JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 38/87

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A. (AG.)

REGINA

VS.

NORD RERRIE
ERROL BENNETT
JEREMIAH GRANT

F.M.G. Phipps, Q.C., Hugh Small, Q.C., and Trevor Ruddock for Appellant Rerrie

K. Churchill Neita and George Soutar for Appellant Bennett

A.J. Nicholson and George Thomas for Appellant Grant

G. McBean and E. Wright for the Crown

October 7-9, November 25, 1987 and February 24, 1988

ROWE P.:

In a trial which was conducted in the Resident Magistrate's Court, Lucea, on divers days between December 8, 1986 and February 25, 1987, the appellants were convicted by Her Honour Miss Cynthia Kennedy for several breaches of the Dangerous Drugs Act, as under:

NORD RERRIE:

(1) Inf. No. 3074/86 - Possession of Ganja. Fined $500.00 or three months hard labour.

(2) Inf. No. 3075/86 - Possession of Ganja. Fined $2,000.00 or six months hard labour and in addition to be imprisoned for three years hard labour.

(3) Inf. No. 3077/86 - Dealing in Ganja. Fined $10,000.00 or six months hard labour and in addition to be imprisoned for three years at hard labour.

(4) Inf. No. 3417/86 - Taking steps preparatory to exporting Ganja. Fined $1,000.00 or six months at hard labour and in addition to be imprisoned for three years at hard labour.

It was ordered that the custodial sentences were to be concurrent and that if the fines were not paid the sentences were to be consecutive to the custodial sentences.

ERROL BENNETT:

(1) Inf. No. 3075/86. Possession of Ganja. Fined $1,000.00 or six months hard labour.

(2) Inf. No. 3077/86. Dealing in Ganja. Fined $10,000.00 or six months hard labour and in addition to be imprisoned for eighteen months at hard labour.

(3) Inf. No. 3417/86. Taking steps preparatory to the exportation of Ganja. Fined $1,000.00 or six months at hard labour and in addition to be imprisoned for eighteen months at hard labour.

The custodial sentences were made concurrent and if the fines were not paid the alternative sentences should be consecutive to the custodial sentences.

JEREMIAH GRANT:

(1) Inf. No. 3075/86 - Possession of Ganja. Fined $1,000.00 or six months hard labour.

(2) Inf. No. 3077/86 - Dealing in Ganja. Fined $10,000.00 or six months hard labour and in addition to be imprisoned for twelve months at hard labour.

(3) Inf. No. 3417/86. Taking steps preparatory to the exportation of Ganja. Fined $1,000.00 or six months at hard labour and in addition to be imprisoned for twelve months at hard labour.

It was ordered that the custodial sentences run concurrently and if the fines were not paid the alternative sentences were to run consecutively to the custodial sentences.

Each accused gave verbal notice of appeal. Rerrie and Grant were remanded in custody while Bennett was given bail.

The appellant Rerrie owned real property at Industry Cove in Hanover. On this property stand two houses about ten chains apart, one described as "the cottage" and the other as the "upstairs house." The entire property was fenced with barbed wire with two gates. The gate to the cottage was padlocked; the large gate leading to the upstairs house was not locked. That was the state of the premises on November 1, 1986 when a party of armed policemen, led by Dep. Supt. Grant raided those premises. They saw, said the prosecution witnesses, the appellant Grant in the middle of the property, about five chains from each of the two buildings, using a tarpaulin to cover a large number of packets on the ground. Grant saw them, ran, was chased and captured and brought back to where he was seen. The senior police officer identified himself to Grant, removed the tarpaulin, cut open the one hundred and seventy-two packets, each wrapped in plastic and taped with adhesive tape and discovered what appeared to be compressed ganja therein. When examined the ganja weighed 2,707 lbs. 9 ozs. Beside the compressed packages, the police found one hydraulic jack, one iron ganja press, and two wooden ganja presses.

Dep. Supt. Grant cautioned the appellant Grant, showed him the packets and told him they contained ganja. Grant responded: "Yes sir, a Mr. Nord Rerrie ganja, a him me work with, him pay me fe watch it that no one can't thief it." Grant also said the jack and ganja presses were the property of Rerrie.

