times during the trial."*

Consideration:

15. The court's attention is immediately drawn to the fact that no real reference was made to the Magistrate's notes in rebuttal of any of these serious allegations of procedural defects raised by the Appellant. The prosecutor's affidavit seemed designed to fill glaring gaps in these notes. The noticeable absence in the court record of much of what the prosecutor states in his affidavit means that this court had very little material to consider in relation to what occurred during that trial. Moreover, where the notes are silent the benefit of the doubt must be given to the Appellant.

16. That the court possibly asked the Defendant whether he *"knew English"*, indicates that a suspicion was raised in the court's mind. (The notes do not reflect this). The question itself as stated is not really fair to the accused. It does not ascertain what is truly relevant. That is, whether conduct of the trial in English would be comfortable for him. There is no evidence whatsoever that he was offered the assistance of an interpreter at the beginning of the trial.

17. At any stage of any court proceedings a judge may determine that there is a need for an interpreter. Usually an attorney may make the request or a party may inform the court of his limitations. But a judge must be alert and aware

particularly where a party is unrepresented. His role then is critical and even more so in criminal matters where the liberty of the subject is at stake. If it appears that the party is having difficulty the judge should immediately enquire. It need be no extensive inquiry. A simple "*do you need an interpreter,"* is often sufficient.

18. In fact, I find it to be a good rule of thumb to ask this of every party who appears to have a language other than English as a first tongue. More importantly, whenever a request is made for an interpreter it must be complied with. Belize is multi-lingual and the court must be prepared to meet the needs of its users. This ensures the fulfilment of our duty to provide equal access to justice.

19. Where a court becomes aware of a party's difficulty understanding the language being used at trial, its duty does not end simply by permitting the assistance of an interpreter. All that has transpired prior must be explained or re-read to the party with the aid of the interpreter. Although this may seem time consuming and tedious it is the only way the court can ensure that what was said prior has been effectively communicated to the party.

20. The Magistrate's notes do not speak to the calling or swearing of the translator at all and this is unfortunate and improper. The calling and swearing of a translator is an integral part of the court process. As such a translator's appearance must be placed on the court record. So too should his taking of the oath as it informs that the statutory duty imposed on the court has been performed and his translation could safely be relied upon. Furthermore, it ensures that issues like these, now before the court, would not arise or are easily resolved if they do.

21. What is striking about the court prosecutor's evidence is that it states in detail when the interpreter was called but it does not state who this interpreter was. He certainly does not state that it was the Magistrate's Court official translator. The court is compelled to question why he would omit such an important piece of information, especially when he knows the appellant has raised an issue. He does not even offer an explanation for this blatant omission. Even more disturbing is the absolute absence of any of this from the magistrate's notes of evidence.

22. When an interpreter is sworn whatever he says before he begins to translate is his testimony and must form part of the court record. He ought to testify as to his name and competency before he is allowed to translate. This establishes, not only for the court, but the parties as well, who the translator is and that he is suitably qualified. If the interpreter is the official court interpreter, testimony to this effect will suffice. If he is not, then proof of his competency is paramount. The court may even inquire whether either party knows the interpreter or has any objection to his use. This may eliminate possible conflicts or the appearance of impropriety as the Defendant is alleging here.

23. The court prosecutor's affidavit says that once the translator was sworn in, he started taking evidence from the first witness all over again. This is not reflected in the record. The notes flow smoothly with no indication of the trial stopping and resuming or evidence having been taken twice. In fact, the only reference to interpreter in the entire court record is when the second witness gives his testimony. He is asked to point out to the court the male person he was referring to (the accused). The note states *"person sitting between the police and interpreter."*

24. This reference to the interpreter adds nothing to the omission in the court's notes it simply indicates that an interpreter was present in court while the second witness was testifying. The question as to when the interpreter arrived remains unanswered.

25. This court considers that the evidence provided by the first prosecution witness was the most damaging, yet the Defendant asked no questions in cross-examination. However, he was able to question the second prosecution witness who testified along the same vein. I am minded to believe that the translator only arrived after the first witness had testified and the second was on the way. The very nature of the questions posed, informs that Mr. Pott would not simply have accepted all the first witness had narrated if he had fully understood what was being said. He questions what was found on him, what he was wearing and why they were saying something was found on him. These questions could easily have also been asked of the first witness and would have been just as, if not more, relevant there.

