J A M A I C A

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL No. 69/80

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Rowe, J.A.
The Hon. Mr. Justice White, J.A. (Ag.)

REGINA vs. WINSTON LINCOLN

F.M.G. Phipps, Q.C. for Appellant

F.A. Smith, Deputy Director Public Prosecutions for Crown

December 19, 1980; April 3, 1981

ROWE, J.A.:

At the conclusion of the arguments on December 19, 1980 we dismissed the appeal, affirmed the conviction and sentence and promised to reduce our reasons to writing. We now fulfil that promise.

The appellant the proprietor of the Savoy Club and Restaurant at 57 Barnett Street in the parish of St. James, would in the course of his legitimate business earn foreign exchange. A party of policemen descended on the Savoy Club in the very early morning of Wednesday, December 20, 1978 armed with a Search Warrant and in their search of the premises found $575.00 in U.S. currency in the pocket of a waistcoat the property of the appellant. After some investigation Mr. Lincoln who describes himself as a businessman "with a big business" was arrested and taken off to the police station. He has engaged and paid for the services of experienced senior counsel; he has forfeited the sum of $575.00

U.S. and he has paid a fine of $2,829.00. Such is the penalty for retaining a modest sum of U.S. currency in one's possession in breach of the Exchange Control Act.

Mr Phipps did not trouble the Court with arguments in support of his first ground of appeal "That the verdict was unreasonable and cannot be supported having regard to the evidence." With this approach we entirely agree. There was the evidence of the finding of the foreign exchange, there was evidence of answers given by the appellant admitting his possession of the foreign exchange which he said were his week's sales and of his purpose in retaining the same. The live questions were those that formed the subject of complaints in grounds 2 and 3.

In ground 2 the appellant complained that the learned resident magistrate wrongly admitted in evidence hearsay statements:

> "(a) What Sgt. Stewart discovered on reading the appellant's books of account;
>
> (b) the appellant's bank account."

The learned resident magistrate heard evidence from Det. Sgt. Linval Stewart, that having discovered the foreign currency he asked the appellant for his books and these he produced. Sgt. Stewart examined the books and in evidence he said: "There was no record of U.S. currency in his books." The books to which the Sgt. referred were not tendered in evidence. Nevertheless the learned resident magistrate in his findings of fact said, inter alia, "Furthermore his records do not enclose (sic) the receipts of any foreign currency since his visit to the Bank the previous day. "

We do not agree with Mr. Phipps that an undesirable feature of this trial, was the admission without objection, of parol evidence of the contents of the appellant's books without first having served on him a notice to produce or indeed impounding the books and producing them in evidence. The police sergeant did not purport to give evidence of any particular thing that was written in the books

which the appellant produced and which he examined. In saying that there was no entry in the books relevant to his enquiry, it became evident why the sergeant did not consider it expedient to impound and produce the books. It was never at anytime the contention of the appellant that an entry in his books was overlooked by the police officer or that there was any record in those books which would contradict the Crown's case. There is, therefore, no merit in ground 2(a) of these grounds of appeal.

The learned resident magistrate made a primary finding of fact that the foreign currency the subject of the charge was the proceeds of the week's sale from the appellant's business and that although he had visited the bank on December 19, 1980 he had not lodged the foreign currency. When he introduced his second finding with the word "Furthermore", the learned resident magistrate was indicating that this was indeed an additional and separate ground for holding the appellant to be guilty rather than that this was evidence which assisted him in making his first finding of fact. We respectfully adopt the test propounded by the Privy Council in Teper v. R. (1952) 2 All E.R. 447 at 451 where Lord Normand said:

> "The test is whether on a fair consideration of the whole proceedings the Board must hold that there is a probability that the improper admission of hearsay evidence turned the scale against the appellant. "

In that case too their Lordships said that:

> "Before assessing the prejudice caused by the wrongful admission of the hearsay evidence and deciding whether it affected the substantial justice of the trial, the nature and effect of the other evidence must be looked at. "

We appreciate the force of Mr. Phipps argument on this ground of appeal but we are satisfied that in the circumstances of this case, recourse to the oral evidence of the contents of the appellant's books did not turn the scale towards his conviction.

