JAMAICA

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL No. 79 of 1972

BEFORE: The Hon. President.
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Hercules, J.A.

CLEVELAND ARNOUGH v. R.

Ian Ramsay for the appellant.

Velma Hylton for the Crown.

1973 - June 15

SMITH, J.A.:

Shortly after 9 o'clock on the night of May 12, 1972, detective sergeant Dobson was in ambush at the parking lot of the Mahoe Bay Club in Saint James. He saw the appellant drive a Triumph motor car into the parking lot and parked it. The appellant came out of the car and spoke to persons standing in the parking lot. He then went to the boot of the Triumph and removed a grey suitcase from it, which he held in his hand. Sergeant Dobson held him. There was another suitcase in the boot. The grey suitcase was opened and a paper bag removed from it. In it was 2 lbs. 3 ozs. of vegetable matter, which was subsequently analysed by the Government analyst and certified to be ganja. The appellant was charged for being found in possession of ganja and for transporting ganja, offences under ss. 7 (c) and 22 (1) (e), respectively, of the Dangerous Drugs Law (Cap. 90).

At his subsequent trial in the Resident Magistrate's Court for Saint James before His Honour Mr. Boyd Carey, the appellant disclaimed the suitcases and their contents. He said he had given a lift in his motor car to a white man on the night of his arrest. He saw the white man with the two suitcases at the Salt Spring and Montego Hill junction. He offered to take the white man and the suitcases to his destination, the Mahoe Bay Club. On his arrival there the white man left the car and said he would soon return. He (appellant) took the two suitcases

from the car and put them on the ground behind the car. Soon after sergeant Dobson and other policemen came and he was arrested. The appellant was convicted on both charges on June 20, 1972. For possession of ganja he was sentenced to imprisonment at hard labour for two years. For transporting ganja he was sentenced to pay a fine of One Hundred dollars.

The evidence of sergeant Dobson, if believed, was sufficient to support the convictions. There was, however, another witness called by the prosecution. This witness, Joseph Fortier, was, perhaps, called more in proof of the charge against Anthony Dillon, who was jointly charged, and tried, with the appellant for possession of ganja. Dillon was, however, acquitted. The evidence of Fortier was made the subject of all the complaints made by the appellant in his appeal against his convictions. That evidence was to this effect: Joseph Fortier was a special agent of the Bureau of Narcotics of the Department of Justice of the United States of America. In May of 1972 he and two other agents were in Jamaica working in conjunction with the Jamaican police. On May 11 he and his agents were taken to the house of one Sydney Burke outside Montego Bay. There he met Dillon, who told him that he had a large quantity of marijuana (ganja) for sale. Burke said he had an associate with 100 lbs. of hashish for sale at $40.00 per pound. On the following day, May 12, Fortier went with Dillon to Burke's house. Burke went away and returned with the appellant. The appellant told him that he was the owner of the hashish and that he had 100 lbs. to sell. Later that day Fortier returned to Burke's house with two empty suitcases. Burke and the appellant left with the suitcases. They returned later with them. They contained what the appellant said was 100 lbs. of hashish. Fortier told them that the suitcases rattled too much and asked that they be repacked so that they did not rattle. The suitcases were emptied of their contents by Dillon, Burke and the appellant. All three and Fortier then repacked the contents with paper and cloth. Fortier said that after this he asked the appellant for some "grass" (ganja). The appellant left and returned in three or four minutes with a paper bag with marijuana, which was put into the grey suitcase. The appellant asked how and when Fortier wanted the suitcases delivered. Fortier told him they should be delivered at the parking lot at the Mahoe Bay Club at 9 p.m. No money was paid to the appellant. This is how the prosecution accounted

for the appellant's presence with the suitcases at the parking lot where he was arrested. The appellant, in his evidence, denied that he had ever met Fortier as he said or had any dealings with him.

