SAINT VINCENT & THE GRENADINES

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO.11 OF 1996

BETWEEN:

JOYCE WARNER

Appellant

and

THE QUEEN

Respondent

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

Appearances: Dr. R. Gonsalves for the Appellant
Mr. K. Hudson-Phillips, Q.C. for the Respondent

1997: July 25;
September 15.

Criminal Law - Possession of a controlled drug (cocaine) with intent to supply to another - *Drugs [Prevention of Misuse] Act* - Combined sentence of imprisonment & a fine (in default of latter, 3 years' imprisonment) - Whether similar fact evidence was properly admitted - DPP v. Boardman H.L. referred to, Makin v. A.G. for New South Wales (1894) referred to - Exercise of judge's discretion - Kenneth Francis Lunt [1987] 85 Cr App R 241 applied - Meaning & import of the phrase "unsafe & unsatisfactory" - Illegality & inadequacy of sentence - Correction of sentence. Appeal dismissed.

JUDGMENT

MATTHEW J.A. [Ag.]

On May 11, 1994 the appellant, than approximately 46 years old, was jointly charged with her daughter, Udine Walker, on a two count indictment under the Drugs [Prevention of Misuse] Act, Cap.219 of the Laws of St. Vincent and the Grenadines Revised Edition 1990.

The first count was one of possession of a controlled drug with intent to supply it to another, contrary to section 7[3] of the Act and the second count was drug trafficking contrary to section 16[1] of the said Act.

At the very beginning of the case learned Counsel for the respondent informed the Court that the Crown would be only proceeding on the first count and sought leave to withdraw the second count. Leave was accordingly granted. Later in the proceedings after the Crown had presented their case, learned Counsel for the respondent intimated that the case against Udine Walker was very slight and he requested that the jury be directed to return a verdict of not guilty against Udine Walker. That was done and Udine Walker was discharged from the case just before Joyce Warner began her defence.

The Crown led evidence against the appellant through two senior police officers one of whom eventually took the drugs to the Forensic Centre in Port-of-Spain, Trinidad for testing. No issue arises on this aspect of the case.

In his summing-up to the jury the learned trial Judge referred to the only count which was before them. On October 31, 1996 the jury returned a verdict of guilty and the learned trial Judge imposed a sentence of four years imprisonment and a fine of $150,000.00 to be paid within one year and in default of payment three years imprisonment.

On November 6, 1996 the appellant lodged an appeal against conviction and the second limb of the sentence as follows:

1. The decision is unsafe and unsatisfactory.
2. The learned trial Judge erred when he admitted “similar fact” evidence of the appellant’s alleged possession of two packets of cocaine on the same day and at the same premises as for the instant offence.
3. The learned trial Judge erred in law by imposing an alternative term of three years to the fine of $150,000.00

When this matter was first called learned Senior Counsel for the respondent was absent. Learned Counsel for the appellant successfully sought leave from the Court to withdraw ground 3 of his appeal. So there is in effect no appeal against sentence and therefore the provisions of section 40[7] of the Eastern Caribbean Supreme Court [St. Vincent and the Grenadines] Act Cap.18 may not be applicable. The sub-section states:

> "On appeal against sentence, the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict, whether more or less severe, in substitution therefor as it thinks ought to have been passed, and in any other case shall dismiss the appeal."

At the hearing of the appeal learned Counsel for the respondent addressed the Court on the illegality of the sentence of the court handed down on October 31, 1996 as it related to the alternative period of imprisonment and in addition Counsel submitted that the term of 4 years was not acceptable having regard to the quantity and street value of the cocaine in this case. So there are three issues which arise for determination and I shall deal with them in the order that they were dealt with by learned Counsel.

