J A M A I C A

IN THE COURT OF APPEAL

C.A.# 38/65

BEFORE: The Hon. Mr. Justice Duffus, President
The Hon. Mr. Justice Waddington
The Hon. Mr. Justice Shelley (Acting)

R. vs J O S E P H B O U C H E R

Mr. R. White for the Crown

Mr. B. Judah for the appellant

21st February, 1966.

DUFFUS, P.,

The applicant in this case Joseph Boucher was convicted of the offence of cultivating ganja, contrary to Section 7(b) of the Dangerous Drugs Law, Chapter 19.

Evidence was led on the part of the Crown that between the first and the eighth of October, 1964, the applicant was seen working in a cultivation very close to his home in the parish of St. Elizabeth. Early in the morning of the eighth of October, a strong party of police went to the applicant's home pursuant to a search warrant issued under the Dangerous Drugs Law, and there they saw the applicant in his house, and the police proceeded to make a search. A fairly substantial quantity of prepared ganja was found in parcels in pockets of a jacket hanging up in the room occupied by the applicant. The applicant admitted that the jacket was his, but he denied that he had put the ganja in his pockets or that he knew that it was there. The police also found in the kitchen a pan in which were a quantity of dried stalks of the ganja plant. Having found these things the police then proceeded a short distance away to the applicant's field,

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where two police officers had previously seen him working between the first and the eighth of October. The applicant was taken along with the police, and in that field nine ganja plants were found growing. The police rooted them up and the applicant was charged with the offence of cultivating ganja. He was tried in the Circuit Court for the parish of St. Elizabeth, convicted and sentenced.

The appellant sought leave to appeal. His application was considered and refused by a single judge, and it first came before this Court on the 22nd of September, when on the application of learned Counsel for the applicant it was adjourned pending the receipt of a full transcript of the evidence, which there appears to have been most undesirable delay in supplying, by the shorthand-writers in the Court below. Learned Counsel for the applicant sought today to be permitted to argue a number of supplementary grounds of appeal. The Court listened to the arguments in support of the reasons why he should be permitted to argue these supplementary grounds, but with one exception the Court was not satisfied that there was any good reason shown why these late grounds should now be argued.

The original application for leave to appeal contained the following ground:

> "That the learned trial judge wrongfully admitted evidence, the prejudicial effect of which was too great and outweighed the probative effect of such evidence, namely, evidence of the possession of ganja which was not the subject of the charge."

It was the submissions of learned Counsel for the appellant before us today, that the learned judge erred when he admitted, in spite of objections taken, the evidence as to the finding of the ganja in the pockets of the appellant's

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jacket in his house, and the finding of the ganja stalks in the kitchen. We listened with interest to the submissions made by learned Counsel.

The rule in cases of this nature was succinctly stated by Lord Alverstone, C.J. in the case of R. v Bond (1906) 2 K.B. 389 at p. 394 which was referred to by this Court in the case of R. v. Larman (1964) 6 W.I.R. 550 at p. 557. The rule is this:-

> " The general rule of law applicable in such cases can be clearly stated. It is that, apart from express statutory enactments, evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment cannot be given unless the acts sought to be proved are so connected with the offence charged as to form part of the evidence upon which it is proved or are material to the question whether the acts alleged to constitute the crime were designed or accidental or to rebut a defence which would otherwise be open to the accused."

And in the same case Bray, J. said (ibid., at p. 414)

> " A careful examination of the cases where evidence of this kind has been admitted shows that they may be grouped under three heads: (1) where the prosecution seeks to prove a system or course of conduct; (2) where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake; and (3) where the prosecution seeks to prove knowledge by the prisoner of some fact."

In the instant case the learned trial judge admitted the evidence of the possession of ganja under the third head, where the prosecution was seeking to prove knowledge by the prisoner of some fact. The prosecution were seeking

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to show that the growing of plants of ganja in the field of the applicant was something deliberate and designedly done by the applicant, and that there was nothing accidental about it. The prosecution had to establish [redacted] that the plants being grown in the field were ganja, and that this was known to the applicant. Learned Counsel for the appellant, pointed out, that this evidence did not establish that the ganja found in the house had been grown by the applicant as he may very well have obtained that ganja from some other source, but this was something which the learned judge did point out to the jury in the course of his directions.

The Court is of the view, that the Crown was acting properly and well within its rights in this case by adducing evidence of the finding of ganja in the appellant's house, in the circumstances in which it was found. It clearly connected the applicant with Cannabis Sativa or ganja, and showed that he must have had knowledge what it was. We feel that the evidence was properly admitted, even though it was evidence which showed that the applicant may have been guilty of an offence other than that charged in the indictment.

The only other matter which gave us some amount of concern was with regard to the supplementary grounds dealing with the judge's directions on certain admissions and confessions which the prosecution's case disclosed had been made to the police officers. The learned judge in the course of his summing-up on page 8 said this -

> " There is no evidence here of any threats, force promise of favour or inducement of any kind, but you can look through the evidence for yourselves and see if you see where any threats were made to the accused or force or promise of favour or any inducement."

It was the submission of learned Counsel for the applicant that this was a wrong direction as there was some evidence of

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force used to the applicant, and the Court's attention was directed to page 44 where the appellant in giving evidence for himself said in answer to the question -

" Q. Did you leave your room with the Police?
A. Yes, sir, and after that, after him take down the jacket him attempt to lick me, and I say, "no man, I am a sick man, don't knock me," and him say I must go up the hill with him, and I tell him I can't go except him lead me for I was weak and him help me up."

It was conceded by learned Counsel for the applicant that this threat of violence to the prisoner would have had no effect in respect of the alleged confessions which had been made earlier to the police at the time the ganja was found in the jacket pockets, but Counsel submitted that this threat of violence may very well have had some effect on the mind of the prisoner, in respect to a subsequent confession made by him when the ganja was found growing in the field.

The learned trial judge appears to have been referring to the fact that there was "no evidence ... of any threat, force, promise or favour etc." when he was dealing with the evidence given by the prosecution's witnesses, because he did remind the jury on page 13 of his summing-up when he was dealing with the defence of the appellant's statement that -

" The Corporal attempted to hit me, and I said, 'no man, don't lick me for I am a sick man, don't knock me."

We consider it was unfortunate that the judge at this stage did not bring to the mind of the jury the fact that this allegation of an attempt to use force by the Corporal of police was something they ought to take into account when considering whether or not the statement alleged to have been made by the applicant in the field when the ganja was found, was in fact a voluntary statement. It does seem that no

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questions as to the attempt to hit the appellant were put to the police witnesses when they were giving their evidence, and what appears to have happened is that the learned judge in summing-up the evidence to the jury may have over-sighted the fact that there was some evidence of violence which came from the defendant, or it may be that he had in his mind that it was unnecessary to mention it while dealing with the prosecution's witnesses. Be that as it may, we feel, that it would have been better had the learned judge drawn to the attention of the jury this evidence of a threat of violence when he was dealing with the evidence of the prosecution on page 8, or alternatively, when he was dealing with the defence on page 13 and that he should have related this threat of violence to the alleged confession which the appellant was supposed to have made in the field. However we do not consider that this matter could possibly have caused any miscarriage of justice in the instant case. The case against the applicant was over-whelming. It was an extremely strong case, and we are of the view, that there could have been no difference in the verdict of the jury had the judge mentioned this threat of violence when he was dealing with the prosecution's case. In these circumstances the application for leave to appeal is refused but in view of the delay in hearing it the Court orders that the sentence commence from the first of June, 1965.