26. This court therefore finds that the translator was not present during the arraignment of the Defendant or the testimony of the first prosecution witness. The court also finds that the testimony was not read over to the Defendant or retaken after the translator arrived. The Defendant was therefore denied his right to cross-examine that witness. The court further finds that the translator was a police officer whose propriety has been called into question.

27. While the court can make no finding on the translator's capability or propriety it states for the avoidance of doubt that using a police officer as an

interpreter in a criminal trial is not improper, it may not even be unusual. However, the circumstances surrounding the use must always be considered and a judge must in his own discretion make a determination. He must call all his aids to bear.

28. Where the accused is represented and his counsel agrees, there could be no issue. However, if the person needing the interpreter is an unrepresented accused it may be best to seek the assistance of an independent translator. Where such a person simply cannot be located, then the Magistrate may be wise to make a record accordingly and include that a police officer was used. In this case it would be good also to ask the accused if he has any objection and to record his response.

29. In this case, the prosecutor for the state was a police from the Prosecution Branch. The accused was unrepresented. There is no note as to any effort made to secure an independent translator. It may not have been proper to ask the accused, in those circumstances, whether he objected to a police officer being used. In any event no such inquiry is recorded. Even more disconcerting is why wasn't the official court translator used. Justice must not only be done it must be seen to be done.

30. Both the appellant and the Respondent's witness informed that it was the Appellant who raised his difficulty understanding the proceedings with the magistrate. This indicates that the Appellant was capable of raising it at any time and perhaps could have done it earlier. But it does not excuse the magistrate from not re-arraigning him and re-reading any evidence already taken and offering him a fresh opportunity to cross-examine. This is not being understanding or cautious. Fairness demands it.

31. The Appellant asserts that in his own defence he said that he *"did not do any wrong and that it was not true that I had any drugs on me, but I don't know what the translator said, but my attorney informs me and I verily believe that the record of the trial shows that I said nothing in my defence and that is not true."*

32. The court finds this particularly difficult to believe. Certainly, if the Defendant had said all that and he could understand some English, he would have known that the translator had not conveyed his very lengthy statement. Moreover, the court would have realized that what was interpreted was far less than what the accused actually stated.

33. I am compelled to say that it is also important for the court to explain to the party requiring the interpreter the precise role of an interpreter, that is, to listen and convey what is being said in the court proceedings, offer no advice, make no suggestions and have no private conversation with the party. An astute judge may find that an interpreter is not adhering to his role where his answers appear longer or shorter than what was said by the party or the party seems confused or questions the interpreter. The court ought to intervene immediately.

34. Finally, the court notes do not reflect what, if anything was said to the unrepresented accused in relation to his rights or court procedures nor is there anything to indicate that he received any assistance in putting his defence to the prosecution. The notes of evidence are woefully inadequate.

35. At paragraph 33 of ***Akeem Thurton*** (ibid) the court, was at pains to explain that the trial judge's duty is not to extend itself beyond reason to assist an unrepresented accused. Rather, they quoted from ***Jose Ochoa v The Queen***

Criminal Appeal Case No. 1 of 2007 at paragraph 6 and 8 which set the perimeters:

> "*There is no question that the judge's clear duty is to give such assistance to an unrepresented defendant as is appropriate in the circumstances. That, we apprehend, does not mean that the judge must bend over backwards or to use the words of Lord Bingham CJ, "give the defendant his head, to ask whatever questions, at whatever length, he wishes"*
> 8. The duty of a trial judge where an accused person is unrepresented is to assist him to ensure that the jury understand the defence being put forward. He is not to act as defence counsel. Clearly he will assist the accused to put questions in cross examination, having ascertained the point or the issue the accused wishes to address within the bounds of relevance. This duty to assist an unrepresented accused includes assistance in putting forward his defence in intelligible terms…"

Finding:

36. Carey JA stated at paragraph 10 of ***Manuel Fernandez v The Queen Criminal Appeal No. 20 of 2009*** while discussing ***Randall v The Queen [2002] UK PC*** 19:

> *"In that case Lord Bingham noted that the right of a criminal defendant to a fair trial is absolute. He stated as follows*:
>
> > *"But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, OR so irremediable that an appellate court will have no choice but to condemn a trial ….. and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty …."*

37. This court finds that what is recorded in the Magistrate's notes reflect such a departure from good practice and what has been found to have transpired is so prejudicial, that the trial must be condemned and the conviction quashed. There is, therefore, is no need to consider the reasonableness of the Magistrate's decision.