Similar Fact Evidence

As his second ground of appeal which he dealt with firstly, learned Counsel for the Appellant submitted that the learned trial Judge erred when he admitted similar fact evidence of the appellant's alleged possession of two packets of cocaine on the same day and at the same premises as for the instant offence. To understand this ground of appeal one should be told something about the facts of the case. On January 13, 1993 a police party went to the home of Julian and Joyce Warner where they executed a search warrant. The Warners lived at Glamorgan at the time with their children, namely: Udine, Magdalene, McClean and Tyrone all under twenty years old at the material time. On arrival the search party met three members of

the family - Julian, Joyce and Udine. The police found the appellant in her liquor shop with a sack under the counter which when searched later on revealed two packages which were later proved to be cocaine. Upon further searching the premises the police found 1060 packages in the basement of the dwelling house and the Prosecution's evidence is that the packages found in the basement were similar in size and in colour with the same brown tape wrappings as those two packages found in possession of the appellant.

The appellant was charged summarily for the two packages found in her possession consisting of 1152 grammes of cocaine with intent to supply. She was convicted of the offence on August 20, 1993 and fined $60,000.00 payable forthwith with an alternative of three years imprisonment. I understand that she has paid the fine although it is also stated that an appeal was lodged in respect of the matter on September 1, 1993. Nothing has been heard of the appeal. At the trial of the present case learned Counsel for the appellant objected to any evidence being led as to the two packages found in the sack. Counsel submitted that to lead such evidence would be contrary to the rules of evidence because it is not competent for the Prosecution to lead evidence to show that the appellant had been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the appellant is a person likely from her previous conduct to have committed the offence for which she was being tried. Counsel referred to the following authorities:

Makin v A.G. for New South Wales [1894] A.C. 57;

D.P.P. v Boardman [1975] A.C.421 at 453.

Learned Counsel was very critical of the decision to split charges which arose from one search.

Learned Counsel for the respondent satisfactorily explained the recourse to more than one charge. He submitted that the charge with respect to the two packages could only be against the appellant alone. This means it was quite possible that other people could be jointly

charged with the appellant for the much larger quantity. As I said earlier Udine was at one time charged in respect of the cocaine found in the basement. The record shows that Julian has not been heard of since the day of the search. More importantly, Counsel says even if there was one trial there would have to be two counts in the indictment to reflect the different findings and possession.

As to the issue of the similar fact evidence, the respondent submitted that the purport of the evidence was that the appellant was in possession of two packages of cocaine similar in appearance and wrappings as those with respect to which she was charged. This evidence the respondent says was highly relevant and probative particularly having regard to the denial by the appellant that she knew that there was in the basement of her house cocaine, the subject matter of the indictment and having regard to the provisions of section 30[1] and [2] of the Drugs [Prevention of Misuse] Act. The respondent contends that it is a misconception to consider the challenged evidence as "similar fact" evidence. The respondent cited the following authorities:

1. Director of Public Prosecutions v Boardman [1975] A.C. 421, 451;
2. Makin v A.G. for New South Wales [1894] A.C. 57, 65;
3. Noor Mohammed v R [1949] A.C. 182;
4. Phipson on Evidence 14th Edition paras 17-30; 17-55; 17-56 et seq;
5. Archbold 1995 Vol.1 Chap. 13-6 et seq.

In the Fourteen Edition of Phipson on Evidence, the learned authors referring to similar facts in criminal cases at paragraph 17-30 state as follows:

> "Statement of the principles
> In Makin v A.G. for New South Wales, Lord Herschell L.C., delivering the judgment of the Judicial Committee of the Privy Council, laid down two principles to be observed in such cases. The first was that:
> 'It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of

> criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that he is a person likely from his criminal conduct or character, to have committed the offence for which he is being tried. This rule must be regarded as fundamental in the law of evidence and is probably one of the most deep rooted principles of the criminal law. Lord Sumner added, in a well-known passage from his judgment in Thompson v R [1918] A.C. 232:
> "No one doubts that is does not tend to prove a man guilty of a particular crime or that he is generally disposed to crime and even to a particular crime."

