JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL No. 103/1971

BEFORE: The Hon. President.
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Hercules, J.A.(Ag.)

REGINA v. HERBY McDONALD

C.S. Orr for the Crown.

Ian Ramsay and Patrick Atkinson for the Appellant.

16th, 17th, 18th, 19th, 25th, 26th November,
17th December, 1971, and 21st January, 1972

HERCULES, J.A.(Ag.)

On the 17th December, 1971, we dismissed this appeal and indicated then that we would put our reasons for so doing in writing. This we now do.

The trial of Appellant was commenced before the learned Resident Magistrate for St. Ann on 5th July, 1971, and on 15th July, 1971, he was convicted on the information charging that he did unlawfully have ganja in his possession on 27th November, 1970, contrary to Section 7 (c) of the Dangerous Drugs Law, Chapter 90. Leave was granted to Appellant's Counsel to argue a supplementary ground and the whole appeal turned on this ground:

"That a fundamental breach of procedure occurred in this case, rendering the whole trial a nullity, viz:-

For the first time in history, the Crown was allowed to make out a prima facie case and close its case, all in one, after the Defence was completed.

AND THAT

(a) this inversion of the order of things was contrary to existing jurisprudential principle.

FURTHER

(b) the ignorance shown by all concerned in the Court below is no excuse, and cannot cure an error of basic principle."

After three Crown witnesses as to the facts had completed their evidence, the learned Resident Magistrate made the following note:-

"Clerk of the Courts advises Court that except for the evidence of Analyst to be given on 15/7/71 as requested by Defence. Counsel for Defendant asks that Defendant be called and Clerk of Courts reserves right to call Analyst to complete case for the Crown."

So at that stage, at the request of Appellant's Counsel, Appellant went into the witness box and completed his evidence and his case. Then the matter was adjourned to 15th July 1971, on which date, after the Analyst gave evidence, the whole trial was concluded and the Appellant was convicted and sentenced to 2 years imprisonment at hard labour.

There could be no doubt that there was a departure from the usual procedure when the Defence was interposed before the Crown had closed its case. In our view, notwithstanding that the departure was at the request of Appellant's Counsel, if the conduct of the case by the learned Resident Magistrate led to a mistrial or to a miscarriage of justice, this Court should interfere and quash the conviction.

Learned Counsel presenting the appeal drew our attention to a number of well-known cases dealing with the discretion of a trial judge to call evidence upon any matter which arose ex improviso or the necessity for which no human ingenuity could have foreseen. Be it noted however that while those cases illustrate the procedure as a general rule of practice, it is not an absolute rule and may be departed from in special circumstances. See for example R. v. Cleghorn (1967) 51 Cr. App. R. 291. In any event, the cases cited in support of this principle could all be easily distinguished from the instant case. Therefore no useful purpose would be served by examining those cases. In the trial of this case Appellant's Counsel requested that Appellant be permitted to interpose his case before the Crown had closed its case. The request was granted by the learned Resident Magistrate. And now, the learned Counsel who made the request (Mr. Kirliew) did not present the appeal. Mr. Ramsay conceded that Mr. Kirliew could not properly complain and when asked whether he (Mr. Ramsay) was in any better position to complain than Mr. Kirliew, Mr. Ramsay replied that no consent by all concerned or application by Defence for an irregularity could cure the basic error. He described it as a breach of procedure that was fundamental and fatal - going to the power of the Court and by itself constituted a miscarriage of justice. He added that the ultimate responsibility for this rested with the learned Resident Magistrate, who must be presumed to know the law, and even though everyone concerned acted in good faith, the trial was reduced to a nullity by reason of three distinct breaches of procedure as follows:-

the facts of not a single case cited turned out to be on all fours with the instant case.

The first question to be considered is whether in granting the request of Appellant's Counsel, the learned Resident Magistrate committed a fundamental and fatal breach of procedure, thus rendering the trial a nullity. The most apposite and persuasive dictum to be found on this point appears in R. v. Rice (1963) 1 All E.R. 832 where, at page 839, Winn J. stated:-

> "There is a general principle of practice, the court thinks, though no rule of law, requiring that all evidentiary matter that the prosecution intend to rely on as probative of the guilt of an accused person ..... should be adduced before the close of the prosecution's case if it be then available."

