40

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL 28/71

BEFORE: The Honourable President
The Honourable Mr. Justice Fox, J.A.
The Honourable Mr. Justice Smith, J.A.

R. VS. HERMAN WILLIAMS

C.A. Patterson for the Crown
Ian Ramsay for the appellant.

Heard: 28th, 29th, 30th April, 9th, 10th June,
30th July, 1971.

FOX, J.A.

The essential complaint in this appeal is that the Resident Magistrate should not have believed the two policemen, corporal Weir and detective sergeant Dobson who gave evidence for the Crown. They swore that standing together outside a house at Rocky Point, Granville, in the parish of Saint James, they had looked through a window into a room and seen the appellant and three other men seated on the floor around a ludo board, engaged in cutting up and in parcelling vegetable matter which upon analysis later was found to be ganja. They were also smoking a chillum pipe which was being passed from person to person. An alarm of 'police' was given. The four men rushed from the room. The appellant was held by corporal Weir at the door of the room which was about two yards from the window. Sergeant Dobson held another man. The other two men escaped. Ganja weighing over 6½ ozs. some parcelled and some unparcelled, was found in the room, as well as the chillum pipe, the ludo board and other articles. These were all subsequently tendered in evidence at the trial.

Mr. Ramsay submitted that the statement of the policemen that they had observed the activities of the appellant and the other men in the room through a window, was manifestly false by virtue of a

discrepancy in their testimony as to the description of the aperture in the window through which they had looked. Both policemen agreed that that section of the window contained frosted louvre blades. Under cross-examination both also agreed that two of these blades were missing, but corporal Weir said that the gap had been filled by two pieces of board. The window was 'half open' and he had peeped through a space between two blades. He could not remember if this space was formed by board alone, or glass alone, or board and glass. On the other hand, Sergeant Dobson said that the aperture through which he looked was the gap left by the missing blades. He denied that the gap had been repaired by board. Mr. Ramsay contended that this was a major discrepancy. He pointed out other differences in the descriptions given by the two policemen of the precise details of what they saw when they looked into the room, and invited the court to say that the total effect of all these inconsistencies was to render the evidence for the prosecution incapable of proving the guilt of the appellant beyond reasonable doubt. In substance, the Court was asked to conclude that, as a matter of law, the appellant ought not to have been convicted. Mr. Ramsay submitted further that this position in law, was reinforced by the evidence of David Hall a photographer, and Sadie McKenzie, a dweller on the premises at the time of the police visit on 30th November, 1970. Hall said that the appellant showed him the window on 12th February 1971. It was in two parts. The top half contained louvre blades of plain glass which were movable, but its height from the ground did not permit a view into the room by a person standing outside the house. The bottom half contained blades of frosted glass. Two blades were missing. The gap was filled by wooden blades. This bottom half of the window was sealed and immovable. Hall made photographs of the window which were received in evidence. McKenzie corroborated Hall's description of the window in substantial respects. She said it was in the same sealed and immovable condition at the time of the police visit. Mr. Ramsay submitted that when considered in conjunction with the discrepancy which has been noticed above, the testimony of Hall and McKenzie made the evidence of the two policemen unbelievable.

A first observation to be made on Mr. Ramsay's submissions is that, standing by itself, the evidence of Hall is altogether incapable of proving that the window was sealed and immovable at the date of the visit by the police. This condition could have been easily brought about after that date and before Hall went to the premises 2½ months later. The only relevant evidence on this issue is that of McKenzie. In placing a value upon her testimony, the magistrate was bound to be influenced by her demeanour in the witness box. This leads to a second observation to be made concerning Mr. Ramsay's submissions. They give insufficient recognition to the advantage which the magistrate had in seeing and hearing the witnesses. On the basis of this advantage the magistrate would have been justified in rejecting the evidence of McKenzie as untrue. This advantage was also of vital importance in enabling him to dispose of the discrepancies in the evidence of the policemen in a manner which was consistent with their truthfulness.

In all cases, differences in the evidence of witnesses are to be expected. The occurrence of disparity in testimony recognises that in observation, recollection, and expression, the abilities of individuals vary. Indeed, when the testimony of two witnesses coincide exactly, a judge of fact would be entitled to become suspicious of their veracity. Of course, disagreements between witnesses on the facts are also a warning of falsehood or error. This is one of the purposes of cross-examination - to ferret out conflicts in the evidence, and to provide material for the suggestion that the truth had not been spoken. But whether there has been 'honest mistake' or 'wicked invention' is essentially a question for the determination of the trial judge. He saw and heard the witnesses. The intelligence which he is able to gather from this circumstance is far superior to the information to be extracted upon review from the dead letters of the printed record. It is only where the probabilities arising from the evidence distinctly indicate a contrary conclusion, or where the inconsistencies in the evidence are profound and inexplicable, or where reasons which may have been given are unsatisfactory, that a court of appeal would

be justified in reversing the decision of a trial judge which is based upon his assessment of the truthfulness of witnesses.

