JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL No. 46/70

BEFORE: The Hon. President
The Hon. Mr. Justice Fox J.A.
The Hon. Mr. Justice Smith J.A. (ag.)

REGINA v. JAMES HOWARD

Mr. H. Small for the Appellant

Mr. C. Patterson for the Crown

1st May, 1970
10th July 1970

FOX, J.A.:

At about 9 p.m. on 17th November, 1969, the Appellant was walking on a street in Montego Bay when he was stopped by a Sergeant of Police. A bag taken from him was searched by the Sergeant, and a newspaper parcel of ganja found. The Appellant was arrested and taken to the Police Station.

At his trial by the Resident Magistrate for Saint James for the summary offence of being in possession of ganja contrary to Section 7 (c) of the Dangerous Drugs Law, Cap. 90, objection was made to the reception in evidence of the ganja on the ground that its discovery and seizure had occurred as a consequence of a search of the Appellant by the Police which was not merely illegal, but unconstitutional because it had been made in breach of a fundamental safeguard guaranteed to every person in Jamaica by section 19 of the Constitution of Jamaica which is scheduled to the Jamaica (Constitution) Order in Council, 1962. This objection was overruled and the ganja was received in evidence.

On appeal from the conviction which followed, the gravamen of complaint was that the Magistrate had erred in Law in ruling as he did.

The relevant provisions of Section 19 of the Constitution are as follows:

> "19.-(1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required -

(c) for the purpose of preventing or detecting crime;

Mr. Small's submission that 'law' contemplated in section 19(2) means 'statute' as distinct from 'common' law is in conflict with the view expressed on a similar point by Lewis J.A. in Nasralla v D.P.P. 9 W.I.R.15 at, 26, and agreed with by Lord Devlin in the same case 10 W.I.R. 299 at 304. By section 1 (1) of the Constitution " 'law' includes any instrument having the force of law and any unwritten rule of law" and it is beyond question that the word 'law' in s.19(2) embraces both 'statute' and 'common' law. Nevertheless we agree that there is no real reply to the contention that the search of his property to which the appellant was subjected was not authorized by any law.

At common law, a constable has no power to arrest, and a fortiori, no power to search a person upon mere suspicion of the commission of a summary offence. Consequently, the search of the appellant was not authorized by the common law. It was also not authorized by 'statute' law. In the well known provisions of section 18 of the Constabulary Force Law, C. 72, which makes it "lawful for any Constable, without warrant, to apprehend any person found committing any offence punishable upon indictment or summary conviction and to take him forthwith before a Justice who shall enquire into the circumstances of the alleged offence", there is nothing to justify the search of the appellant, because although he may be said to have been a person "found committing" an offence, and therefore exposed to lawful arrest without a warrant, the section does not authorize his search. Neither is the conduct of the sergeant excused by the equally well known provisions of section 22 of that law, because even if the appellant was "suspected to be in unlawful possession of ganja",- (the fact of this suspicion is not at all clear from the printed record) - and could have been lawfully apprehended without a warrant, the sergeant did not "take him forthwith before a justice .... to be searched in his presence", as directed by the concluding words of section 22. Counsel for the Crown suggested that section 22 was confined to search of a "person" and not of his "property", and that therefore there was no obligation on the sergeant to take the appellant before a justice to be searched. This distinction is attractive

but unacceptable. It goes against the clear intention of section 22 to afford protection to a person "suspected to be in unlawful possession of ganja" by requiring him to be searched in the presence of a justice. It would be a strange anomaly that if ganja is suspected to be on the person of an individual he is entitled to the protection, but not so if it is suspected to be in a bag being carried by hand. The provisions of section 22 should be construed so as to avoid such an inconvenience. But the conclusive answer to Counsel's suggestion that section 22 did not oblige the sergeant to take the appellant before a justice is that the section contains no authority for search in the absence of a justice either of the appellant's person or his property. The complaint that he was subjected to an unlawful search of his property therefore remains uncontradicted.

