

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 6/99

**BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.**

R. v. RICHARD SMITH

Ian Ramsay, Q.C., & Deborah Martin for Appellant

Marva McDonald-Bishop for Crown

7th, 8th, 9th June & 30th July 1999

RATTRAY, P.

At the conclusion of the hearing of this appeal we allowed the appeal, quashed the conviction set aside the sentence and promised to give our reasons in writing. We do so now.

The appellant was convicted in the Resident Magistrate's Court for the parish of St. Andrew holden at Half-Way-Tree on charges of breaches of the Dangerous Drugs Law to wit possession of ganja, dealing in ganja and taking steps preparatory to exporting ganja.

At the trial before His Honour, Mr. Maurice James, Resident Magistrate on the 22nd of January, 1998 the prosecution presented the evidence of Corporal Phillip Pengue of the May Pen Police, who at the relevant time of the alleged offence was stationed at the Narcotics Division in St. Andrew. He testified that on the 12th February, 1997 at about 3:45 p.m. armed with a written authorisation under the Dangerous Drugs Act to search premises 3 Elphinstone Drive, St. Andrew belonging to the appellant, he led a police party to the premises. The appellant and his wife Forna

were both on the verandah of their home. He informed them of his authorisation to search the premises. There was in the car porte, a blue Hyundai motor car and a green Camry parked behind it. A search was carried out on the premises but nothing was found. He asked the appellant if he was the driver of any of the cars and got the reply - "I drive the Hyundai and my wife drive the Camry." A search of the Hyundai disclosed six (6) packages with parcels wrapped in masking tape and transparent plastic in the trunk of the car.

On cutting the parcels open in the presence of the appellant and his wife, there was disclosed vegetable matter resembling ganja. On pointing this out to the appellant, he said "Officer, me wife no know nothing bout it." A search of the Toyota Camry disclosed nothing of interest.

Mr. Smith led the police officers to the back of the premises where he showed them a carton. When opened, this revealed two (2) parcels with vegetable matter resembling ganja. Cpl. Pengue pointed out to Mr. Smith that the parcels contained ganja. The appellant made no statement. Both husband and wife were charged with the offences under the Dangerous Drugs Law but the charges against the wife were later withdrawn. The Forensic Laboratory later confirmed that all the packages did indeed contain ganja. The certificate was tendered and admitted into evidence.

The hearing was adjourned until the 12th of March and on that date, counsel for the appellant cross-examined Cpl. Pengue. Cross-examination revealed the following:

1. That the appellant did tell him that Hyundai
was not working properly;
2. the appellant used a key to open the front door
of the car;
3. the appellant opened the trunk of the car and
"One can just turn the lock of this car and the
trunk will open."

4. The appellant told him that the car belonged to some relative of his or some friend;
5. "he might have told me that a relative left some produce there and asked him to keep it;"
6. the box under the tree at the back of the premises was sealed with masking tape.

In re-examination the witness said "I can't recall if he (the appellant) said ganja he might have said I got the boxes from St. Elizabeth. I make notes but my notebook is lost. It was stolen from my car."

Cpl. Pengue's straightforward evidence-in-chief after the adjournment and under the cross-examination was watered down by him and became contradictory and uncertain.

Detective Constable Angella Foster-Mayne, gave evidence of the search of the house in which nothing was found, and of Mr. Smith opening the car trunk where she "saw eight (8) triangular packages." She later changed that to six (6) packages. Further, in cross-examination she said "I wrote a statement in the matter. My statement is not accurate. I met Mr. Smith at the door. I wrote my statement after the Court case had been called up several times. It is likely then I might have forgotten several things."

She had written in her statement that she had seen four (4) boxes. That she now said was a mistake. When she saw the box in the yard it was not taped.

On a no-case submission the Resident Magistrate ruled that there was no case to answer with respect to the charge of taking steps preparatory to exporting ganja but called upon the defence in respect of the other charges.