At the time of the discovery of the one hundred and seventy-two packets, Rerrie was not at those premises. He arrived at the upstairs building thirty to forty minutes later being driven in a car. He alighted from the car with the aid of two crutches. In the presence and hearing of the appellant Grant, the Dep. Supt. identified himself to Rerrie, told Rerrie that he had seen the appellant Grant covering one hundred and seventy-two packets containing compressed ganja on Rerrie's property with a tarpaulin, that he had found the hydraulic jack and ganja presses and that the appellant Grant had said the ganja was owned by Rerrie who paid him to watch it. Rerrie said: "The man a mad man, Mr. Grant." The appellant Grant retorted: "Me no mad, me

work with you and you pay me fe watch you ganja, if me no work wid you wha me a do pon you property."

Rerrie used a key to open the door to the upstairs house. On the evidence of Dep. Supt. Grant, as they entered the house Rerrie said: "Mr. Grant me want to talk to you about the ganja you find on me property." Dep. Supt. Grant cautioned Rerrie, reduced the caution to writing and invited Rerrie to sign caution which he did. Then Rerrie said:

> "The ganja belongs to Mr. Larry Swartz of Rhodes Hall Property. He knows that me sick so he use some of my guys to press the stuff and do his work. The jack and the presses belong to Jerry Neish. The property is mine and they would be sending off the ganja on Wednesday. Swartz told me that whenever the ganja is exported to the U.S. he will give me some money. The Income Tax assess me for $7 million and I bargain with them and it work down to $2 million. I paid up leaving $80,000 and that is the reason I have to try a thing. I would give you my life to give me a chance. You are human being you can see with me in this time."

Continuing with the narrative of Dep. Supt. Grant, he said he told Rerrie that he was there to search the house for guns, drugs and uncustomed goods. Rerrie used a key to open his bedroom and in a search of that room a carton box was taken from underneath his bed containing J$42,000.00 and a transparent plastic bag containing vegetable matter resembling ganja. Rerrie claimed the money. He was arrested for possession of the ganja and upon caution Rerrie said:

> "Mr. Grant, me a good man, you know sah, me always 100% behind the police - me wi give you any amount of money fe no charge me, just bun up de weed, me hear se you no tek bribe but just do that for me as a parishioner."

Dep. Supt. Grant assured Rerrie that he was only doing his job, whereupon Rerrie said:

> "Lord, me in a one little net now, a prison me a go Mr. Grant, why me never tell you se the weed you find on my property is mine is because me was convicted fe the same thing already and me know se if me convicted again is prison me a go."

The master-bedroom upstairs was searched and in it the police found three parcels of money, J$100,000.00 under the bed, J$80,000.00 in a clothes closet and in another closet J$24,040.00. Rerrie said that all the money was his which he kept at home in cash to avoid tax.

Accompanied by the appellant Rerrie, the police next searched an open section of the downstairs portion of the house and there found eight cardboard boxes on the floor, a large combination safe and large nylon bags with rope tied to the ends. Dep. Supt. Grant said that having regard to his past experiences, he told Rerrie that the bags were used to carry compressed ganja and when exported they could be dropped in the sea, would float and would glow brightly if a light was shone upon them. Rerrie said he used these bags to convey flowers.

The eight carton boxes which were all open contained similar "illuminated" bags to the one hundred and seventy-two bags with compressed ganja found under the tarpaulin. Some of the bags were full while others were partly full. Found also were eight rolls of plastic tape and several rolls of adhesive tape similar to those used on the bags under the tarpaulin. Upon enquiry Rerrie said one Bennett had left the bags and tapes there and Rerrie delivered to the police two Customs Prescribed Forms, Customs Receipt and Air Way Bill and Invoice. These are the documents which the prosecution alleges proved the appellant Bennett's association with the offence.

The appellant Grant was arrested on all the charges on which he was subsequently convicted and upon caution repeatedly said: "Is Mr. Rerrie weed." Rerrie when arrested and cautioned made no statement.

Some twenty-five minutes after these arrests were made the appellant Bennett came to Rerrie's premises. Dep. Supt. Grant showed Bennett the result of the morning's search and the documents which Rerrie had produced to him. Bennett gave a written statement under caution which at trial he said contained the whole truth to which he could add nothing.

The cottage on Rerrie's premises was searched and items including two walkie-talkie radios, one C.B. Base radio, a carton box containing fifteen adhesive tapes and eighteen rolls of plastic, all similar to those found at the upstairs building, and five hydraulic jacks were discovered and removed by the police.

Dr. Coates, the Government Analyst, attended at 230 Spanish Town Road, weighed the one hundred and seventy-two packages and took samples from each. He gave a Certificate which was tendered and received in evidence and showed that the one hundred and seventy-two packages contained 2,707 lbs. 9 ozs. of ganja. The contents of the transparent plastic bag found in Rerrie's bedroom in the box with money contained according to the Certificate of Dr. Coates, 0.413 oz. of ganja.

