J A M A I C A

IN THE COURT OF APPEAL

R.M. COURTS CRIMINAL APPEAL NO. 47/66

BEFORE: The Hon. Mr. Justice Henriques, Ag. President
The Hon. Mr. Justice Moody
The Hon. Mr. Justice Eccleston

R. vs. H E R M A N K I N G

Mr. V.O. Blake, Q.C., }
Mr. I. Ramsay, Q.C., } for the appellant
Mr. M. Tenn }

Mr. I. Forte for the Crown

29th JULY, 1966.

MOODY, J.A.,

The appellant was convicted on the 2nd February, 1966, for the offence of having ganja in his possession contrary to section 7(c) of Cap. 90 of the Revised Laws of Jamaica, and sentenced to 18 months imprisonment with hard labour.

On Tuesday the 11th January, 1966, at about 5.15 p.m. Sgt. Isaacs, Acting Corporal Gayle and Acting Corporal Linton of the police force, in plain clothes, went to the premises of Joyce Cohen at 20 Ladd Lane, Kingston, armed with a search warrant under the Dangerous Drugs Law to search the premises for dangerous drugs. On arrival, Isaacs read the search warrant and Gayle and Linton went to the eastern end of the premises and entered a room in which were the appellant and another man. Gayle identified himself to the two men and told them that the police were there to carry out a search for ganja. Gayle searched the other man first and nothing was found on him. He then searched the appellant and found in his left side trousers pocket, two small brown paper packets and a white paper packet, one end of which was burnt. He opened them in the presence of the appellant and found them to contain vegetable matter resembling ganja, and told the appellant it was ganja, whereupon the appellant said, "Lord a the last of Herman now." He arrested the appellant for having ganja in his possession and cautioned him. The appellant made no statement. The Government Analyst subsequently examined the contents of these packets and found the two brown packets to contain together,

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about 22 grams of ganja and the white packet to contain about 3 grams of a mixture of tobacco and ganja.

The appellant in his defence gave evidence and was supported by Vincent Price, the other man referred to above. His defence was that he had gone to 20 Ladd Lane - a Beer Garden - to visit his year old son. Joyce Cohen is the mother of his son. Gayle entered the room and told Price and himself that the police were there to search and wanted to search them both. He knew both Gayle and Linton having seen them during a disturbance at Harbour View in 1962-3 when he was working there. Also that he had in 1960 sued a member of the police force for assault. Price was searched first and nothing found on him. They asked him to turn out his pockets; he did so. In each of the back pockets of his trousers he had a handkerchief - he took them out and shook them out - he had cigarettes and matches in the shirt pocket. The police told Price to leave the room; then Gayle told him he wanted another search. While he was holding the handkerchiefs, Gayle grabbed one of them from his right hand and 'turned round back' and said he had found ganja. Gayle showed him the 3 packets saying he found them wrapped in the handkerchief. He had no ganja; he never said, "This is the last of Herman now". What he did say was, "Don't frame me."

At the trial, appellant's counsel submitted to the learned Resident Magistrate -

1. That on the totality of the evidence there was sufficient to raise a reasonable doubt:
2. Section 22 of Cap.72, the Constabulary Force Law was not complied with in that the appellant had not been taken before a Justice of the Peace to be searched.

The learned Resident Magistrate's findings, as recorded was "Court accepts evidence of Corporal Gayle and Constable Linton that ganja was found in accused's pocket. Even if section 22 not complied with evidence admissible on basis of R. v. Kuruma".

On appeal learned counsel for the appellant stated he did not propose to argue that "The conviction was unreasonable having regard to the evidence", but would argue that the search allegedly

/conducted....

conducted by the police on the defendant was unlawful, and accordingly any evidence gained thereby was inadmissible alternatively, if technically admissible ought to have been excluded by the Magistrate in the exercise of his discretion".

He submitted:-

1. The warrant was issued pursuant to section 21(2) of Cap.90 of the Revised Laws of Jamaica -

> " If a Justice is satisfied by information on oath that there is reasonable ground for suspecting -
>
> (a) that any drugs to which this Law applies are, in contravention of the provisions of this Law or of any Regulations made thereunder, in the possession or under the control of any person in any premises;
>
> he may grant a search warrant authorising any constable named in the warrant, at any time or times within one month from the date of the warrant, to enter, if need be by force, the premises named in the warrant, and to search the premises and any persons found therein, and if there is reasonable ground for suspecting that an offence against this Law has been committed in relation to any such drugs which may be found in the premises or in the possession of any such persons, or that any document which may be so found is such a document as aforesaid, to seize and detain those drugs or that document, as the case may be. "

The warrant was invalid in that it was not addressed to a named constable; it did not authorise a search of persons found on the premises; it authorised any lawful constable to bring the body of Joyce Cohen before a J.P.; that Actg. Cpl. Gayle was not a lawful constable of the parish of Kingston but of the parish of St. Andrew.