The law relating to the admissibility of evidence obtained by unauthorized search is of respectable antiquity. In the light of several leading decisions, it may be regarded as being now well settled. The latest of these decisions is that of the Privy Council in King v. Reginam /1968/ 2 All E.R. 610, in which a judgment of this Court was affirmed. The appellant in that case was illegally searched. Ganja was found in one of his trousers pockets, and he was arrested. At his trial, objection was taken to the reception in evidence of the ganja on the ground that, even if it were admissible, the Court should in its discretion exclude it. On the authority of Kuruma, Son of Kaniu v. Reginam /1955/ 1 All E.R. 236, the Magistrate held that the evidence was admissible. This Court took the same view in dismissing the appeal. The judgment of the Privy Council reaffirmed the approach of Lord Goddard C.J., in Kuruma's case (239 ibid) that "the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained." The Board recognized the discretionary power of a Court to exclude evidence which had been "unfairly obtained", and it repeated the opinion of Lord Parker, C.J. in referring to this discretion in Callis v. Gunn /1963/ 2 All E.R. 677, that "it would certainly be exercised in excluding the evidence if there was any suggestion of it having been obtained oppressively, by false representations, by a trick, by threats, by bribes, anything of that sort." It described as "valuable" the observations of Lord MacDermott C.J. in giving

the judgment of the Courts-Martial Appeal Court in R. v. Murphy [1965] N.I. 138 on circumstances which will or will not render it unfair to allow admissible evidence to be given against an accused person. In R. v. Murphy, the appellant, a soldier serving in the army, was charged before a district court-martial with the offence of disclosing information useful to an enemy, contrary to s.60 (1) of the Army Act, 1955. 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 to have sympathies, and had elicited the information, the subject of the charge, by asking the appellant questions about the security of his barracks. The appellant was convicted and appealed on the ground that the Court-martial ought, in its discretion, to have rejected the evidence. The appellant relied in his argument on the use of the word "trick" which appears in Kuruma's case and Callis v. Gunn. In commenting on the passage in the judgment of Lord Parker C.J. which has been recorded above, Lord MacDermott C.J. said:

> "We do not read this passage as doing more than listing a variety of classes of oppressive conduct which would justify exclusion. It certainly gives no ground for saying that any evidence obtained by any false representation or trick is to be regarded as oppressive and left out of consideration. Detection by deception is a form of police procedure to be directed and used sparingly and with circumspection; but as a method it is as old as the constable in plain clothes and, regrettable though the fact may be, the day has not yet come when it would be safe to say that law and order could always be enforced and the public safety protected without occasional resort to it. We find that conclusion hard to avoid on any survey of the preventive and enforcement functions of the police, but it is enough to point to the salient facts of the present appeal. The appellant was beyond all doubt a serious security risk; this was revealed by the trick of misrepresentation practised by the police as already described; and no other way of obtaining this revelation has been demonstrated or suggested. We cannot hold that this was necessarily oppressive or that LORD PARKER OF WADDINGTON intended to lay down any rule of law which meant that it was the duty of the court-martial, once the trick used by the police had been established, to reject the evidence that followed from it."

The Board in King v. Reginam agreed with the view that unfairness to an accused was not susceptible of close definition, and on this aspect it quoted a further dictum of Lord MacDermott in Murphy's case (at p.149 ibid) that:

> "it must be judged of in the light of all the material facts and findings and all the surrounding circumstances. The position of the accused, the nature of the investigation, and the gravity or otherwise of the suspected offence may all be relevant. That is not to say that the standard of fairness must bear some sort of inverse proportion to the extent to which the public interest may be involved, but different offences may pose different problems for the police and justify different methods."

In concluding its opinion, the Board in King v. Reginam dealt with the argument on behalf of the appellant that the ganja should have been excluded because it was obtained in violation of his constitutional rights, and said (617 ibid)

> "The provision of the Jamaican Constitution scheduled to the Jamaica (Constitution) Order in Council, 1962 (26) (para. 19) gives protection to persons against search of persons or property without consent. This constitutional right may or may not be enshrined in a written constitution, but it seems to their lordships that it matters not whether it depends on such enshrinement or simply on the common law as it would do in this country. In either event, the discretion of the court must be exercised and has not been taken away by the declaration of the right in written form."