Dep. Supt. Grant denied defence suggestions that the appellant Rerrie refused to sign the document prepared by the Dep. Supt. and only made a pretence at signing when he was threatened by Dep. Supt. Grant and assaulted by both the Supt. and Det. Cpl. Bailey. The police party consisted of fifteen armed men who carried various types of weapons which were fully exposed, but all the police officers who testified denied making any use of these weapons.

With minor variations on peripheral matters, Det. Cpl. Bailey gave evidence corroborative of that tendered by Dep. Supt. Grant. Nevertheless, the defence moved for a dismissal of the case on a no-case submission maintaining that the prosecution witnesses were totally discredited and that there was insufficient evidence to prove that the prohibited substance was ganja. The learned Resident Magistrate ruled that there was a case to answer.

Rerrie gave evidence that he had been seriously injured in a motor vehicle accident on October 5, 1986 and was incapacitated since then. He said he arrived home on November 1, 1986 to find a large number of armed police on his premises. When accosted by Dep. Supt. Grant he refuted the alleged assertion by the appellant Grant. He denied making any admission whatever to Dep. Supt. Grant. According to Rerrie Dep. Supt. Grant and

Det. Cpl. Bailey sat together while Dep. Supt. Grant wrote on a piece of paper, then Dep. Supt. Grant brought this paper folded to him and told him to sign. Rerrie said he refused to sign. Dep. Supt. Grant told him the paper would clear both their names. Upon his continued refusal, the Supt. began to curse bad words and said he would shoot Rerrie. Then the Supt. pointed his M-16 rifle in Rerrie's face and told Det. Cpl. Bailey to tell Rerrie to sign. Bailey, said Rerrie, came over to him, held him by the neck and hit down his head upon the table and said: "Sign the paper boy." Rerrie said he got frightened and in fear of his life, he took up the pen. Dep. Supt. Grant said it only took one bullet to lick off his B.C. head and that, said Rerrie, spurred him on to make a scratch which did not at all resemble his ordinary signature. He therefore denied all the oral evidence of Dep. Supt. Grant as to statements made by him and, through his counsel, produced the document from which Dep. Supt. Grant refreshed his memory, in an effort to discredit Dep. Supt. Grant. Rerrie said he did not have exclusive occupation of his room and the small quantity of ganja found in the box under his bed was not his. He denied any knowledge of the one hundred and seventy-two packages found on the premises in view of the fact that for the previous eighteen days he was confined to bed.

Witnesses called on behalf of Rerrie testified that some of the police officers used violence towards them to compel them to move the one hundred and seventy-two packages to police vehicles. They said too that they were terrified by the nature of weapons carried by the police.

The appellant Bennett in an unsworn statement rested his defence upon the statement which he had given to the police on November 1. He repeated that he was employed to Rerrie as the General Manager of "Our Pastime" Hotel in Negril and had cleared the boxes at the request of Mr. Rerrie.

Jeremiah Grant also made an unsworn statement in which he said he was at the cottage on Rerrie's premises when he saw a helicopter land and some policemen emerge. They invited him to walk through bushes towards the upstairs house and in the process they came upon the tarpaulin covering the

packages. He had stopped by those premises to visit Mr. Rerrie who was ill and it was by chance that he was present when the police arrived.

At great length and in commendable detail, the learned Resident Magistrate summarised all the evidence given during the nine days of trial and then as she was obliged to do under the provisions of Section 291 of the Judicature (Resident Magistrates) Act she recorded her findings of fact in respect of each of the appellants. She found in respect of the appellant Rerrie "that although he was not in physical possession of these exhibits he was in constructive possession and with this knowledge that they were in fact there as inferred from the statements made by both himself and the accused Jeremiah Grant." This finding led Mr. Phipps to submit that Grant's statement to the police, made in the absence of Rerrie, was used by the Resident Magistrate against Rerrie to find possession in Rerrie and that this led to a grave miscarriage of justice. Rerrie, Mr. Phipps said, had rejected Grant's assertion, that he was employed by Rerrie to watch the one hundred and seventy-two packages of ganja. At the first confrontation Rerrie dismissed Grant as a mad man and distanced himself from any assertion by Grant. However, if Dep. Supt. Grant is to be believed Rerrie gave him an explanation as to why he had originally denied Grant's accusation. It is to be recalled that Rerrie is alleged to have said, inter alia: "Mr. Grant, why me never tell you se the weed you find on my property is mine is because me was convicted fe the same thing already and me know se if me convicted again is prison me a go." This explanation can only mean that Rerrie accepted Jeremiah Grant's account, although belatedly, and consequently the learned Resident Magistrate who had heard all the evidence was entitled to say that Rerrie had withdrawn his earlier denial and had accepted Grant's assertions. Viewed in this way, she was not in error in her finding quoted above.