It was submitted that Fortier instigated, incited, encouraged and procured the commission of the offences for which the appellant was convicted and that his evidence should, therefore, have been excluded on the ground of public policy. It was said that "no one, whether law enforcement officer or otherwise, can be allowed to procure and commit a crime in order to purport to solve the said crime to which he is particeps criminis". This submission was based on the well known and oft cited passage in Brannan v. Peek (1947) 2 All E.R. 572 where Lord Goddard, C.J. said that "it is wholly wrong for a police officer or any other person to be sent to commit an offence in order that an offence by another person may be detected". Alternatively, it was submitted that if the evidence was strictly admissible under the rule in Kuruma v. R., (1955) 1 All E.R. 237, then it ought not to have been admitted as it was obtained by means in the category of "trick, deception or fraud" under the principles in Callis v. Gunn (1963) 3 All E.R. 677 and R. v. Payne, (1953) 1 All E.R. 848. In the further alternative, it was submitted that Fortier's evidence was that of an accomplice and ought to have been corroborated.

It was contended that if, as Lord Goddard said in Brannan v. Peek (supra), it is wholly wrong for a police officer to commit an offence in order to detect an offence by another then it must have a result - either the inadmissibility of the evidence or its exclusion by the court. Though this can, perhaps, be said to be a logical deduction from Lord Goddard's statement, the fact is that the Court in Brannan v. Peek did not hold that the evidence in that case was either inadmissible or should have been excluded. No case has been cited to us, and we know of none, in which the evidence of a police spy or an agent provocateur has been held to be inadmissible or has been excluded applying the statement in Brannan v. Peek. In 1967, in Sneddon v. Stevenson, (1967) 2 All E.R. 1277, Brannan v. Peek was referred to and certain comments were made in relation to Lord Goddard's statement which are apposite to the submissions made to us. After citing the passage from Lord Goddard's judgment and a statement from the judgment of Humphreys, J. in concurrence, Lord Parker, C.J. said, at p. 1280:

> "Notwithstanding those strong remarks, the methods used by the police in that case were not a ground for quashing the conviction any more than they were in the later case of Browning v. J.W.H. Watson (Rochester), Ltd., (1953) 2 All E.R. 775. No doubt this court does frown on the practice of police officers being employed to commit offences themselves, or indeed to encourage others to commit offences .... In my judgment, the respondent did not commit an offence; in so far as it can be said that he did act so as to enable others to commit offences by making himself available if an offence was to be committed, it does seem to me that, provided a police officer is acting under the orders of his superior and the superior officer genuinely thinks that the circumstances in the locality necessitates action of this sort, then, in my judgment, there is nothing wrong in that practice being employed."

Lord Parker then referred to R. v. Murphy, (1965) N.I. 138 in which the matter with which he was then dealing was considered on a court-martial appeal. He quoted the headnote of the case and then (at p.1281) cited the following passage from the judgment of the court:

> "We are, therefore, of opinion that what Lord Goddard, C.J., said in Brannan v. Peek does not mean, and was not intended to mean, that evidence produced by police participation in an offence must, because of its nature, be ruled out of account. Accordingly, even if the police witnesses in this case could be considered as participating in the offence charged, so as to be guilty of it, we would not regard Lord Goddard's observations as determining how the court-martial should have acted in the exercise of its discretion."

Lord Parker continued:

> "No doubt action of this sort should not be employed unless it is genuinely thought by those in authority that it is necessary having regard to the nature of the suspected offence or the circumstances in the locality. If, however, it is done for one or other of these reasons, then I myself can see no ground for setting aside a conviction obtained on such evidence or, as in R. v. Murphy, excluding the evidence itself."

The headnote in R. v. Murphy, as quoted, disclosed that he was a soldier serving in the Army and was convicted of the offence of disclosing information useful to an enemy, in breach of the Army Act. The substance

of the case against him was contained in the evidence of police officers who had posed as members of a subversive organisation with which the authorities suspected the appellant Murphy to have sympathies and had elicited the information the subject of the charge by asking the appellant questions concerning the security of his barracks. On appeal from his conviction it was contended that the court-martial which heard the case ought in its discretion to have rejected the evidence of the police officers because of the manner in which it was obtained. It was held by the Courts-Martial Appeal Court that: (i) in criminal proceedings evidence which has been improperly obtained is not thereby rendered inadmissible; (ii) the court has nevertheless a discretionary jurisdiction to reject evidence which, though admissible, would operate unfairly against the accused; and its discretion is not spent at the time when the relevant evidence has been admitted; (iii) in the present case the court-martial which tried the appellant was entitled in its discretion to admit evidence of the police officers, and in the circumstances it had been right in doing so.