Should the learned Resident Magistrate have called upon the defence in respect of the other charges? We need to examine his written findings in the matter to

see if it can assist in this respect. How did he deal with the evidence of the two police witnesses? I cite in extenso his findings in this regard:

"The atmosphere of the evidence in chief given by Det. Cpl. Pengue, on vital aspects of the case, seems to have changed dramatically in his evidence under cross and re-examination. And does the Court wonder why? Why did this Detective Corporal of Police give what could be considered incriminating evidence in chief on one day, but change his evidence under cross-examination on another day?

It will be recalled that in evidence in chief Det. Cpl. Pengue said, upon his request Richard Smith used a key to open the trunk of the Hyundai motor car, but under cross-examination he said, 'I cannot recall if a key was used; one can just turn the lock and the trunk will be opened.' This latter statement suggests that Smith would have had no need to have used a key.

In evidence in chief Det. Cpl. Pengue testified that Smith had said that the 'Ganja came from St. Elizabeth,' but he (Smith) did not mention from whom the ganja came. In cross-examination Pengue said that Smith might have told him that a relative had left some produce there, and asked him to keep it.

Why was not the evidence about the relative given in evidence in chief when the events must have been more fresh in Pengue's mind?

In re-examination Det. Cpl. Pengue said, 'I cannot recall if Smith had said 'Ganja, he might have said I got the boxes from St. Elizabeth.' Det. Cpl. Pengue added that he had made notes in his notebook but that the notebook is lost; it was stolen from his car.

The evidence-in-chief of Det. Cons. Angella Foster-Mayne corroborated that of Det. Cpl. Pengue, but in addition, she gave the registration numbers of the Hyundai as 9922 AW and the Camry as 3994 BC. She also testified that after caution Forna Smith said, 'How could he do this to me.'

However, in cross-examination she said that she saw a verandah and that the car porte was part of the verandah. She said, 'The front door was open ... it may have been closed ... I now say that the front door was open.' Finally she said, 'I wrote a statement in this matter.' 'My statement is not accurate. I wrote my statement after the Court case had been called up several times. It is likely I might have forgotten several

things.' It follows that she could not use her statement to refresh her memory because it was not accurate.

Now is not this utterly unbelievable? Could this Constable have been oblivious of the seriousness of the charges against the accused.

Here is the case where a police officer wrote a statement purporting the same to be the truth. She presented it to the Prosecution in order to assist the Court in doing justice according to law. She swore and gave evidence in chief based on the said statement. Four (4) months after - and under oath - she tells the Court that the statement she had written was inaccurate. So the Prosecution has been misled by a vital witness - it led evidence based on a statement that was not true.

And why would this officer have written an inaccurate statement, and what would or could have led her so to do?

And why would she have waited months before writing a statement in such a serious matter.

And it would not be surprising if Det. Cons. Angella Foster-Mayne considers herself an invaluable asset to the Jamaica constabulary Force.

It seems that on the day of cross-examination both Det. Cpl. Pengue and Det. Cons. Angella Foster-Mayne acquired a virus of forgetfulness but, maybe, be that as it may.

Thus was the case for the Prosecution."

Clearly, in the view of the Resident Magistrate at the end of the Crown's case these witnesses had been completely discredited. How then could he have called upon the defence when the Crown's case on his own assessment was in shambles?

It is the duty of the Crown in a criminal matter to establish its case against the accused persons on the standard of "beyond a reasonable doubt." If at the end of the Crown's case the Judge's assessment of the evidence is such, as he considered it "utterly unbelievable" he has one duty, and one duty only and that is to refuse to call upon the accused person to answer to the charge and to dismiss the charge immediately. That was the duty of the Resident Magistrate in this case and in calling

upon the accused man to answer to the charge when his assessment of the evidence of the witnesses was as indeed he had so graphically stated, he was clearly in error.

Consequently, we allowed the appeal, quashed the conviction and set aside the verdict, entering instead a verdict of not guilty.