Lord Herschell L.C. went on to formulate the second principle saying:

> "On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

In the case of Kenneth Francis Lunt [1987] 85 Cr. App. R.241 at page 244 Neill L.J. after reviewing some of the earlier cases such as Makin v A.G.; Director of Public Prosecutions v Kilbourne and Boardman v Director of Public Prosecutions stated:

> "Having considered these authorities, we would venture to suggest that the following guidelines can be collected from them [1] As a general rule the prosecution may not adduce evidence tending to show that the accused has been guilty of criminal acts other than those charged against him, or that the accused has a propensity to commit crimes of the kind charged. [2] Notwithstanding the general rule, however, evidence is admissible as `similar fact' evidence if, but only if it goes beyond showing a tendency to commit crimes of the kind charged and is positively probative in regard to the crime charged. [3] In order to decide whether the evidence is positively probative in regard to the crime charged it is first necessary to identify the issue to which the evidence is directed. Thus the evidence may be put forward, for example, to support an identification [where unusual points of similarity of appearance or method can be relevant and positively probative], or to prove intention, or to rebut a possible defence of accident or innocent association. In these several examples the answer to the question of what is positively probative may vary. [4] Once the issue has been

> identified the question will be - will the `similar fact' evidence be positively probative, in the sense of assisting the jury to reach a conclusion on that issue on some ground other than the accused's bad character or disposition to commit the sort of crime with which he is charged? If the evidence of similar facts will not assist the jury to this end, it is irrelevant and inadmissible. [5] If the evidence is positively probative in the foregoing sense the judge will nevertheless have a discretion to exclude it if it would probably have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value."

I do not think for one moment that the jury may have been influenced by the summary conviction of the appellant in arriving at their verdict. I agree with the directions by the learned trial Judge to the jury when he told them:

> "The importance and relevance though of these two packages as the Crown submits to you is that they, the two packages found in the sack held by the accused were similar to the 1,060 packages found in the basement of the dwelling house."

Even if the evidence could be regarded as similar fact evidence. I have no doubt that it is evidence which goes beyond showing a tendency to commit crimes of the kind charged and is positively probative in regard to the crime charged. The evidence which was challenged by learned Counsel for the appellant is directed to the appellant's knowledge and possession of the drugs found in the basement. This ground of appeal fails.

Decision Unsafe and Unsatisfactory

Learned Counsel for the appellant next submitted that the decision was unsafe and unsatisfactory. Section 40[1] of the Eastern Caribbean Supreme Court [St. Vincent and the Grenadines] Act. Cap.18 gives this Court power to allow an appeal against conviction if it thinks that the verdict of the jury should be set aside on the ground that in all the circumstances of the case it is unsafe or unsatisfactory. In the case of Sean Cooper [1969] 53 Cr. App. Rep.83 at page 86 Widgery L.J. describes the phrase "unsafe and unsatisfactory":

> "That means that in cases of this kind the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it."

See also R v Wallace and Short [1978] 67 Cr. App. Rep.291, 297, 298 and Robert William Lake [1977] 64 Cr. App. Rep.172, 177.

Learned Counsel for the appellant found fault with the summing-up of the learned trial Judge in so far as the jury were directed that they should not worry about Julian for he was not before them when an essential part of the defence of the appellant was that it had to be Julian who put the cocaine in the building. Counsel further submitted that the jury asked questions about the two packages and because of the haphazard manner in which the defence was put the jury must have concluded that because the appellant had possession of the two packages, she had not only knowledge but also possession of what was in the basement.

In answer to me learned Counsel for the appellant conceded that the issue of the two packages was not the only evidence in the case against the appellant. The Prosecution relied to a large extent on the behaviour of the appellant on the day in question.