The Courts-Martial Appeal Court in its decision in R. v. Murphy was simply re-stating the principles stated in Kuruma v. R. (supra) and followed in many cases since (see e.g. King v. R., (1968) 12 W.I.R. 268). It is the effective answer to the first submission made on behalf of the appellant. The most that can be said of the evidence of a police spy or of a police officer who incites or encourages the commission of an offence in order to obtain evidence of its commission is that the evidence is illegally or improperly obtained. The authorities establish that this does not render the evidence inadmissible. It was submitted that Lord Parker's observations in the Sneddon case (supra) cited above were obiter and too wide and that they were subsequently qualified in R. v. Birtles, (1969) 53 Cr. App. R. 469. What Lord Parker said regarding the admissibility of evidence obtained by police officers who themselves commit an offence in order to obtain it may have been obiter but it nevertheless represented the law as established by the authorities. We do not agree that anything he said in the Sneddon case was qualified in the Birtles case. In the latter case, Lord Parker's observations (on p.473) were concerned with police informers, who do not usually give evidence at

a trial and whose identity are usually concealed from the court.

On the alternative submission, it was contended that there was massive trick and deception. It was said that Fortier went beyond the permissible bounds and involved himself in a crime for which he was not charged; that the evidence was obtained by Fortier by false representation and trick and ought to have been excluded. The only trick, deception or false representation we were able to detect (since none was specifically identified during the argument) was that Fortier represented himself as a foreigner who was interested in, and willing to buy, hashish and ganja. We do not think that this is the sort of trick or false representation which was intended to be referred to in the cases relied on. This is the recognised way in which spies or agents provocateurs operate in order to detect offences which it is otherwise impossible or difficult to detect. This is what was done with approval in the Murphy case (supra). There was no merit in this submission. Nor was there in the contention that Fortier's evidence was that of an accomplice and needed to be corroborated. In the first place, there was ample corroboration in sergeant Dobson's evidence if any was required. Secondly, the authorities clearly establish that what Fortier did did not make him an accomplice in the appellant's offences. (See e.g. R. v. Chambers, (1963) 1 Gl.L.R. 459).

It was next submitted that assuming Fortier's evidence to have been both admissible and receivable, it disclosed a bargain and sale of hashish and ganja which were received and accepted by Fortier in his own containers. On this premise, it was contended that: (a) at the moment of acceptance of the material into the suitcases the possession thereof passed exclusively to Fortier, and (b) the subsequent request by Fortier for the appellant to deliver the suitcases at the Mahoe Bay Club did not and could not in law operate so as to put sole or joint possession of their contents in the appellant since, assuming knowledge, he would be guilty only of transporting ganja. These contentions were based on the law relating to contracts for the sale of goods and particularly to the rules contained in the Sale of Goods Law (Cap. 349). It was submitted that it is abundantly clear that when Fortier examined the goods and had them repacked in the suitcases both the property and the possession in them passed to him; thereafter the appellant had only custody for the purpose of delivery; there had been a symbolic

delivery and the appellant was merely acting as a servant or porter of Fortier. It was said that the question of illegality in the transaction was irrelevant for these purposes because in so far as the law makes possession and sale of ganja offences one has to refer to what the legal concept of possession or sale is in order to determine those concepts.

Interesting though these submissions, and the argument in support of them, were they do not avail the appellant. In so far as the submissions were based on the provisions of the Sale of Goods Law, we hold that those provisions were not intended to, and do not, apply to transactions which are illegal and, therefore, not legally enforceable. Even if those provisions did apply to a sham transaction of sale, as this was, it is clear on the evidence that delivery, i.e. voluntary transfer of possession (see s.60), of the contents of the suitcases was not to take place until the suitcases were received by Fortier at the Mahoe Bay Club where, presumably, payment would have been made. The appellant was therefore still in possession when he was held. In any event, it cannot be said on the evidence that there was any agreement for the sale of the ganja placed in the suitcase.