2. In reading of the warrant and in advising the appellant the police were there to search for ganja the police were representing to the appellant that he was obliged to submit to a search and could not in law refuse to be searched.

Force was used to carry out the search albeit no more force than was necessary.

The search was oppressive as in any civil case on these facts punitive damages could be asked as the police acting under the colour of authority invaded the plaintiff's rights.

/Under the...

Under the Constitution of Jamaica Order in Council 11/8/62 sections 13,19 & 26(8), security of the person which includes the right of an individual not to be searched, is provided for with certain modifications.

At common law the police have no powers of search of individuals, save where a warrant is issued in respect of stolen goods.

The power of search derives from statute.

The only authority the police had was under the warrant issued addressed under section 21(2) of Cap. 90 of the Revised Laws of Jamaica. In the absence of this the search of the appellant was in direct contravention of section 19 of the Constitution.

3. Learned counsel for the appellant conceded that the only other way the police could have proceeded was under section 22 of Cap. 72 of the Revised Laws of Jamaica. -

> " It shall be lawful for any Constable to apprehend without warrant any person known or suspected to be in unlawful possession of opium, ganga (Cannabis Sativa), morphine, cocaine or any other dangerous or prohibited drugs, or any person known or suspected to be in possession of any paper, ticket or token relating to any game, pretended game or lottery called or known as Peaka Peow or Drop Pan, or any game of a similar nature and to take him forthwith before a Justice who shall thereupon cause such person to be searched in his presence, "

and submitted that where the provisions of a statute are mandatory and the section can be construed as providing for the conditions in which evidence becomes admissible then any evidence obtained in breach of the statute is inadmissible.

Section 22 of Cap. 72 is mandatory in so far as it prescribes what is to take place where a constable wishes to search a person suspected of being in unlawful possession of ganja. 'Known' in this context means from information received or found committing in the sense of having been seen with the drug and running away.

In the case of R. v. John Wallace, 5 J.L.R. 38, it was not argued that the evidence was inadmissible and the court failed to consider that there was a difference between the

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opening provisions of section 22, Cap. 72, which were enabling and the later power which was mandatory.

Further the facts in Wallace's case were different. If Wallace's case rightly decided appellant should be discharged as no explanation was given as to why appellant was not taken before a J.P.

The object of section 22, Cap. 72, is not only to enable the police to apprehend on suspicion but also to deal with the circumstances under which evidence to justify suspicion can be obtained. The fact that the police is protected from a civil suit does not affect the circumstances under which evidence can be obtained. It affects the guilt or innocence of the accused and goes to the weight and credibility of the Crown's case, e.g. if no drug is found the J.P. can be called as a witness to say so; section 22 of Cap. 72 is mandatory when evidence relating to the suspicion is to be procured.

4. If the evidence is admissible it ought to be excluded.

The test is relevance. If the evidence is relevant the method by which it is obtained is immaterial in so far as technical admissibility is concerned; Kuruma's case, 1955, 1 A.E. R. 236 decides this.

Where however evidence though technically admissible is being obtained by oppression, force, false representation, trick, threat, bribe or the like the Court ought in exercise of its discretion to exclude it.

Where the facts surrounding the case are as consistent with oppression etc. as with the absence of it or the like the accused should be given the benefit of the doubt and the evidence excluded. R. v. Payne, 1963, 1 A.E.R. 848. Callis v. Gunn, 1963, 3. A.E.R. 677.

The learned Resident Magistrate ought to have excluded the evidence.

There is no evidence that the police searched appellant for any other reason than in pursuance of the warrant.

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The circumstances are ambiguous; the inference in favour of the appellant must be drawn.

Learned counsel for the Crown submitted:

Section 22 of Cap. 72 is wholly enabling and does not provide for the conditions under which evidence becomes admissible.

Even if this section is mandatory the evidence of the search is admissible.

If the evidence is admissible the learned Resident Magistrate rightly exercised his discretion in admitting the evidence.

On the facts there is no evidence of any oppression or false representation or trick or threat as would warrant the learned Resident Magistrate in excluding the evidence. The police suspected the accused might have had ganja and so searched him. This search had nothing to do with the warrant. The appellant offered no objection to the search.

The police would have been entitled to search under section 22 of Cap. 72 if the warrant was defective.

Counsel for the appellant was heard in reply:

Those who are concerned with the preparation and/or issuance of a document which affects the liberty of the citizen ought to take care to ensure that such a document is prepared and issued in strict conformity with the section of the law which authorises its issue. The warrant in this case which purports to have been issued under the authority of the provisions of section 21(2) of Cap.90 of the Revised Laws of Jamaica falls so far short of observing those provisions as to amount to no more than a vulgar display of slovenliness. The warrant is clearly invalid and did not entitle the police acting under it to search the appellant although the section 21(2) of Cap.90 does provide for the search of any persons found in premises named in the warrant.

