

whether verdict of R.M. unreasonable having regard to evidence - whether evidence supported conviction for dealing in ganja contrary to Sec. 7(b) Dangerous Drugs Act; Appeal against conviction dismissed.

JAMAICA

Re: Sentence varied from 2 years imprisonment to 18 months imprisonment as delay in proceedings while appellant in custody not due to any fault of appellant.

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 15/87

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comp

No case referred to

BEFORE: THE HON. MR. JUSTICE KERR, J.A.  
THE HON. MR. JUSTICE WRIGHT, J.A.  
THE HON. MR. JUSTICE DOWNER, J.A. (Ag.)

REGINA

VS.

EVERALD FINN

Mr. Ernest Smith for the Appellant

Miss Jennifer Straw for the Crown

March 24, 1987

KERR, J.A.:

On the 22nd of February, 1986, about 7:45 a.m., a party of policemen went to Orange Grove, St. Elizabeth and to a house there and under powers of search conferred by a written authority, searched that house.

On arrival the door was opened by the appellant, who gave his name and address. With him was a female accused, a Miss Barnett and when Sergeant Smallwood, the Chief of the Investigating Officers, the leader of the party enquired what part of the house was occupied by Finn, the lady pointed to the room and the policemen, Corporal Williams, Sergeant Smallwood and others entered that room and under a dresser in a carton box bearing the marks "Star Candles", the quantity of ganja was found.

This was in the presence of the other occupants of this three apartment house. In a bottom draw of the dresser a

paper bag containing ganja was also found. No statements were made by any of the parties present. In the bathroom was also found a carton box marks "Cool Aid", and in that box ganja was also found. There was a second bedroom and when the Police enquired for the occupant of this room which was locked, one Patrick Graham said, it belonged to his brother, who was in the United States of America as a farm worker. Upon enquiry Graham said that the keys were kept in Finn's room; he went and fetched the keys and opened the door of the room, and inside six plastic bags, one knitted bag and a barrel all containing vegetable matter, which when tested was found to be ganja.

The six persons found in the house were arrested and charged for unlawful possession of ganja. Exhibits were taken, submitted to the government analyst and tendered in evidence at the hearing. Sergeant Smallwood also exhibited the bunch of keys containing the key which opened the door.

The defence was that this house was occupied by several persons; ganja was found in the absent Graham's room, no ganja was found in Finn's room, or in the bathroom, and that Graham's room was entered by the police breaking down the door; in short, there was never any key found by Patrick Graham or that this room was opened with any key.

In support of this defence evidence was given by the appellant and by Patrick Graham who said they had asked him to obtain from the owner, a Miss Inez, the key for the room, that he had gone with two police officers but they were unsuccessful in obtaining from Miss Inez the key and the police officers broke down the door and in that room the ganja was found.

Before us, Mr. Smith contended that the verdict was unreasonable having regard to the evidence and he based his complaint against the finding of the Resident Magistrate on the following aspects of the case: that the exhibits of the two

parcels found in the room bore the date 28th of February, 1986, while all the other exhibits bore the date the 22nd of February, 1986 and that the explanation given by Detective Smallwood ought not to have been accepted; that explanation by Smallwood was to the effect that when the exhibits were transported to the Narcotics Centre in Kingston on the day that the analyst came to examine it, he noticed that the labels on those two exhibits had fallen off, he replaced them and it was then that he dated it the 28th of February, 1986.

Mr. Smith points out that this explanation was only made after an adjournment and so he was giving him time to re-consider and that the supporting witness, Williams said that the labels had been pasted on firmly by good gum. In our view it was for the Magistrate to assess whether or not the explanation was of such a nature as to be acceptable to him. We do not find his accepting that explanation as being unreasonable.

The other aspect of the crown's case which Mr. Smith attacked was as regards the ganja found in the bathroom. He submitted as it is unanswerable that the bathroom was the sole bathroom in the house, it was available to all the occupants and therefore anything found therein could not be said to have been in exclusive possession of the appellant.

With respect to the third room, Graham's room, the evidence of crown's case, fixing possession in the appellant, rested on his having in his possession the key to that locked room. Mr. Smith has urged us that the evidence of the prosecution witnesses as to the existence of keys and those keys being found in the appellant's room ought not to have been accepted. Firstly, because he said the evidence of the defendant and Patrick Graham that the Police had sought from Miss Inez the keys to that room supported the contention that there was no keys in Finn's room. This was a matter for the

Resident Magistrate and he accepted the evidence of the two police officers, Smallwood and Acting Corporal Williams that the door was opened by the key taken from the room of Finn, and in our view we see no reason to go against that finding.

