JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' COURT CRIMINAL APPEAL NO. 26/2004

BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE K. HARRISON, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A. (Ag.)

OSCAR SERRATOS v. R

Mrs. Jacqueline Samuels-Brown instructed by Tom Tavares-Finson, for the appellant.

Herbert McKenzie, Asst. Director of Public Prosecutions and Jeremy Taylor, for the Crown.

April 13, 14, 2005 & July 28, 2006

PANTON, J.A.

1. After hearing submissions in this matter on April 13 and 14, 2005, we allowed the appeal, quashed the convictions and set aside the sentences. We also entered a judgment and verdict of acquittal in respect of each charge. At the time of the announcement of our decision, we gave our reasons for judgment orally, with a promise to reduce them into writing. This we now do.

2. The appellant was convicted by Her Hon. Miss Carolyn Tie sitting in the Resident Magistrate's Court at Montego Bay, St. James, of the following offences:

(i) unlawful possession of cocaine;
(ii) unlawful dealing in cocaine; and
(iii) unlawfully importing cocaine into Jamaica.

In respect of each offence, he was fined $500,000 or six months imprisonment, and in addition ordered to serve a "mandatory sentence" of four years imprisonment. The sentence imposed for importing was however, ordered to run consecutive to that for possession. Her Hon. ordered that if the appellant failed to pay the fine imposed for dealing in cocaine, the alternative sentence as well as the "mandatory sentence" of four years were to run concurrently with the sentences for possession and importing.

3. On October 14, 2003, the appellant was the pilot of a private aircraft, an Air Commando jet, that landed at the Sangster International Airport, Montego Bay, at approximately 10:50 a.m. With him on the flight were three other men (his co-pilot and two passengers). After the pilot and co-pilot had had a conversation with a female employee of one of the agencies at the airport, a truck drove beside the aircraft and the latter was re-fuelled.

At about 12:45 p.m. when the appellant and his companions were about to re-embark, Det. Sgt. Dennis McKenzie and other police officers who had been observing the occurrences accosted and told them that the police had information that the aircraft had dangerous drugs aboard. The appellant was the only English- speaking person in the party, and acted as interpreter during the subsequent conversations and events. Under caution from Det. Sgt. McKenzie, the appellant said that they were en route from Venezuela to Honduras and then to Mexico City, and had stopped to refuel. The appellant, in respect of the suspicion that drugs were on board, told the officer to "go ahead and search".

4. Det. Sgt. McKenzie, assisted by a sniffer dog, conducted a thorough search of the aircraft. Nothing of interest was found on the inside. The baggage section on the outside was searched after the appellant produced a key which opened a small door to it. The suitcases of the appellant and his companions were searched, but nothing was found. Sgt. McKenzie noticed that in the forward section of the luggage area was "a piece of panel" that "had screws and appeared to be tampered with". He noticed also that "there were marks on it around the screws and they looked freshly screwed". The appellant, when asked what was behind the panel, said,

"nothing". He assisted in the search by retrieving a screwdriver from inside the aircraft, and used it to pull the screws from the panel. There were two other pieces of panel below the one referred to earlier. On the third one was a piece of paper on which were the words, "Fuel High Pressure". The appellant was reluctant to remove the paper, saying that it meant danger. He also pointed to the fact that it was getting dark and said that he wanted to leave because he did not wish to be caught by bad weather. Det. Sgt. McKenzie thereupon used the screwdriver to remove the panel. He found two hundred and ninety-four packages of cocaine secured with brown masking tape. The men denied knowledge of the contents. By this time, the search had lasted for four and a quarter hours. They were all arrested and, at the trial, the appellant was convicted while the others were acquitted.

5. In answering the charge, the appellant made an unsworn statement. He said he lived in Mexico City, and was employed by Starflight Management as a pilot. He said that he was given the plane to fly after it had been parked without supervision for one day at the airport at Marquetia, and five days at the airport in Caracas, Venezuela. The cocaine, he said, was found in a section of the aircraft that is exclusively

accessible to the mechanic. He also said that he had noted that when the learned Resident Magistrate was ruling on the no case submission, she had said that he had guilty knowledge. However, he insisted that he was innocent.

6. The learned Resident Magistrate gave reasons for her decision. This is a desirable practice. A mere statement of the Court's findings of facts may appear attractive, as that is all that is required by the Judicature (Resident Magistrates) Jurisdiction Act. However, an accused person is entitled to know the reasons for the recording of a conviction against him, unless the circumstances are so obvious that he ought to know. The Resident Magistrate identified the issue for determination thus:

> "The issue for the Court was whether the prosecution had proved its case. There is no dispute that the cocaine was found on the aircraft. The issue is whether Mr. Serratos had knowledge of the presence of the substance."