The two prosecution witnesses were Station Sergeant Rouzendal Francis and Sergeant David Hazelwood. Francis explained to the appellant the purpose of his visit and showed the appellant the search warrant which he was carrying. Both officers testified that the appellant then began to cry and said: "I wonder who could have done that to me". I think this is significant. Sergeant Hazelwood gives another statement of the appellant during the search where she is reported to have said: "All you dun find the coke. Come let we go". Of course this was said with reference to the two packages but it could indicate that the appellant was anxious that the police party left her premises without any further searching and she

almost succeeded. Station Sergeant Francis said they later left the house and were about to enter the vehicle which was parked on the road and as he was looking at the house he noticed there was a step leading downstairs on the eastern side of the house but outside of the building itself. He then spoke to the other officers and they returned to conduct a further search. The Prosecution relies too on the fact that the appellant had control of the room where the drugs were found. They allege that she either had possession of the key to the basement or at least knew where it was kept. Station Sergeant Francis testified that when he asked the appellant for the key to the lock she replied "Let Udine bring the keys". There is another bit of significant evidence just about the time of the discovery of the large haul in the basement of the appellant's dwelling house. Station Sergeant Francis said he opened the door and entered with Sergeant Hazelwood and other police officers, and there they found in that basement some baysand and other articles. The appellant was present. There were two sheets of plywood on the floor. As the officers removed them the appellant left the room crying and then pretended as if she had fainted by throwing herself against the steps. She was brought back in the room. Beneath the plywood was a concrete slab. That was removed revealing a hole with several sacks. Thirty-seven sacks containing 1,060 packages weighing 2,756 pounds of cocaine were taken from that hole in the basement. As stated above these packets found in the basement were very similar to those found in the possession of the appellant in the sack which she had under the counter of her liquor shop and which she took up with her when the officers began to search the shop.

In my view there was abundant evidence upon which the appellant was convicted and I do not entertain any lurking doubt in my mind so as to make me wonder whether any injustice has been done in this case. This ground of appeal likewise fails.

Illegality and Inadequacy of Sentence

The appellant was found guilty of an offence under section 7[3] of the Act. In accordance with the Fourth Schedule, the maximum punishment for the offence on indictment would have been fourteen years and $200,000. She was sentenced to four years and fined $150,000 to be paid within one year and in default three years imprisonment. The respondent conceded that in so far as the Drugs [Prevention of Misuse] Act does not stipulate alternative terms of imprisonment for fines imposed under the Fourth Schedule, the provisions of section 26[1][c] and section 29 of the Criminal Code Act Cap.124 appear to apply and this would mean that the maximum term of imprisonment for non-payment of a fine of $150,000.00 would be one year's imprisonment. In R v Marquis 59 Cr. App. Rep.228, it was held that a person who has been convicted and has been sentenced to a sentence unknown to the law, such as an invalid Probation Order, has a right to appeal to the Court of Appeal against the purported sentence. I agree with the learned Counsel for the respondent so far. Learned Counsel then drew attention to the provisions of section 16 of the Act where the specific punishment is laid down for those who commit the offence of drug trafficking or of being in possession for the purpose of drug trafficking. Counsel submitted that a drug trafficking offence is defined in section 2 of the Act as meaning the offence for which the appellant was convicted and by section 16[1][b] conviction on indictment as in this case for a trafficking offence renders the accused liable to imprisonment for life. Counsel argued that this meant that the term of imprisonment for life laid down by section 16[1][b] is applicable and not the sentence stipulated in the Fourth Schedule which His Lordship the learned trial Judge appears to have applied in error.

With great respect, I do not agree that this Court should impose a sentence on the appellant based on section 16 on which a count was based and which the Prosecution specifically sought leave to withdraw. Even if from one point of view, a section [7][3] offence can come within the umbrella of drug trafficking it is still a specific offence

with a specific punishment. When the second count was withdrawn against the appellant, all parties - Prosecution, Defence and Judge were focused on the one count only contained in section7[3] and in my view it would be unfair at this stage to impose this more severe penalty on the appellant which was not in the contemplation of anybody at all during the trial.

There was no appeal against sentence and all that needs to be done is to correct the sentence of the trial Judge by replacing the alternative term of three years imprisonment with one year's imprisonment.

Save for the correction of the sentence, I would dismiss the appeal.

ALBERT MATTHEW
Justice of Appeal [Ag.]

I Concur.

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

I Concur.

ALBERT REDHEAD
Justice of Appeal