Although the one hundred and seventy-two packages were found on Rerrie's property, Mr. Phipps submitted that on the Crown's case any inference

of possession in Rerrie as owner of the property was weakened as there was another person, Jeremiah Grant, who was in physical possession. Again, the prosecution was not relying entirely upon the finding of the packages on property owned by Rerrie but in addition to the statements which he allegedly made to Dep. Supt. Grant.

The central complaint of the appellant Rerrie was that any finding by the Resident Magistrate that the statements attributable to him were voluntarily made would be unreasonable and in addition the learned Magistrate applied the wrong test in determining whether these statements should have been admitted. The Resident Magistrate found as a fact there was nothing in Rerrie's evidence, from his behaviour or movements that day to suggest that he was harrassed in any way. She referred to the fact that Rerrie said he was allowed to sit sometimes and was free to move about on his crutches. Having found as a fact, that Dep. Supt. Grant was a witness of truth and integrity, she found too that he faithfully recorded what Rerrie said to him on a sheet of paper which Rerrie signed and then she found that the statements made by Rerrie were made voluntarily and without any threat or duress or inducement or oppression.

At trial it was put forward by the defence that the presence of so many heavily armed men was an overwhelmingly intimidating factor which would paralyse the will of Rerrie and other persons resorting to those premises. Certain defence witnesses, described by the learned Magistrate as friends of the appellants who had come to Court merely to endeavour to assist the appellants, had testified that they were forced at gun point to convey various articles and were assaulted in the process. Their testimony was rejected. The appellants had not complained of being actively terrorized, except that Rerrie said he was threatened and assaulted to sign the statement, and yet on their account the mere onlookers who arrived hours after the incriminating discoveries were willing to describe these police excesses.

The Court found that it was normal procedure on a Raiding Operation to question and search persons entering the premises in question and for the police to be fully armed to combat any attempts that may be made to attack or prevent them from carrying out their duties.

Mr. Phipps submitted that the true rule applicable when an objection is raised in criminal proceedings to the admission in evidence of an alleged admission by the accused is that laid down in D.P.P. v. Ping Lin (1975) 3 All E.R. 175. The relevant part of the Headnote reads:

> "It was not sufficient for the Crown to show that the person in authority had not intended to extract a confession or that there had been no impropriety on his part; what was necessary was to show, as a matter of fact, that the statement in question had not been obtained in consequence of something said or done by him which amounted to an express or implicit threat or promise to the accused."

D.P.P. v. Ping Lin was a case in which in the course of interrogating a heroin dealer, he said to the police officer: "If I help police, can you help me?" The police superintendent replied: "I can make no deal with you." but then added: "If you show the judge that you have helped the police to trace bigger people, I am sure he will bear it in mind when he sentences you." The heroin dealer then gave valuable information. Objection was taken at trial to the admission of the statement on the basis that it was induced by reason of the superintendent's remark about the sentence. All the Courts upheld the voluntariness of the statement and upheld the man's conviction.

Rerrie was not believed by the tribunal of fact when he asserted that he was threatened and assaulted by the police. Merely seeing the armed police did not on his evidence cause him to be apprehensive and intimidated. It was a question of fact for the Resident Magistrate as to whether in the circumstances the presence of the armed men could amount to an implied threat to the appellant Rerrie to induce him to make a statement. She considered that it was normal police practice to go armed when searching for dangerous drugs and in our view that finding cannot be said to be unreasonable. From the

evidence of Rerrie to which reference has already been made it is clear that what he said frightened him was the attitude of Dep. Supt. Grant who cursed him, threatened to shoot him, pointed an M-16 rifle in his face, and then ordered Det. Cpl. Bailey to tell Rerrie to sign. Their act together with the hitting of his head upon the table, overcame his earlier resistance and caused him to sign a paper which had been prepared by Dep. Supt. Grant of his own accord. There is no admission by Rerrie that he made any oral admissions or under what circumstances he made those admissions. The principle in D.P.P. v. Ping Lin quoted earlier although applicable in a case of this nature cannot avail the appellant Rerrie, as having regard to the facts found by the learned Resident Magistrate, the prosecution showed that the oral, as well as, the written statements attributed to the appellant Rerrie were not obtained in consequence of anything done or said by the police which could amount to an implied threat to Rerrie in the circumstances.