She then proceeded to indicate that in arriving at her verdict no reliance was being placed on the "question and answer documents" that were admitted into evidence. The decision was based strictly on the evidence of what had transpired at the Sangster International Airport. The learned Resident Magistrate then went on to state that she was satisfied that the

prosecution had proven its case beyond reasonable doubt, while finding that the appellant had knowledge that the cocaine was concealed on the aircraft. She said:

> "The unchallenged evidence is that Mr. Serratos was the pilot in charge of the aircraft. DSP McKenzie testified that Mr. Serratos who (sic) used a key to open the door leading to the baggage area and that it was obvious to him, McKenzie , that within that area a panel had been tampered with. The Court is of the view that this would have also been apparent to Mr. Serratos, who was in charge of this aircraft."

7. At page 41 of the record, the learned Resident Magistrate made the following comments:

> "In considering the statement which Mr. Serratos gave from the dock, I observe the guidance given by the Privy Council in the case of DPP v. Walker 12 J.L.R. 1369 as to the appropriate treatment of such a statement. The Court finds that his statement from the dock conflicts with the response given to the police. The Court is of the view that he is not being truthful and finds that Mr. Serratos was being deceptive and that he was seeking to divert the police from locating the cocaine. DSP McKenzie testified that Mr. Serratos opened this panel which led to another which also appeared to have been tampered with. On coming upon the final panel which would reveal the cocaine, the Court finds that Mr. Serratos was no longer willing to co-operate. His first reaction was telling DSP McKenzie 'can't remove, have to be careful'. When the officer repeated his request, Mr. Serratos' concern changed. He indicated that

> it was getting dark and that he had to leave because he did not want bad weather to catch him. The officer opened the panel himself and discovered the cocaine. No harm befell him. The Court finds that his statement regarding the dark and the weather was a diversionary tactic.... The Court does not accept that the reaction of Mr. Serratos at this crucial point, when it came to opening the panel which led directly to the cocaine, was merely coincidental. It was an attempt to prevent the panel from being opened. He did not want the panel opened because he fully knew what was behind the panel. The Court also took into account the reaction of Mr. Serratos upon being shown the package. His response was that the officer should ask the guys about it. When the package was opened and the cocaine shown to him he remained silent. The nature of his reaction at these crucial times further strengthened the view of the Court that he had knowledge of the presence of the narcotics. There is nothing to suggest any surprise on the part of Mr. Serratos."

8. At the hearing, leave was granted to the appellant to abandon the original grounds, and to argue ten supplemental grounds in relation to the convictions and two in respect of the sentences imposed. There were three particular areas of concern that attracted our attention: the ruling on the submission of no case to answer, the 'silence' of the appellant as seen by the learned Resident Magistrate, and the finding as to possession being in the appellant. In our view, the decision could not stand in the light of the approach taken by the trier of fact in respect of each of these areas of concern.

The submission of no case to answer

9. **Ground 6** complained thus:

> "The appellant's chance of acquittal was impaired as at the end of the prosecution's case the learned Resident Magistrate made findings of his guilt."

This ground arose from the comments made by the learned Resident Magistrate when she ruled on the submission of no case to answer. Mr. Tom Tavares-Finson, attorney-at-law, who represented the appellant at the trial, filed an affidavit which indicated that on June 14, 2004, in delivering her ruling on the no case submission, the learned Resident Magistrate read from a prepared text, and a careful note was made of the ruling when the Magistrate complied with a request to re-read it. The need for the affidavit arose from the fact that the record of appeal did not include that portion of the trial. In his affidavit dated February 14, 2005, Mr. Tavares-Finson states:

> "7. Having found that there was no case for the accused Tecla, Vasques or Romero to answer, the Resident Magistrate went on to attempt (to) distinguish the case against Serratos and ultimately called upon him to state a defense (sic) to all the charges except the charge of conspiracy for which she found there was no case for him to answer.

8. In her ruling the learned Resident Magistrate identified and highlighted five (5) aspects of the evidence adduced by the Crown as pointing to the guilt of Serratos. She eventually arrived at the finding of fact that 'it was evident that the accused had knowledge of the presence of the narcotic' and should therefore answer to the charges.

9. The five (5) aspects of the evidence identified by the learned Magistrate as being evidence that the accused had knowledge of the drug were as follows;

    (a) the fact that in his question and answer, a record of which was before the court as an exhibit the co-accused of Serratos, Jose Tecla the co-pilot of the aircraft had told investigators that Serratos had the keys to the plane all the time the craft was parked in Venezuela for six (6) days prior to leaving for Jamaica.

    (b) the fact that in his question and answer, a record of which was also before the Court as an exhibit Serratos identified himself as the pilot and as the person who had control of the craft as he was the only pilot assigned to that craft by his employer.

    (c) the fact that when he was asked by the investigating officer what was behind the panel in the plane he said 'nothing'. This the Judge said was 'curious and spoke volumes and it was evident that he had knowledge of what was behind the panels'."