38. For completion and the need to address the plea in mitigation issue only, the court will now consider the sentence.

Whether the sentence was inordinately severe and not in keeping with the principles of sentencing:

39. The Defendant was found guilty and sentenced pursuant to section 18(1) of the Misuse of Drugs Act:

> *'18.-(1) A person who is convicted of the offence of drug trafficking, or of* being in possession of a controlled drug for the purpose of drug trafficking-
>
> (a) on summary conviction, shall be imprisoned for a term which shall not be less than three years but which may extend to ten years, and in addition, shall be ordered to pay a fine which shall not be less than ten thousand dollars but which may extend to one hundred thousand dollars or three times the street value of the controlled drug (where there is evidence of such value), whichever is the greater:
> Provided that where the controlled drug is respect of which the offence is committed is less than-
> (i) one kilogramme of diacetylmorphine (heroin);
> (ii) one kilogramme of cocaine;
> (iii) two kilogrammes of opium;
> (iv) two kilogrammes of morphine; or
> (v) five kilogrammes of cannabis or cannabis resin,
> the court may, for special reasons to be recorded in writing ,refrain from imposing a mandatory custodial sentence and, instead, order the convicted person to pay a fine to the extent specified above and in default of such payment, to undergo imprisonment for a term specified above;

40. He says he was not given an opportunity to offer a plea in mitigation. Regrettably, there is no indication in the Magistrate's notes that such a plea was invited or that its importance was explained, having particular regard to the fact that the Defendant was exposed to a mandatory sentence of imprisonment. The prosecutor in his affidavit says that the Defendant was given the opportunity and the significance of the plea was explained to him in layman's terms. However, he chose to say nothing.

41. The record reveals the contrary. It reads:

"Prosecution closes its case Defendant was given three options:

The Defendant chooses not to ask any questions.

Choose not say anything.

Have no witness to call.

I found guilty of drug traffic.

Sentence to three year in prison plus $10,000 i/d paying will spend an addition three years."

42. On first reading the court wondered whether *"I found guilty of drug traffic"* could perhaps have been what the Defendant said when asked to mitigate. There was some ambiguity, but it was given quietus when the court realized that there would then be no conviction recorded. *"I found guilty of drug traffic"* was in fact the Magistrate's record of the conviction. No allocution follows, nor is a call for antecedents made.

43. Failure to allocute does not invalidate a trial, but it may impact sentence. In this case, because of the proviso, the allocutus could have had a significant impact on his sentence. The quantity of drug found was far less than a kilogramme of cocaine and he was eligible to be considered for a non-custodial sentence. Far worse is that Mr. Pott informs that he is fifty-five years old, has had no previous convictions and was gainfully employed.

44. This court finds that, any factors the Magistrate considered would not have included any special circumstances which may have existed for this Defendant. Consequently, Mr. Pott was entirely denied the possible benefit derived through the proviso, including the application of sentencing principles and guidelines. Even the Crown admitted that there was no indication that the Magistrate had applied his judicial discretion.

45. The Magistrate fell into serious error in omitting to consider possible mitigating circumstances in determining an appropriate sentence. If this were the only issue it would be open to this court to quash the Magistrate's sentence and substitute a sentence therefor, this is not necessary here. The court has already determined that Mr. Pott had been denied a fair hearing. The obvious lack of a plea in mitigation only strengthens this finding.

46. There is no doubt that the Magistrates are under considerable pressure. They are sometimes called upon to undertake the unenviable task of keeping records by hand. This is certainly not the most ideal circumstance, but it is the reality. It may sometimes cause detail to be compromised in an attempt to be efficient. Error and omission may and will occur. But, there can be no efficiency if an accused is denied a fair hearing or if there is a failure to keep a record which reflects that the Magistrate has been faithful to his duty to: *"ensure that the proceedings are conducted in an orderly and proper manner which is fair to both prosecution and defence"* – ***Randal v The Queen (ibid))***.

47. This accused has already spent four months in prison. When the court considers the quantity of drug found it can see no reason whatsoever to order a retrial in the circumstances.

48. The Appeal is accordingly allowed. The conviction and sentence are quashed.

SONYA YOUNG
JUDGE OF THE SUPREME COURT