Dep. Supt. Grant refreshed his memory from the statement which he said Rerrie gave. That statement was called for by the defence and was put in as an exhibit in the case by the defence.

Three separate findings were made by the Resident Magistrate in respect of the statement as under:

> "3. The Court also accepts the evidence of Superintendent Grant who impressed me as a witness of truth and integrity and finds that all the statements made by Rerrie and recorded by him after caution was in fact made.
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> .....
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> 7. That having been produced by the Defence as Exhibit 18, it was then open to the Court to either accept or reject the contents written thereon.
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> 8. That the Court has accepted it as a true recording of what Rerrie said to Superintendent Grant on 1/11/86 and it was in fact signed by him."

Mr. Phipps submitted that the statement Ex. 18 was put in evidence in order to test the credibility of the witness Dep. Supt. Grant but the learned Magistrate used the statement as proof of the contents thereof. In R. v. Wallace Virgo (1978) 67 Cr. App. R. 323 the Court of Appeal in England held that if a document used to refresh the memory of a witness is tendered in evidence at the very highest it could show consistency in the testimony of the witness, but in no way could such a document be evidence of the truth of its contents. A similar decision was arrived at in R. v. Britton (1987) 2 All E.R. 412 when Lord Lane C.J. said at p. 415:

> "The decision of this court in R. v. Virgo (1978) 67 Cr. App. R. 323, shows that their effect is solely to show consistency in the witness producing them, and they are not to be used as evidence of the truth of the facts stated in the aide-memoire."

The Court in the instant case was in error in thinking that as the document was put in by the defence it could be looked at for all purposes. There was nothing particularly remarkable about the document although defence counsel made as much as he could about the writing-over of the times in some instances and the transposition of one or two of the events. If the learned Magistrate had confined her conclusion as to the consistency of the witness Dep. Supt. Grant, she could not be faulted. However, finding as she did that it was open to her to accept or reject the contents of the document, that was an irregularity, the effect of which will be considered later.

Ground 3 of Rerrie's Grounds of Appeal complained that there was no proof that the articles for which Rerrie was charged were in fact ganja as defined by law. It said that the bulk of the exhibits was never examined by the Government Analyst and in respect of the samples which were in fact examined, no certificate was tendered in evidence. Supporting this ground, Mr. Phipps argued that in accepting the certificate of the Analyst as to the bulk amounted to trial by an expert. He said the basis of the expert's evidence must be placed before the Court and it is not for the defence to challenge the witness in cross-examination. He said further that notwithstanding the provisions of Section 27 of the Dangerous Drugs Act, the scientific basis for the experts' opinion must be given. He relied upon R. v. Turner (1975)

1 All E.R. 70 and R. v. Hunt (1987) 1 All E.R. 1.

In Turner's case the Court of Appeal decided that the evidence of an expert was only necessary where the expert could furnish the Court with scientific information which was likely to be outside the experience and knowledge of the tribunal of fact, judge or jury. Hunt's case was concerned with possession of a controlled drug and the live issue was whether the burden of proof lay on the Crown or on the defence to show that the morphine came within the statutory exception. A person under the English statutory provisions could possess a preparation of morphine containing not more than 0.2% of morphine. The House of Lords held, interpreting the English statute, that the burden lay on the prosecution to prove not only that the powder contained morphine but also that it was not morphine in the form permitted by the statute.

In the Dangerous Drugs Act, a provision is made for the admissibility of the certificate of an Analyst which shall be sufficient evidence of all the facts therein stated, unless the person charged requires that the Government Chemist or any Analyst be summoned as a witness, when in such case his certificate would not be admissible with the statutory effect of finality. No request was made by the appellant Rerrie or any of the other appellants for the Analyst to attend and give evidence.

The factual situation on the testimony of Dep. Supt. Grant was that the Analyst took samples of contents of the one hundred and seventy-two packages and the certificate of the Analyst did not make reference to the samples but rather to the bulk. This Court decided in R. v. Glassington Outar and Morris Outar, R.M.C.A. 28/89 (unreported) that it was permissible for the Analyst to take and test samples and so to determine the character of the bulk. White J.A. in delivering the judgment of the Court, said in part:

> "Suffice it to say that the procedure adopted of taking samples from the individual packages was eminently a practical way of testing the contents of the 70 packages. Otherwise, it would entail a detailed check of every particle of the contents of each package, which would be an enormous and time-consuming task. It cannot be

> "cogently argued that it is imperative for the Government Analyst to say that he had tested the samples - and for him to state what is the result of the test on the samples themselves before he can certify that the contents of the packages were as stated in the certificates."