The hashish which Fortier said the appellant agreed to sell to him, and which was contained in the two suitcases, was examined by the analyst but was not found to be ganja. This fact formed the basis of a complaint that the convictions of the appellant were unreasonable. It was argued that in Fortier's evidence there should have been some doubt as the pattern of the evidence was that Dillon had ganja for sale and the appellant had hashish. It was suggested that because the hashish turned out not to be ganja there was a "switch" (presumably by Fortier and the police) and the appellant was made responsible for the bag with ganja. It was said that the relative quantities of hashish and ganja must raise a doubt. Alternatively, it was contended that if there was any ganja during the transaction with Fortier it came from Dillon's store; that if the appellant took Dillon's ganja to Fortier that would not put the appellant in possession of it. Submissions of this nature are more properly addressed to a trial court and no doubt these were addressed to the learned Resident Magistrate and taken into account by him. They do not persuade us that the convictions were unreasonable as contended.

The last ground of complaint in the appeal against convictions was faintly argued. The appellant was charged with being "found in possession" of ganja rather than with "having" ganja in his possession as s.7 (c) of the Law provides. It was submitted that the time of arrest is the material time when a person must be in possession and that at the time of arrest the appellant was merely conveying ganja and was not in possession. There would have been some substance in this argument if the submission that property and possession in the contents of the suitcases had passed to Fortier at Sydney Burke's house had been accepted. As it was not there is no merit in this complaint.

For the reasons which have been stated we dismissed the appeal against convictions.

There was also an appeal against the sentence imposed for the offence of possession of ganja. At the time when this sentence was imposed the learned Resident Magistrate was obliged by law to sentence the appellant to a minimum term of eighteen months' imprisonment. It was his first recorded conviction under the Dangerous Drugs Law. A short time afterwards the law was altered by removing the mandatory minimum term of imprisonment. The learned attorney for the appellant sought to persuade us that we could, and should, apply the law as it existed at the time of the hearing of the appeal. He asked us to reduce the sentence by imposing a fine, as is now frequently done for this type of offence since the repeal of the mandatory provisions. It was submitted that the change in the law was to the appellant's benefit and was so intended by the legislature and he was, therefore, entitled to rely upon it. We were of the clear view that we had no power to impose a sentence which the Resident Magistrate was not empowered to impose on the date that the sentence was passed.

The learned attorney then submitted that the authorities indicate that the appellant ought, nevertheless, to have a hope as regards reduction of sentence. The authorities to which he referred were the Birtles case (supra) and R. v. McCann (1972) 56 Cr. App. R. 359. In both of these cases sentences were reduced on the ground that there was a possibility that the appellant in each case was encouraged to commit an offence which he otherwise might not have committed. In this case the learned attorney for the Crown agreed with the contention on behalf of the appellant that the material time

when the offence was committed was when the appellant was apprehended by sergeant Dobson. As we have said, Fortier's evidence was probably introduced to implicate Dillon in the appellant's offence. Dillon and Fortier were present in the parking lot when the appellant was held. If the parcel with ganja was not in the suitcase the appellant would have committed no offence in view of the negative results on analysis of the hashish. If the contention is right, and we do not say that it is, that the offence was committed when the appellant was held, then the appellant's possession of the ganja at that time can be said to have been encouraged by Fortier. The better view, we think, is that the appellant was in possession from he brought the ganja at Fortier's request and that this possession continued until he was apprehended. In view of the pattern to which reference has been made, where the appellant was interested in selling hashish and not ganja to Fortier, he must either have acquired possession of the ganja to satisfy Fortier's request or it was ganja which he already had in his possession. Whichever it was the appellant would not be any less guilty. But if it was the former, it can be said that the appellant was encouraged to commit an offence which he might not otherwise have committed. We do not know which it was, but the possibility which benefited the appellants in the Birtles and McCann cases can be said to be present in this. Because of this we yielded to the request that the sentence be reduced. It was ordered reduced to the minimum mandatory eighteen months' imprisonment. To this extent the appeal against sentence was allowed.