    (d) the fact that during the search of the craft Serratos drew the attention of the officers to

the sky and said it was getting dark and he had to leave as he did not want to get caught in bad weather.

(e) the fact that he hesitated to pull panel which had words written DANGER FUEL HIGH PRESSURE on it and said, 'can't remove...have to be careful'.

In concluding the ruling on the no case submission made by council (sic) on behalf of Serratos the Magistrate found that it was evident to the court that he had knowledge of what was behind the pannels (sic) and did not want to remove it as he had knowledge as to what was behind it and I therefore call upon him to state his defence."

10. The learned Resident Magistrate was requested by this Court to comment on Mr. Tavares-Finson's affidavit. She confirmed, as regards paragraph 9 (a) and (b) thereof, that she had made reference to the question and answer documents, but said that those exhibits were not considered when she made her determination of guilt at the end of the case. She also confirmed that she 'had made notes of (her) response to the no case submission', but she did not have those notes in her possession at the time of her response to the affidavit. She did not recall itemizing her comments, nor the exact wording of her response to the submissions.

She continued:

> "I, however, do not challenge the essence of what is stated as being part of my comments, save to state that I made no conclusive findings relative to the culpability of the accused. My view at that stage of the proceedings was that there was sufficient evidence as regards Mr. Serratos' knowledge of the substance on the aircraft to call on him to state his defence."

11. Mrs. Samuels-Brown submitted that the Resident Magistrate, in ruling on the no case submission, had found as a fact that the appellant had knowledge of what was behind the panels. At that stage, she contended, the Resident Magistrate was not entitled to make such a finding as she had not yet heard from the defence. Once a prima facie case had been established, Mrs. Samuels-Brown said, it was the trial judge's duty to hear the defence with an open mind so if she embarked on this aspect of the trial having come to a conclusion on any ingredient of the offence, then the defence would have been faced with a fait accompli and, a fortiori, there would have been a miscarriage of justice. Mr. McKenzie's response was that the Resident Magistrate must be presumed to know the law, and there was nothing on the record to indicate that she had made a finding of guilt at that stage. He submitted that what the Resident Magistrate meant was that at that stage there was a prima facie case. According to Mr.

McKenzie, the appellant's statement that he had been found guilty at the no-case stage was simply the assertion of someone who is unfamiliar with the trial process.

12. An examination of Mr. Tavares-Finson's affidavit and the response of the learned Resident Magistrate makes it difficult not to conclude that there had indeed been a finding that an important ingredient of the offence had been proven. Having said that it was "evident" that the appellant "had knowledge of what was behind the panels", the learned Resident Magistrate was making a finding that it was plain or obvious that the appellant was fully aware of the cocaine located behind the panels. This has to be viewed as an unfortunate error, given the fact that she had not yet heard from the appellant. It is perhaps appropriate to remind judges that in ruling on a no case submission, there should be no comment on the evidence or on the credibility of witnesses. This Court stated its position in 1979 on this area of the law. In **Regina v. Eric Mesquita** SCCA No. 64/78 (unreported) delivered November 9, 1979, Rowe, J.A. (Ag.) (as he then was) in delivering the judgment of the Court (Robinson, P., Melville, J.A. and Rowe, J.A.(Ag.), said at page 7:

> " ... whether the trial is by judge alone or by judge

> and jury, if the judge proposes to rule that there is a case to answer it is undesirable that he should make any comment whatever on the evidence or on the credibility of witnesses when for all he knows the defence may tender evidence which compels him to form a different opinion of the evidence for the prosecution."

This reasoning followed that of Roskill, L.J. in **R. v. Falconer-Atlee** (1974) 58 Cr. App. R. 348 at 356:

> "At the end of Counsel's submission, the learned Judge turned to the jury who were still there, having listened to all this. He told them in an address extending over four pages of transcript why it was that he was leaving the case against the appellant to them. With great respect, that was unwise, to say the least, in the circumstances, because it involved expressing, however tentatively, a view on the facts which it would have been much better not to do. If he was going to leave the case to the jury, he should have left it saying no more than that there was evidence to go to the jury and it was for them to say whether or not the appellant should be convicted."

The silence of the appellant

13. Ground 3 states:

> "The learned trial judge erred in making adverse inferences of guilt from the appellant's silence when, on the Crown's case, he was confronted with the unlawful substance."

Mrs. Samuels-Brown submitted, quite rightly, that an accused has a right of silence which is emphasized and protected by the caution administered to a person suspected of having committed a crime. She pointed to the fact that in the instant case a caution had been administered to the appellant before the search had commenced, and submitted that the subsequent "silence" ought not to have been used in a manner adverse to the appellant. In any event, she said, no accusation had been made against him to which a reply could have been expected. Mr. McKenzie conceded that the Resident Magistrate was wrong in law to have drawn an adverse inference in respect of the appellant's silence. However, he contended that without this "silence", the Resident Magistrate still had ample evidence on which to have convicted the appellant. In that situation, Mr. McKenzie was, inferentially, urging the application of the proviso to section 14 of the Judicature (Appellate Jurisdiction) Act.