We are of the opinion that Outar's case was correctly decided on this point. Testing samples was the method of testing the bulk as it would be absurd to ask an Analyst to test every leaf of 2,707 lbs. of vegetable matter to determine that that was the amount of ganja in the packages.

Mr. Phipps submitted that the element of knowledge was inferred from the statements allegedly made by Rerrie which statements he said were inadmissible on the ground of being involuntary. Having regard to what we have said earlier as to the admissibility of these statements, there is no merit in this ground of appeal.

When the trial had been considerably advanced and the appellant Rerrie was giving his evidence, the appellant Grant made an outburst in the Court, the nature of which was not canvassed before this Court. It was sufficiently alarming, however, to draw a comment from the learned Resident Magistrate who said: "Is this arranged?" Counsel for the defence immediately requested that she disqualify herself on the ground of bias. This she refused to do and in answer to affidavits filed by counsel for the defence the learned Resident Magistrate said:

> "I sat patiently and listened to all ten witnesses called by the Defence and it was only inadmissible evidence objected to by Crown Counsel that was disallowed as is recorded in my Notes of Evidence.
>
> Finally I must state that I neither knew nor heard of the three accused prior to their appearance before me. I was neither biased or prejudiced or influenced by any extraneous matters and that my Findings were given without fear or favour, affection or ill-will."

Mr. Small in a very lucid presentation argued that at the very least the question from the Court would leave a clear impression that the Resident Magistrate displayed a pre-disposition to believe that what had occurred in Court when Rerrie was giving evidence was pre-arranged. Then he asked the question: Pre-arranged by whom? And his answer was that the question itself

amounted to unconscious operative prejudice on the part of the Resident Magistrate. The statement he said was at least an injudicious remark made by the tribunal of fact and law and at the highest an unequivocal expression of bias. Mr. Small further submitted that the first principle applicable in a case of this nature is that justice must not only be done but must manifestly appear to be done. Consequently where a remark is made in the course of a trial the Court should not only look at the words used, but also the impression that those words would have on the parties involved. In his submission if the Court found that the remark was injudicious the verdict should not be allowed to stand and that whereas in a civil case it might be appropriate to order a new trial in a criminal case, where the liberty of the subject is involved, a fundamental principle ~~relating to fairness~~ in the administration of justice has been breached and the correct outcome should be an acquittal.

For the general principles on bias we were referred to R. v. Grimsby Borough Quarter Sessions (1955) 3 All E.R. 300. Mr. Small cited and relied upon Campbell v. Guelph (1963) 5 W.I.R. 366. The Resident Magistrate for St. Andrew was trying a civil case in the course of which he remarked that he remembered that the plaintiff had been before him on a previous occasion in a similar case. The plaintiff and his Solicitor gave fuller accounts and the President of the Court of Appeal added that he recalled sitting on an appeal a few weeks earlier when there was a similar case from the same Resident Magistrate in which the said plaintiff had brought a similar action for Commission and had lost because he had not been believed and had been discredited by the Resident Magistrate on vital issues of fact. A new trial was ordered. Lewis J.A. said in part:

> "That the plaintiff is a man with a sense of grievance is quite clear; that the impression should have been created is unfortunate since it is an impression which in my view might reasonably have been created, having regard to the circumstances in which the learned Resident Magistrate said he made the remark. The principle to which the learned President has referred that 'justice should manifestly been seen to be done,' applies in this case and it should go back for a new trial."

Gale v. Commissioner of Police (1968) 13 W.I.R. 372, is a decision of the Court of Appeal of Barbados, in which Campbell v. Guelph was cited with approval. In the Barbadian case a man was charged for the statutory offence of driving a motor vehicle in excess of the speed limit. When the defendant entered the witness box and before he was sworn, the learned Magistrate proceeded to lecture the defendant and his counsel on the question of perjury and said that anyone on speeding charges who came into his Court and committed perjury was going to be sent to jail forthwith. The defendant was convicted and on appeal he complained that he understood the Magistrate's remarks to mean that the Magistrate had made up his mind before he gave evidence that he was going to be untruthful in his evidence and this the defendant regarded as a threat. That conviction was not allowed to stand as it was held that the remarks of the Magistrate could not fail to put the appellant at serious disadvantage in the presentation of his defence. The only result of those remarks, the Court said, was to intimidate the appellant and the only conclusion was that the Magistrate had closed his mind against the appellant.