The third area of complaint is that certain applications made on behalf of the appellant Finn were refused by the learned Resident Magistrate. The first was as to production of the police station diary which, in appellant's Counsel's view, would discredit the evidence of the witnesses for the prosecution and in particular the witness Acting Corporal Williams. Now at that stage when the application for the production of the station diary was made, Detective Smallwood was being cross-examined as to the contents or the entries in that diary on the particular date and he said that he did not make the entries but that they were made by Inspector Bailey, who was the Senior Police Officer in the raiding party but who really took no part in the search. The Resident Magistrate refused the application on the ground that the entry was not the entry of the witness and it could not be used to discredit him. That was eminently right. Later on, however, it transpired that policeman Williams said it was he who made the entries in the diary, that he entered what was dictated by Inspector Bailey but what he entered was not what he saw at the scene. This of course, depending on what was in the diary, could very well have discredited Williams, but at that stage according to the record, no specific application was made for production of the diary.

Another area of <sup>which</sup> complaint was made that the application to visit the locus in quo to have the keys tested in the lock of the door was wrongly denied him by the Resident Magistrate. The visit to the locus in quo was to better understand the evidence and the situation at the time of the

application was the same as at the time of the alleged incident.

Now, as regards the lock to the door the policeman said he was unable to say it was the same lock and while we would have expected the policeman to be more precise and as a trained officer to be less uncertain, it seem to us that the Resident Magistrate in the exercise of his discretion was of the view that this particular test would not take the matter any further as having regard to the passage of time there might have been changes in the lock and in the locus itself. Those were his reasons, and it cannot be said that he exercised his discretion wrongly in the particular circumstances.

As regards the diary it would appear that Corporal Williams was a spineless junior, who according to him, wrote in the diary whatever Inspector Bailey told him. Whether or not what he wrote was diametrically different to what he said in Court we cannot now say. But it seems to us that from his findings the Resident Magistrate relied in the main on the evidence of Detective Smallwood.

After reviewing the evidence in the case the Resident Magistrate made inter alia the following findings:

1. Sgt. Smallwood and Cpl. Williams carried out the search of the premises not Insp. Bailey. Before search began Insp. Bailey sent Police and Billy Graham to find owner of house, they did not. The contention by defence that Sgt. Smallwood said Cpl. Williams went with Billy Graham to look for woman and Cpl. Williams says nothing like that happened is not supported by the evidence. In appellant's room ganja was found under the dresser and in a dresser drawer by Sgt. Smallwood and was shown to appellant who said nothing. Two bunches of keys were in dresser in appellant's room.
2. In bathroom "Kool Aid" box containing ganja was found and shown to all accused who said nothing.
3. Door to third room was locked. Billy Graham said key to door was in Finn's room.

"Finn said nothing. Cpl. Williams and Billy Graham went to Finn's room, Graham took bunch of keys and used one to open door to third room. Ganja was found in that room and shown to all accused, who were arrested and charged then.

Ganja and accused were taken to Santa Cruz Police Station where all exhibits were sealed and labelled in presence of accused. Exhibits were taken to Narcotics Department, Kingston. On 28/2/86 Mr. Coates attended there and took samples and smaller exhibits to Forensic Lab. Tests showed articles found at house contained ganja".

He found that Barnett, the lady, was a visitor and that there was not sufficient evidence of possession in the other occupants of the house, so he acquitted them and found the appellant guilty.

The contest in this case centres on questions of fact and the acceptance and rejection of oral testimony. Despite Mr. Smith's eloquent endeavours we cannot say that the findings of the learned Resident Magistrate were unreasonable.

As regards the conviction for dealing in ganja Mr. Smith submitted that the evidence did not support a charge of dealing contrary to Section 7(b) of the Dangerous Drugs Law, in that the evidence showed possession and no other activity from which the inference to be drawn that the appellant was a dealer.

Now we have given our careful consideration to the section and we find that the words "otherwise deals in" would embrace a wide range of activities pertaining to trading and would include all the activities that are attendant on or incidental to the illicit trade in ganja.

Miss Straw in reply submitted that having regard to the quantity of ganja found on the premises the inference was inescapable that the appellant was a dealer and that there is no reason to hold otherwise. The inference she said would be less compelling if the Court found that only the

three pounds in the bedroom were in the possession of the applicant.

We have considered the inferences to be drawn from the finding of the keys in the room of the appellant and we are of the view that that was sufficient for the Resident Magistrate to infer that he was in possession of the ganja in the third room, Graham's room.

As far as dealing is concerned having regard to the quantity of ganja found and to the way those in Graham's room were put up it was open to the Resident Magistrate and it was reasonable for him so to find that the ganja was there for the purposes of dealing in ganja. The quantity of ganja in that room was 163 lbs.

For these reasons we dismissed the appeal against the convictions and we affirmed the convictions. With regards sentence, Mr. Smith adverted our attention to the fact that he was in custody from the 22nd of February and that Judgment was entered against him on the 11th of July, 1986. There has been some delay in the proceedings coming before this Court and that delay was not due to any fault of the appellant.

We are mindful that this is so and as far as the appeal against sentence is concerned the appeal is allowed and the custodial sentence varied by substituting for two years imprisonment a sentence of eighteen months imprisonment in each case. Sentences to run concurrently and from the date of conviction.