Such is not the case here. Nothing in the evidence for the defence raises up a probability that McKenzie was a witness of truth. The appellant did not assist. In his unsworn statement from the dock no reference was made to the condition of the window. His defence was a denial of having been present in the room. He lived at Spring Mount, and had gone to the premises at Rocky Point to visit his 'baby's mother'. He was at a stand pipe there when the police came and held him. The evidence of Hall is, as we have pointed out, largely extraneous and, at the highest, of slight incidental value only. The other witness for the defence, Daphne Hodges, who also said that the window could not be opened, and that she had been on the premises all day and had witnessed the arrest of the appellant, was contradicted by McKenzie on the latter statement, McKenzie said that when the police came, Hodges was at the river. Hodges returned to the premises as the police "were going through the gate", and was told by McKenzie what had happened. Nothing in the evidence for the crown gives rise to a probability that McKenzie was a truthful witness. The two policemen contradict her. The inconsistencies in their evidence do not make this contradiction less explicit, but are relevant to the question of their credit.

Mr. Ramsay suggested that upon an objective assessment of the effect of these inconsistencies, the credit of the two policemen is revealed to be so seriously undermined as to cancel out the advantage the magistrate had in observing them in the witness box. We cannot agree. If the window was in truth and in fact closed and immovable as the defence maintained, and if as a consequence the interior of the room was invisible to the two policemen, it is strange that they should have agreed in such a clumsy fashion to have the window 'half open'. The particular disparity in their evidence is out of character with a mentality which had deliberately conspired to concoct the sophisticated falsehoods which are implicit in a description of imagined acitivities by unseen persons in a closed room. The 'slip up' is consistent neither with that attention to detail which would have been a requisite

for prevarication along the bold lines suggested, nor with that standard of intelligence to be expected in policemen of some rank and experience. The magistrate would have been entitled to consider that a corporal and a sergeant of police who had planned such a serious and substantial perjury - (an unnecessary perjury really, having regard to the other evidence in the case which gives rise to a strong inferential proof of guilt) - could scarcely have failed to recognise the necessity to be agreed upon the details of the aperture they had arranged to create in the window.

The reasons for the magistrate's decision were not spelt out in a written judgment. Neither the law nor the practice in his court requires this. Nevertheless, in compliance with the approved practice, he made a brief note of his findings from which it is clear that the two policemen were accepted as witnesses of truth. It is not too difficult to understand how he could eventually have come to appreciate that when the policemen were observing the activities of the appellant and the other men within the room, the precise condition of the window at that time was for them an unimportant particular which remained incidental however insistent the attempt to inflate it at the trial. The differences in the descriptions of what was observed in the room are all of a minor nature. They could have resulted from the varying capacities of individuals, and can take the complaint no further. In our view, all the inconsistencies are explicable in terms which are reasonable and innocent, and to say that they unequivocally suggest the sinister is to exaggerate. The central complaint of the appeal is therefore without merit.

One other matter remains to be discussed. At the trial, the magistrate rejected numerous applications by the defence to visit the locus in quo for the purpose of observing the window. Complaint was made of the magistrate's decision. In the light of the authorities which are collected in the 3rd edition of Cross on Evidence, pp. 8 and 9, the submission of the learned author that "what takes place at a view is a species of real evidence", was adopted. The Court was urged to say that by declining to visit the locus in quo the magistrate

had wrongly rejected relevant evidence. This submission is altogether misconceived. A decision as to whether or no the locus in quo should be visited is entirely a matter within the discretion of the trial judge. So long as this discretion has been judicially exercised, this court cannot interfere. The considerations which guide the discretion in making this decision are not circumscribed by the rules which regulate the reception of the evidence as was contended. It is true that in Goold v Evans & Co. [1951] 2 T.L.R. 1189 at 1191 Denning L.J. spoke of the view as 'real evidence". Nevertheless, it is not wrong to treat it as something which enables a better understanding of the evidence given by witnesses in court. No case lays it down that an application for a view out of court is to be determined by the rules which govern the reception of evidence. We can foresee grave inconvenience in the administration of criminal justice in this country if this should become the law. We are therefore not prepared to endorse the innovation proposed by Mr. Ramsay.

We cannot agree that the magistrate improperly exercised his discretion by refusing to visit the locus in quo. The defence did not claim that by way of an inspection over seven weeks afterwards, proof that the window was sealed and immovable at the time of the police visit on 30th November, 1970 was possible. It is difficult to imagine the factors which could have justified any such claim. The magistrate was eventually provided with photographs and a description of the condition of the window at the time of the trial. From this material he could have formed a sufficiently authentic view of the matters the defence wished to be considered. No satisfactory ground was established for the exercise of the magistrate's discretion in the manner urged by the defence. This complaint is also without merit. The appeal is dismissed. The conviction and sentence are affirmed.