/The record...

The record does not reveal that any objection was taken by counsel at the trial when the evidence of the search was being tendered on the ground that it was inadmissible or if admissible that the learned Resident Magistrate ought to have exercised his discretion and excluded it on the ground that such evidence would operate unfairly against the appellant, nonetheless such a submission was made by counsel in his closing address.

In our view the evidence was relevant and admissible and the learned Resident Magistrate acted quite rightly in following the test laid down in Kuruma v. Reginam 1955, 1 A.E.R. 236 at 239, in deciding whether the evidence was admissible.

Before leaving this part of the appeal, we would like to say that in our opinion the police could also have acted under section 18 of Cap. 72:

Section 7(c) of Cap. 90 of the Revised Laws of Jamaica provides that "every person who has in his possession any prepared opium or ganja shall be guilty of an offence against this Law." Thus, merely having ganja in one's possession is an offence whether the offence has been detected or not. Accordingly when an individual who has ganja in his possession is searched and ganja is found in consequence of the search, such a person is found committing the offence and liable to be apprehended without a warrant notwithstanding that the constable had no prior knowledge or suspicion that on searching he would find ganja within the meaning of section 22 of Cap. 72 of the Revised Laws of Jamaica.

When the Court observed that the police might have acted under section 18, learned counsel replied that there was no evidence that the appellant was 'found committing' an offence. For the reason just stated "we do not agree there was no evidence that the appellant was found committing the offence." The evidence is the same as that sought to be excluded on the ground that it was obtained by oppression, force, misrepresentation or the like.

So far as this case is concerned, the powers of search given to the police are under the Dangerous Drugs Law, Cap. 90,

/and the...

and the Constabulary Force Law, Cap. 72. Under section 22 of Cap. 72, power is given to any constable to apprehend any person known or suspected of being in unlawful possession of ganja and to take him forthwith before a justice of the peace who shall cause such person to be searched in his presence. This section is designed primarily to afford protection to a constable in circumstances which would otherwise constitute a trespass and unless a constable strictly complies with the conditions specified in the section, he is liable to an action for trespass or is deprived of the protection he would otherwise have. The section makes no provision as to evidence or the admissibility of evidence or the exercise of discretion by the trial judge to admit or disallow evidence resulting from a search under this section which does not comply strictly with the conditions specified. "It is well known that in every criminal case, a judge has a discretion to disallow evidence, even if in law relevant and therefore admissible, if admissibility would operate unfairly against an accused. In considering whether admissibility would operate unfairly against an accused one would certainly consider whether it had been obtained in an oppressive manner, by force or against the wishes of the accused or by false representations, trick, threats or bribes or anything of that sort." Callis v. Gunn, 1963, 3 A.E.R. 677, at 680. Therefore we are of the opinion that failure to take the appellant before a justice of the peace to be searched in his presence does not affect the admissibility of evidence resulting from a search otherwise than as provided in section 22, Cap. 72 of the Revised Laws of Jamaica. Furthermore, it is only if failure to take the appellant before a justice of the peace amounted to or was evidence of oppression, force, false representations, trick, threats or the like, that a trial judge could be asked to exclude the evidence resulting from such a search. For these reasons it seems unnecessary to decide whether section 22 of Cap. 72 is enabling or mandatory or partly enabling and partly mandatory.

We agree that if a person who is suspected of having ganja in his possession is searched in the presence of a justice of the /peace...

peace and evidence as a result of such search was forthcoming, the justice of the peace could be called as a witness and his evidence would be corroborative of the evidence of the investigating constable.

The question whether a constable had reasonable cause to suspect a person of being in possession of ganja is immaterial as it is the fact of possession that constitutes the offence and not the conduct of the accused. The fact that the police may have innocently believed they had authority to search was immaterial.

We cannot agree that in the circumstances of this case the reading of the warrant was a false show of authority or that in reading of the warrant the police represented by conduct they had authority to search and consequently caused the appellant to feel he was obliged to submit to a search or that there is any evidence that the search was carried out in an oppressive manner. If the appellant had heard the warrant read he would have realised the police were not thereby authorised to search him thereunder. In cross-examination, Gayle who effected the search stated that the warrant did not authorise a search of anyone else beside Joyce Cohen's premises and also that he suspected the accused might have ganja on him. These answers do not suggest that there was doubt whether Gayle was acting under the warrant or not when he searched the appellant.

Indeed the submission of learned counsel at the trial was on the footing that the police had acted under section 22 of Cap. 72 of the Revised Laws of Jamaica.

Accordingly the appeal is dismissed and the conviction and sentence affirmed.

J.A.