14. This Court has on several occasions reminded trial judges of the principle that an accused person is not obliged to say anything at any time. The right to silence is more or less inviolable. Adverse inferences are not necessarily to be drawn against accused persons who exercise their right of silence. This is particularly so where an accused person is not on the same terms as the person to whom it was expected that he would have broken his

silence. In recent times, this Court has had to comment on this area of the law. Indeed, in **Christopher Belnavis v. R.** SCCA No. 101/2003 (unreported) delivered on May 25, 2005 we took the opportunity to remind trial judges of several decisions on the right of silence. In that case, the convictions were quashed. The result had to be the same in the instant case.

Was there evidence of possession in the appellant?

15. The two areas of concern dealt with so far (the ruling on the no case submission, and the drawing of adverse inferences from the silence of the appellant) pale into insignificance when the major question of whether there was evidence of possession in the appellant is considered.

Ground 5 reads:

> "The learned trial judge erroneously ascribed custody/control of the drugs to the appellant by virtue of its mere situation in a section of the aeroplane to which the appellant did not have direct access and accordingly there has been a miscarriage of justice. Further and in the alternative the learned trial judge wrongly equated being in charge of piloting the airplane with knowledge and control of things situated in an area on the face of it not normally accessible to a pilot."

16. Mrs. Samuels-Brown emphasized the following undisputed facts:

> (i) the prohibited drug was found after going through three panels in the interior of the plane; and
>
> (ii) there were at least two points on the journey when the aircraft was not under the control of the appellant – for six days on one occasion, and for one night on the other.

In the light of these facts, she submitted that even if it could be said that the appellant was in control of the aircraft, "on the peculiar facts of this case where the substances were found in a section of the aircraft, not normally accessible, and external to the section of the aircraft normally occupied by the pilot, then it cannot be said that the appellant was in control of that section of the aircraft". She further said that the "separate ingredient of knowledge" in the appellant was not established on the prosecution's case.

17. Mr. McKenzie responded that the appellant was the person in charge of the aircraft, and that he had instinctively taken charge when the police arrived and were questioning them. This, however, ignores the fact that the evidence indicates that the appellant was the only one of the four persons on the aircraft who spoke English, and as a result, had to act as interpreter for the others. The appellant, he said, had control of the aircraft

from September until his arrival in Jamaica. The aircraft came to Jamaica for refueling, and there is no evidence that anyone went into it for maintenance purposes. Further, Mr. McKenzie submitted, there is an inference to be drawn that on the stops the appellant had control of the keys for the aircraft.

18. It is undisputed that the appellant was one of two pilots assigned with the responsibility of piloting the aircraft. The other pilot, Jose Alfredo Terrero Tecla, in a question and answer session with the police, described the appellant as "the other captain of the aircraft". Implicit in this statement is an admission that he (Tecla) regarded himself as a captain of the aircraft, with responsibilities that were equal to those of the appellant. In the light of this, there ought to have been some explanation as to why the learned Resident Magistrate dismissed Tecla but convicted the appellant. There is no evidence which pointed to the appellant as one who had exclusive possession of the aircraft and its contents. There is no evidence which excludes the likelihood of the cocaine being placed on the aircraft at one of the stops referred to by the appellant in his answers to questions put to him by the police. The learned Resident Magistrate was therefore in error to have concluded as she did. The error seems to have come about due to the fact that she considered the questions and answers in

determining whether there was a case for the appellant to answer, yet she ignored them in determining the question of guilt. That was a puzzling approach for her to have taken.

19. The question of what amounts to possession was settled in **R. v. Cyrus Livingston** (1952) 6 J.L.R. 95. Forte, J.A. (as he then was) restated the position in **Bernal and Moore v. R.** (1996) 50 WIR 296 at 304 f:

> "The law in Jamaica therefore is that before a defendant can be convicted for an offence of possession under section 7(c) of the Dangerous Drugs Act, it must be proved that he had knowledge, not only that he had the thing in question, but also that he knew that the thing which he had was (the prohibited drug)."

In the instant case, there was no evidence capable of proving beyond reasonable doubt that the appellant knew that there was cocaine hidden behind the panels. The site of the find coupled with the evidence of the lack of exclusivity of control of the aircraft in the appellant, made the task of the prosecution extremely difficult if not impossible so far as proof was concerned. In view of this situation as well as the learned Resident Magistrate's comments in response to the submission of no case to answer, and on the 'silence' of the appellant, the Court had no choice but to quash the convictions and enter a judgment and verdict of acquittal.