In this case, there is no evidence of "oppressive" conduct by the police which would justify exclusion of the ganja found in the possession of the appellant, and Mr. Small's submissions as to its inadmissibility were not pointed in this direction. The suggestion seriously made was that the Board in King v. Reginam has insufficiently considered the position of evidence obtained as a consequence of infringement of the constitution: Such evidence was per se inadmissible, not as the result of exercise of a judicial discretion, but by virtue of the imperatives of a written constitution which, by making specific provisions for the rights of individuals, had elevated these rights beyond the ordinary incidents of the common law: The constitution superseded, and did not merely supplement the common law: It was the duty of the Court to uphold the constitution,

and with respect to the rights given in section 19 this duty could only be discharged by a consistent application of the exclusionary sanction to evidence obtained in breach thereof. The authority advanced for these propositions, which in the light of the settled law outlined above, can only be regarded as revolutionary, was the judgment of the Supreme Court of the United States in Mapp v. Ohio 81A Supreme Court Reporter 1684. In that case, the Supreme Court affirmed the rule which it had laid down in Weeks v. United States, 1914, 232 U.S. 383 that evidence secured through illegal search and seizure in violation of the fourth amendment to the American Constitution, was inadmissible. The rule in Weeks was confined, however, to proceedings in Federal Courts. As late as 1949, in refusing to extend it to the States generally, the Court emphasized in Wolf v. People of State of Colorado 338 U.S. 25, that the rule did not offend the fourteenth amendment which restrained the States from depriving "any person of life, liberty, or property without due process of law." Enforcement of the rule was thus left a matter for the States, many of which declined to adopt it. As a consequence, evidence which was inadmissible in a Federal Court could be received in a State Court. In this way a certain procedural asymmetry was imported into the law. This was the position in 1961 when the Court came to consider its decision in Mapp v. Ohio. The view which had been the basis of the decision in Wolf was discarded. In overruling that case, the Court declared that enforcement of the rule was indispensable to "due process of law." The majority of the learned justices considered that they were compelled to this conclusion by the "logical dictate of prior cases," and by a "common sense" which required them to eliminate the growing "double standard" which had come to disfigure the law since Wolf. This could only be achieved by imposing the rule upon the States.

The rationale in Mapp v. Ohio marks a high point in the supervision which the federal judicial system has come to assume over State criminal procedure through interpretation of the due process requirement in the fourteenth amendment. The amendment expressly empowers Congress "to enforce, by appropriate legislation, [its] provisions," but Congress has taken no action to prescribe minimum standards in State criminal procedure. It was left to the Supreme Court to formulate such standards. This was not done all at once; but gradually; ad hoc, so to speak; in

appeals in which abuse of State criminal justice was alleged. In the first five decades after 1868 when the amendment was added to the constitution, there was no significant activity by the Supreme Court, and the sovereignty of State Courts continued substantially unimpaired. But in 1927, the Supreme Court set aside a State court conviction, for the first time on the ground that it was void for want of due process. (Tumey v. Ohio, 273 U.S. 510) (1927)). Thereafter, with a mounting vigour, the Court pursued its historic task of ensuring fairness in State criminal procedure. The first pronouncements were of a general nature; procedure must conform to a "principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental". Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). In 1943 a somewhat sweeping doctrine was expounded;- procedure "must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions." Buchalter v. New York, 319 U.S. 427, 429. Today the stage has been reached where the Court has imposed on the States requirements which one writer has labelled "novel." Included amongst these is the rule in Mapp v. Ohio which the same writer describes as "far reaching;" adding the comment that its absence "can hardly be said to deprive the criminal defendant of 'life' or 'liberty' "without due process of law." (Lewis Mayers - "The American Legal System", Revised Edition, p.17)

It is therefore obvious that the occasion for the rule was determined by historic urgencies within a political complex which, embracing as it does such a vast "multiplicity both of laws and jurisdictions" has evolved the peculiar legal system and the distinctive juristic approach considered necessary to ensure ordered growth within, and stability of the Federal structure. Such an occasion can never occur in Jamaica where the relatively unsophisticated arrangements of a unitary form of government prevail, and where the stresses which arise inevitably out of interaction of several State systems and a National system are non-existent. It is the need to contain and resolve these stresses which has impelled the Supreme Court to undertake its role of "moulder of the law," and in the field of law-enforcement administration, to assume powers which resemble so closely those of the legislature as to be indistinguishable therefrom. The altogether more benign environment of a unitary state on the other hand,

exerts no constitutional pressure upon this court to "make" law, and offers it no enticement away from the discharge of its primary function to "interpret" the law.