Sgt. Stewart under cross-examination from counsel for the defence said:

> "I went to the bank and found that no foreign currency had been lodged by the accused in last three days. "

Counsel for the defence attempted to obtain further answers from the witness as to the identity of the bank official from whom he had obtained the information but the objections of counsel for the Crown on the ground that the witness wished to remain anonymous were upheld by the Court.

It is true that this response of the witness to counsel for the defence was not only hearsay but prejudicial to the interest of the appellant. Counsel in embarking upon his cross-examination must have had specific instructions and if indeed he had fished in deep unfamiliar waters and had received an inconvenient reply damaging to his case, his best approach would be to call witnesses to repair the breach. He undertook no such burden and we do not now see how an answer wrung from the witness in cross-examination can support ground 2(b) in this appeal.

Ground 2 raised quite a novel and interesting point of law. In it was the complaint that the learned resident magistrate wrongly admitted in evidence a document, exhibit 2, which purported to be a statement of the appellant. Mr. Phipps maintained that the document, exhibit 2, purported to be a record of what had taken place at the appellant's premises by way of a search and in addition some of the questions which were asked and the answers given in contradistinction to all the questions asked and the answers thereto. This document, he said, was essentially the Crown's case as given in the oral testimony of the witnesses and could have been tendered for no other reason than to corroborate that oral testimony. He pointed to what were, in his view, unwholesome aspects of the document, in that it contained unexplained alterations and an addition which appeared to be in a different ink from the remainder of the document. The real mischief in his submission, was that the learned resident magistrate relied

on the contents of the document in his findings of fact to support his verdict of guilty.

Prosecution witness, Sergeant Linval Stewart, said that in the course of his search and investigation on that morning, he cautioned the appellant on three occasions. In the first instance he wished to know from the appellant who owned the waistcoat. We are unable to determine from the Record what transpired immediately upon the second caution. It was after the third caution that Sergeant Stewart made a written record of the questions and answers.

At trial, evidence was led from Sergeant Stewart to prove affirmatively that the "statement" given by the appellant was a voluntary one. The attorney for the defence objected to the admission of the "statement" on the ground that it was vague and he relied on Commissioners of Customs and Excise v. Harz and another (1967) 1 All E.R. 177. The objection was not upheld and it appears to us that that case had no real relevance to the instant case. This was not a case where the police officer in order to extract an admission from the appellant threatned that the appellant would be liable to prosecution for failure to answer. Nor was this a case where the officer purported to ask his questions by virtue of any special statutory or administrative authorisation.

Mr. Smith, the Deputy Director of Public Prosecutions, in his usual helpful manner, submitted that the document, exhibit 2, was admissible partly under Rule I of the Judges' Rules and partly in accordance with Rule II of those Rules. It will be remembered that the revised Judges' Rules adopted by Her Majesty's Judges of the Queen's Bench Division in January 1964 were also adopted by the judges of the Supreme Court of Jamaica and came into effect in Jamaica on May 1, 1964. The notice of the adoption of these Rules under the hand of Allan Louisy, then Registrar of the Supreme Court is dated March 25, 1964 and in this notice the English Judges Rules as appear in Home Office Circular No. 31/1964, issued January 1964 are fully set out.

Rule I permits the police who are trying to discover whether, or by whom an offence has been committed to question a person suspected from whom he thinks that useful information can be obtained. Before doing so the police officer need not caution the suspect. Here a distinction must be drawn between facts giving rise to mere suspicion and facts which would afford reasonable grounds for suspecting that the particular individual has committed an offence. In these second set of circumstances Rule II requires that the police officer administer a specified caution before putting any or any further questions to the suspected person.

In the instant case, the document, exhibit 2, began with three sentences indicating those who were present at the time, date and place and that a Search Warrant under the Exchange Control Act had been read to the appellant. Then followed the question and answer:

> "Q. Do you have any foreign currency here?
>
> Ans. No, I don't deal in that kind of thing, it is better you say something else. "

The document, exhibit 2, then records:-

> "Search commenced.
>
> In a waistcoat pocket was found a bundle of U.S. currency notes. Search concluded no more foreign currency found. "

It is clear beyond a peradventure that the foregoing notation had nothing to do with anything done or said by the appellant that morning and as a note is wholly irrelevant to prove any aspect of the Crown's case.