Winn J. was substantially reaffirming the dictum of the majority of the Australian Court in Shaw v. R. (1952) 85 C.L.R. 365 at page 380 where Dixon, McTiernan, Webb and Kitto JJ. stated:-

> "We are not disposed to lay down the rules in the terms adopted from Tindal C.J. in R. v. Frost. It is a matter of practice and procedure, and in such matters, even where the procedure is criminal and is directed to safeguarding the position of the accused, there is less reason for closely following English authority than where the development of the substantive law is involved ........ It is probably enough to say that the occasion must be very special or exceptional to warrant a departure from the principle that the prosecution must offer all its proofs during the progress of the Crown case and before the prisoner is called upon for his defence."

This would seem to put the procedure beyond peradventure as a general principle of practice and not a rule of law. It would also seem to permit the exercise of a discretion by a trial judge. The learned Resident Magistrate did, in the exercise of his discretion, grant the request of Appellant's Counsel and a further question for consideration was whether the Appellant became prejudiced thereby with the result that there was a miscarriage of justice.

As Goddard L.C.J. asked in R. v. Ballysingh (1953) 37 Cr. App. R. 28 at page 31: "Who is in a better position to judge prejudice and embarrassment than defending Counsel?" Defence Counsel must always be conclusively presumed to be acting at all times in good faith on the instructions of his client and in the best interest of his client, so that when he requests or consents to a certain course, the Court is entitled to hold that any variation involved was with a view to facilitating his client and therefore was in his best interest.

Here Defence Counsel requested the attendance of the Analyst on a subsequent date and also requested that his client give evidence before that. It now lies ill in the mouth of the Defendant, or his Counsel at the trial, or any other Counsel for that matter, to use the variation requested as a ground of appeal.

But let us see whether any prejudice or miscarriage of justice arose. In this charge of unlawful possession of ganja, the Crown had to prove (1) possession and (2) that it was ganja within the meaning of the law. It is obvious from the record that Defence Counsel was quite prepared to divide the trial into those two compartments. He may well have thought that he would contest the first issue of possession and if the learned Resident Magistrate resolved that in his favour then the second issue of whether it was ganja within the meaning of the law would not arise. But the first issue was not resolved in Appellant's favour on the first day of hearing and although the Appellant had already given evidence before the Analyst gave his evidence on the second day, if after hearing the Analyst, the learned Resident Magistrate found that the second issue of ganja within the meaning of the law was not proved, then it would by no means have been too late to acquit the Appellant. Moreover the evidence of the Analyst could not be regarded as having been used to discredit the Defence. Indeed the Analyst could not have contributed anything on the issue of possession and could not induce the learned Resident Magistrate to disbelieve the Appellant. Whether or not it was ganja within the meaning of the law was hardly pursued at all, so Appellant could not have been prejudiced on the issue of possession by the Analyst not giving evidence before the Defence. In considering too whether there was a miscarriage of justice, regard must be had to how the Defence was conducted and also to the nature of the tribunal. Where for example there is a jury the judge must be more cautious. But the learned Resident Magistrate, in exercising his discretion, must be presumed to have assessed the whole situation properly. It would appear that he rejected the evidence of the Appellant that he was not in possession. It would further appear that he was satisfied that it was ganja within the meaning of the law, and in resolving the two issues against the Appellant, he proceeded to convict him. In the premises, we took the view that the Appellant was not prejudiced and suffered no substantial miscarriage of justice by the departure from the usual procedure.

For the reasons indicated above, we did not consider the procedure adopted as a breach going to the power of the Court and therefore fundamental and fatal. We considered it a departure from a general principle of practice, and not from any rule of law, in special and exceptional circumstances brought about by Appellant's Counsel.

Before parting with the case we feel constrained to record our great surprise that the learned Resident Magistrate permitted the departure from the usual procedure and we can only express the hope that this will never happen again. We were even more surprised that this was made a ground of complaint on behalf of the Appellant. Even if we had come to another conclusion on the technical points which have been raised in support of the appeal, this in our view, is a case which would clearly fall within the proviso, that is to say a case in which there was no substantial miscarriage of justice - Per Davies L.J. in R. v. Tregear (1967) 51 Cr. App. R. 280 at page 290.

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