Turning now to examine the validity of the rule within the Jamaican context, it should be observed at the outset that the decision in Mapp v. Ohio was not unanimous. Mr. Justice Harlan, Mr. Justice Frankfurter and Mr. Justice Whittaker dissented. They did not believe that the fourteenth amendment empowered the Court to foist such an adamant sanction upon the States. They considered that the duty upon the Court to safeguard an individual's constitutional rights against abuses by the police was qualified by a corresponding obligation to refrain from action which may embarrass the States in coping with their own peculiar problems of criminal law enforcement. A like balance is discernible in the thinking of the Lord Justice General (Lord Cooper) in Lawrie v. Muir, 1950 S.C.(J.) 19 when he said (at p.26) -

> "From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come in conflict - (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high handed interference, and the common sanction is an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand, the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods."

This passage and one which followed was referred to with approval in King v. Reginam (615 ibid).

It should also be noticed that after emphasising that a state conviction came to the Supreme Court "as the complete product of a sovereign judicial system," Mr. Justice Harlan echoes the relevancy test

of admissibility in Kuruma's case when he said (at p. 1706)

> "The specifics of trial procedure, which in every mature legal system will vary greatly in detail, are within the sole competence of the States. I do not see how it can be said that a trial becomes unfair simply because a State determines that evidence may be considered by the trier of fact, regardless of how it was obtained, if it is relevant to the one issue with which the trial is concerned, the guilt or innocence of the accused."

These two circumstances, namely,

(a) absence of unanimity in the Court, and

(b) approval by the minority of essential features of the settled law in this jurisdiction,

rob the decision of the Supreme Court of so much of its persuasive force as to render it of little value as a guide to this Court. And even this little value disappears when it is realized that underneath all the arguments based upon the duty of the Court to uphold the guarantees in the fourth and fifth amendments, of freedom from unlawful search, and from compulsion to give self incriminating evidence, the real reason for the rule was "to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it." Elkins v. United States, 364 U.S. at p.217. This shows that the Supreme Court was convinced that the usual sanctions of the action of damages, of disciplinary action within the police system, and even of criminal prosecution, were inadequate restraints against, and gave insufficient remedy for arbitrary intrusions by the police upon the constitutional rights of persons. We are not so convinced. There was nothing before us to support Mr. Small's assertion that the usual sanctions were, in effect, unavailable, or that they were in danger of deteriorating to the status of "theoretical remedies."

The Supreme Court was also of the view that if the constable did blunder, the criminal must indeed be set free, and that since it would be the duty of the Court to liberate him, the rule was necessary. We think the price exacted for police irregularities, whether resulting from ignorance, inconvenience or infamy, not only too high, but unnecessary. In our opinion, which we express with respect, it is superior policy to allow all evidence which is relevant to the guilt of an accused to be received at his trial, subject only to the exclusion of material obtained "oppressively," or by way

of an "involuntary confession", and to deal with infractions of constitutional rights by other means. In addition to the usual sanctions mentioned above, the Jamaica Constitution has itself supplemented these "other means" by providing specific machinery in section 25 for the redress of such constitutional wrongs as may fall outside the scope of existing law. Smooth working of this machinery has been ensured by the Judicature (Constitutional Redress) Rules, 1963 (Jamaica Gazette Supplement, 1st July, 1963 No. 178) setting out the procedure for enforcement in the Supreme Court of the fundamental rights and freedoms guaranteed in Chapter III of the Constitution. In the face of these measures, the judicial remedy proposed by Counsel is entirely redundant.

We have made this detailed examination of the question raised up by counsel in deference to his submissions, and out of respect for the illustrious court whose decision provided the foundation for his argument. But in truth, the question is given a simple answer in terms of the doctrine of 'stare decisis' which obliges this Court to follow its own decisions, and more so the decisions of the Privy Council, where the facts in the cases are indistinguishable. The facts in the case before us are substantially the same as those in King v. Reginam. The constitutional question was dealt with in that case, and we cannot agree that it had been insufficiently considered. Consequently, even if it had been prepared to agree with the majority decision in Mapp v. Ohio, this court would have had no other alternative but to be bound by the decision of the Privy Council, and to affirm the admissibility in evidence of the ganja found upon the appellant.