In the two cases cited above the tribunal of fact made declarations from which it could reasonably be inferred that the Magistrate had a mind-set prejudicial to the accused. Lewis J.A. referred to the reasonableness of the appellant's belief in Campbell v. Guelph, supra, and in Gale's case, Douglas C.J. said that "the only result which could have been produced" by the Magistrate's remarks was intimidation and conclusion of a closed mind. The Courts in those cases were not dealing with a situation which suddenly arose in the course of a trial and which required a response of some sort by the trial judge. What is all this? a judge might have asked, or Has someone arranged this? Just what is happening? These are questions which a trial judge might with spontaneity put to Counsel and Counsel might with candour and in equal surprise with the Judge, say: "We are surprised, we do not know, please adjourn for a few minutes so that we can find out what is happening." In this trial Attorneys for the defence did not so respond. They went on the offensive. They sought

to implicate the Resident Magistrate, who but a moment before could have had absolutely no fore-warning of the outburst. In our view she quite rightly refused to disqualify herself as the spontaneous question posed by her could not reasonably raise in anyone's mind the notion that she was taking sides. Mr. McBean who argued for the Crown brought to our attention an Australian case R. v. Lusink and Another (1980) 32 A.L.R. 147, reported in the Commonwealth Law Bulletin 1980 which in our view expresses the true rule applicable in a case such as the present one. It is a short report and we set it out in full:

> " COURTS PRACTICE AND PROCEDURE
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> Expression of opinion by judge in the course of a trial - whether proof of bias.
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> A wife lodged an application in the Family Court of Australia for maintenance and property settlement for herself and the children of the marriage under the provisions of the Family Law Act 1975. Before evidence was called, counsel for the husband made, in the presence of the Court, an open offer to settle the matter. The offer was rejected and proceedings continued.
>
> At the conclusion of the wife's case, the trial judge indicated to counsel for the husband that, on the evidence as presented to that point, she considered the husband's initial offer unsatisfactory in view of the overall wealth of his family. She also considered that the then living conditions of the wife and children were unsuitable and that other arrangements would have to be made.
>
> Counsel for the husband then asked the trial judge to disqualify herself. This was refused. Prohibition was then sought from the High Court of Australia on the ground that it could reasonably be suspected by a fair-minded person that the trial judge had prejudged the matter.
>
> The High Court held, dismissing the husband's application that -
>
> (i) a court which is asked to grant prohibition will not lightly conclude that the judge may reasonably be suspected of bias, and it must be firmly established that such a suspicion may reasonably be engendered in the minds of the parties or the public; and

> " (ii) the evidence did not justify a conclusion that the views which the trial judge expressed, although strong, were other than provisional, or that it could reasonably be suspected that at the end of the case she would not decide with a fair and unprejudiced mind.
>
> R. v. Lusink and another (1980) 32 A.L.R. 147."

That case establishes that a Court should not lightly be accused of bias and further that the evidence on which the accusation of bias is made should be such as to firmly establish in the minds of reasonable persons that there was a suspicion of bias. When the test in R. v. Lusink supra is applied to the instant case, the evidence falls very short of the requisite level.

Ground 7 complained in respect of Nord Rerrie and there was a similar ground in respect of the other appellants that the learned Resident Magistrate had apparently made up her mind on conviction before the conclusion of the trial. This they said was demonstrated by the fact that immediately after Mr. Nicholson ended his address she commenced to read her summary of facts and findings which lasted from 11:32 a.m. to 12:35 p.m. This Court asked the learned Magistrate to explain the procedure which she adopted and she replied:

> "11. Further I might add that my summation and Findings in this case were prepared by me up to the end of the day's hearing on 24th February, 1987.
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> On the 25th of February, I continued the hearing by recording the address of Mr. Nicholson and thereafter recorded my final Findings and Conviction and Sentence which were based solely ~~on the evidence~~ before me and my Findings of Fact therefrom which made me feel sure that these offences were in fact committed by all three accused.
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> That I at no time made up my mind to convict the Accused until I had heard all the evidence by the Prosecution and the Defence."

On February 24, 1987 the last of the defence witnesses were called. Then Mr. Phipps made his final address on behalf of Rerrie. Mrs. McIntosh replied on behalf of the Crown and made her speech in relation to the other two appellants neither of whom it is to be recalled had called any witness and both of whom had made unsworn statements. Mr. Neita commenced his address on behalf of Bennett and concluded that address on the 25th. Mr. Nicholson made a final speech on the 25th February on behalf of the appellant Grant.