The document, admitted as exhibit 2, went on to indicate that a caution was administered to the appellant in the form approved under Rule II of the Judges' Rules. Twelve questions were then put to the appellant and to these he made very frank answers, probably too frank, if now he wished to argue that his conviction ought to be set aside. Question 8 and the answer thereto provided material

for Mr. Phipps to argue that the document was not a complete record of all that the appellant told the police on that morning. The question and answer were:

> "Q. When this foreign currency was found, did you not say that it was to pay your mortgage?
>
> A. Yes, I said so. "

It seems to us that exhibit 2, did not purport to contain everything that was said by the police officer nor everything said by the appellant on the occasion of the search. Sergeant Stewart was concerned to record his direct questions to the appellant and his precise answers to those direct questions. Statements which may have been volunteered by the appellant were not specifically noted. We agree with the submissions put before us by Mr. Smith that Sergeant Stewart's questions as recorded in the document, exhibit 2, fell squarely within the Judges' Rules I and II and that consequently the learned resident magistrate had a discretion whether or not to admit the record of those questions and answers in evidence.

Provision is made under Rule IV of the Judges Rules for what is commonly termed "Caution Statements" which may be tendered in evidence if all the requirements of that Rule have been compiled with. Clearly, the document, exhibit 2, did not conform with the provisions of Rule IV, but it is avowedly a document certified by the applicant of his interview by the police. Such a record was held admissible by the Court of Appeal in England in R. v. Todd, The Times Newspaper November 6, 1980. Mr. Justice Caulfield delivering the judgment of the Court (Lord Lane, Lord Chief Justice, and Mrs. Justice Butler-Sloss) said,

> "That the appellant, who had been convicted of burglary, had gone to an hotel room with an accomplice to steal and on being disturbed by the occupant had run off. He was later arrested and interrogated by the police in accordance with the Judges' Rules. With

"an abundance of caution the police noted each question and answer so that there was a complete contemporaneous record of the interview. The appellant was invited to sign the record by putting his signature next to each question and answer and at the end of the document. That he did.

" During the interrogation he made certain admissions in regard to his complicity. Since some months later the occupant had been unable to pick out either of the accused at an identity parade, that was the only evidence against him. Evidence of what took place at the interview was adduced from the detectives, but the Crown also sought to put the document recording the questions and answers before the jury as an exhibit to that evidence. The appellant's counsel objected on the ground that it was neither an aide memoire nor a statement within rule 4 of the Judges' Rules. The objection was unsuccessful, and the appellant now appealed.

" While records of admissions were admissible, it had not been wholly decided whether a signed record such as that in question in the present case ought to go before the jury as an exhibit.

" The practice varied, and the court should give some guidance. Clearly such a document was not an aide memoire or a statement under rule 4. It was something in between - a record certified by the appellant of his interview by the police. It was admissible as an exhibit but subject to the over-riding discretion of the judge to exclude it. That had been the practice for some time in Inland Revenue prosecutions.

" The appellant had objected that at the time of signing the document he had been drunk and that the police had not written down accurately what he had said. Those points had been properly put to the jury by the judge, and the jury had chosen to believe the police. The appellant had therefore been properly convicted.

" The court wished to give encouragement to the method used in the present case of making a record of an interrogation. "

This appellant did not advance the excuse that he was drunk when he signed the document, exhibit 2, neither did he meekly bow, when he gave evidence. He said firstly that he was never cautioned by the police at any time but in re-examination he admitted that he was cautioned but only after he had signed the document. His account of what transpired was that the police asked him questions, wrote down his answers and then made him sign the document without first

reading it to him. He did not specifically say that he did not himself read the document.

We wish to endorse fully the encouragement proferred by Mr. Justice Caulfield to police officers to make a full record of their interrogation and to place the record at the disposal of the Court of trial.

We hold that the document, exhibit 2, was a fair record of the police interrogation of the appellant, that it was signed voluntarily by him and the learned resident magistrate quite properly exercised his discretion to admit the document in evidence as an exhibit to the oral testimony given by the police officers of the interview. Accordingly we were not persuaded that there was merit in the second ground of appeal.