IN THE SUPREME COURT

OF TURKS AND CAICOS ISLANDS Case number CR-APM 16/07

BETWEEN

BONYI BARA

AND

THE CROWN

C Barnett for appellant

A Brooks for respondent

Hearing: 20 February 2008

Judgment: 22 February 2008

Judgment

On 3 December 2007, at the Providenciales Magistrates Court, the appellant was convicted on his own plea on a single charge of unlawful entry; contrary to section 67(1) (a) of the Immigration Ordinance, Cap 51. The learned Chief Magistrate sentenced him to 10 months imprisonment and recommended deportation.

This appeal is against that sentence on the following amended ground filed on 18 February 2008:

> "That the learned Magistrate wrongly exercised his discretion in imposing the sentence on a defendant who was unrepresented and who was therefore, as a foreign national, unable to represent himself with sufficient competency to have persuaded the tribunal that the offence warranted a less severe sentence having regard for all the circumstances once properly presented and fairly weighed."

The facts of the offence do not appear on the court record because the learned Magistrate, who takes his notes on a computer, has advised that the computer failed with the result that some of the notes are lost.

However, it appears the appellant entered this country illegally from Haiti. The Information states it was during the year 2004 but it would appear it was much more recent. The contemporaneous record simply states:

> "First appearance
> Plea guilty
>
> Creoleinterpreter
> 2nd time in jurisdiction illegally – deported last time
>
> -10monthscustody
> Recommendedfordeportation
> 5 days to appeal
>
> *(NB computer memory down lost some of notes)*"

Ms Brooks, for the Crown, was unable to supply this Court with any further information as to the statement of facts outlined to the court or of the evidence to support the statement that it was the appellant's second time in the jurisdiction illegally. I note that she was not the attorney in the lower court but the Court expects counsel for the Crown to be fully instructed about the case especially where, as here, it was apparent before the appeal was listed for hearing that the record had, in large part, been lost. I shall return to the effect this has on the present case.

Mr Barnett, for the appellant, accepts that the amended ground of appeal in fact discloses two grounds and he addressed the Court on that basis.

The first relates to the competency of someone in the appellant's position to conduct his own defence. His attorney relies on the sentiments expressed by the English Judicial Studies Board in its Equal Treatment Benchbook. Chapter 1.1, headed 'Equality and Justice' sets out what it describes as key points which state the unarguable fact that many individuals or sections of the public suffer various disabilities in terms of court appearances and may need special or different treatment in order to ensure fairness and equality in the trial process.

Equally indisputable is the statement that effective communication is the bedrock of the legal process and that:

> "Unless all parties to proceedings accurately understand the material put before them, and the meaning of the questions asked and answers given during the course of the proceedings, the process of law is at best seriously impeded and at worst thrown seriously off course."

Every court is aware of the need to ensure that an unrepresented defendant is able to understand and to have his case fairly tried. The appellant is a Creole speaker and I have no doubt the experienced Magistrate in the present case ensured he understood the proceedings. There is no dispute that an interpreter was present and, equally, his attorney has raised no point to suggest the appellant did not understand. In those circumstances the matter is academic and this Court will not give purely advisory opinions in an appeal. There is no merit in this aspect of the appeal.

The second ground is more fundamental.

In his memorandum of reasons for sentence, the learned magistrate helpfully lists the matters with which he deals under separate headings. The aggravating features of the offence are stated as:

> "Immigration cases of this nature, no matter from which overseas country the accused may be from, for public policy reasons are to be considered as being serious by the court. The influx of illegal immigrants from Haiti is one of the most serious problems facing the islands.
>
> There is a prevalence of unlawful entry cases by those arriving illegally into the jurisdiction. There is a need, for public policy reasons, to ensure that Bara and those who intend to follow his example are deterred from doing so. This court has consistently passed custodial sentences for unlawful entry cases to ensure that those who enter unlawfully may understand the likely penalty if brought before the courts.
>
> Most significantly, this is the second time that Bara has entered the Turks and Caicos unlawfully. He was on the first occasion not brought before the court but he was repatriated at great cost to the authorities."

He then passes to the mitigating features:

"The court has great sympathy for and is aware of the evident plight of a number of genuine persons who live in Haiti and who seek to find a better life or to fund their family who remain in Haiti as economic refugees in other countries such as the Turks and Caicos Islands

I have taken into account that Bara pleaded guilty at his first attendance at court and have reduced the sentence accordingly."

In his general remarks on the sentence, the magistrate set out his approach to the sentence in some detail:

"Following a guilty plea, those who commit this offence for the first time and the immigration records do not show anything to the contrary, have consistently received a custodial sentence of only three months. Due to the extremely large number of unlawful entrants (on occasion two boats in one period with over 100 persons aboard each vessel) it has proved understandably unrealistic for the Immigration Department to bring each one before the courts to seek to secure a conviction. The practice has been to bring a maximum of one or two person from each vessel and to repatriate the others after they have been fingerprinted. *The finger printing is carried out so that the authorities can tell* if an unlawful entrant has previously entered the jurisdiction unlawfully. *Those who are repatriated know that they have entered illegally, know that the Government of the Turks and Caicos has had the great expense of paying for their repatriation flight back to Haiti and know that they should not return and enter or attempt to enter illegally. If, with this knowledge, non nationals still persist with this unlawful activity they should expect lengthy custodial sentences.* The courts have to pass sentences, having regard to the legislative framework, which reflect the merited concern caused by the continual influx of illegal immigrants. I have regard to the fact that I must not increase any sentence beyond the length that is commensurate with the punishment and deterrence that the offence requires. For the avoidance of doubt, I do not pass an exemplary sentence on Mr Bara. I do not pass sentence to make an example of Mr Bara."(my italics)

Mr Barnett raises two challenges to that approach. The first is whether it is correct for the court to use the previous illegal entry as a reason for different treatment where there is no conviction, The second is the degree of proof needed to establish the earlier offence. From those, he challenges the magistrate's insistence that this sentence is not an exemplary one passed to discourage others.

Evidence of previous convictions given to the court before sentence is passed is necessary because the judge should know about the character and antecedents of the person upon whom sentence is to be passed. However, such convictions may only be treated as relevant evidence if they are either admitted by the convicted person or, if not admitted, they are formally proved. Once they are properly adduced, the court is entitled to take the offence as having been committed.

Unfortunately, the loss of the record of the lower court means that this Court has no knowledge of whether the previous illegal entry was put to the appellant, whether he was asked if he admitted it and, even if he did, whether such an admission was to be treated as a previous conviction.

This Court is fully aware of the problems the immigration authorities face as a result of the sheer bulk and persistence of illegal immigrants to which the learned magistrate referred. The solution, however, lies with the Executive and the Legislature and, once found, must be incorporated in the law before the courts can apply it. The courts cannot take note of procedures which are neither properly proved nor established or required by the law.

Whatever the Executive considers necessary to deal with illegal immigrants before any prosecutions are instituted, is not for the court in a case such as this. Once it is decided to prosecute a case, the court must decide it on the facts before it and not on any extraneous information. The reference by the learned