We understand the learned Resident Magistrate in her explanation to be saying that she completely summarised the evidence on the night of the 24th February and also recorded certain provisional findings of fact. After the final speech by Mr. Nicholson, she then made final findings of fact. It was a long case and the Resident Magistrate wished to dispose of it as soon as she could conveniently do so. We accept the submissions of Mr. Small that where there are multiple accused in a case, the tribunal of fact ought not to come to a final determination on the facts until the case for the defence is closed which in most cases co-incides with the final speech from the last of the counsel.

Section 280 of the Judicature (Resident Magistrates) Act provides that upon a trial on indictment before a Resident Magistrate an accused person if he appears in person, or his counsel if he is defended by one, should be given an opportunity to sum up the case to the Resident Magistrate at the conclusion of the evidence. No similar statutory provision is however made for counsel to sum up the case when the Resident Magistrate is sitting in his special statutory summary jurisdiction. We acknowledge that there is a practice for some Resident Magistrates to permit counsel to sum up in some types of summary offences and indeed each counsel was permitted to do so in the instant case. The trial was substantially over on the 24th of February when Mr. Phipps and the Crown had completed their addresses and the areas upon which the other counsel addressed were taken into account before the learned Resident Magistrate made her final findings of fact. We do not find that

this was an irregularity in the trial and the complaint in Ground 7 fails.

Mr. Neita who argued the appeal for the appellant Bennett adopted the arguments put forward by Mr. Phipps and Mr. Small insofar as they could affect Bennett's case and he argued two additional grounds, viz., that the verdict was unreasonable and that the learned Magistrate failed to properly construe the caution statement given by Bennett.

Bennett has been found guilty on the basis that he aided and abetted Rerrie in the several offences for which Rerrie was convicted. In his short unsworn statement Bennett said he cleared the boxes at the request of the appellant Rerrie, who was his employer and that the contents of his statement Ex. 2 were true. That statement was to the effect that one Carlton Barrett, whom Bennett did not know, telephoned him at Rerrie's hotel and asked him to pick up some boxes at the airport for Barrett. Because Bennett was clearing some goods for himself he agreed to clear the boxes for Barrett and Barrett agreed to repay him the cost of clearing the boxes which Bennett would hand over to Rerrie. Bennett said he did not know the contents of the boxes before clearing them but at the time when the boxes were examined by the Customs Officer he saw that they contained plastic bags, tapes, and nylon bags.

Upon examination of the Customs documents it was seen that the goods were consigned to "Earl Bennett of Red Ground, Westmoreland" and the contents were said to be "Personal Effects Not for Resale No Commercial Value." Customs Officers imposed duty of $4,764.75 and $1,357.95 which Bennett paid. The goods were consigned to Bennett at his private address. These goods were not sent to him at the hotel "Our Pastime" or to the appellant Rerrie. The goods found themselves at Rerrie's premises and co-incidentally were of the exact type and description as the containers in which the vast quantity of ganja was packaged. The learned Resident Magistrate was in our view, entitled to infer from the circumstances of the finding of the boxes of illuminated plastic bags etc., some of which were partly used, that Bennett was aiding and abetting Rerrie in the offences for which he was convicted.

Mr. Nicholson submitted on behalf of the appellant Grant that the learned Resident Magistrate made up her mind that Dep. Supt. Grant was a credible witness before she heard the final address on behalf of the appellant Grant and that this was an irregularity which vitiated the trial. We have already held that the procedure adopted by the Resident Magistrate in recording her findings of fact did not invalidate the trial. In our view the overwhelming evidence was that the appellant Grant was in physical possession of the one hundred and seventy-two packages of compressed ganja and therefore his convictions cannot be assailed.

We said earlier that the complaint by Mr. Phipps that the learned Resident Magistrate wrongly treated the contents of the document which Dep. Supt. Grant had used to refresh his memory as if they were primary evidence in the case, was well-founded. The learned Resident Magistrate formed a completely independent view of the credibility of Dep. Supt. Grant, without the aid of the document Ex. 18 and even when faced with what appeared to be variations between the oral testimony of Dep. Supt. Grant and the statements attributed to Rerrie in Ex. 18, she was able to say that those variations were not substantial. We are of the view that she found Dep. Supt. Grant to be a witness of truth despite Ex. 18, and not because of anything that she saw in Ex. 18. We think therefore that the provisions of Section 305(3) of the Judicature (Resident Magistrates) Act should be applied and that the appeals in relation to Rerrie should be dismissed.