JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES COURT OF APPEAL NO. 114/88

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

REGINA

v

JAMES LEWIS

F.M.G. Phipps, Q.C. and Michael Clarke for the Appellant

V. Grant for the Crown

December 13, 1988 and January 30, 1989

WRIGHT, J.A.:

After a trial which began on October 30, 1986 and ended September 2, 1987 (there were four trial days) before His Honour Mr. R.A. Stewart Resident Magistrate for the parish of St. Elizabeth sitting at Santa Cruz the appellant was convicted for possession of 30 lbs. of ganja and sentenced to 2 years imprisonment at hard labour. From such conviction and sentence he now appeals.

The case for the prosecution was keenly contested. A Police Party from the Special Operation Branch, St. Andrew, including Corporal Alden Davis and Constable Ian Jacobs raided the premises of the appellant at Braes River in the parish of St. Elizabeth at about 4.00 p.m. on Tuesday, July 22, 1986. The party consisted in all of seven men and the stated purpose of the raid was to search for guns, ammunition and dangerous drugs. Corporal Davis who was in charge of the party testified that the premises which were enclosed by zinc and barbed wire fencing consisted of what appeared to be a large dwelling-house, a garage and a store-room. When the Police arrived the appellant

was absent but after identifying themselves to some females on the premises the Police searched the dwelling-house. That search yielded nothing. They next turned attention to the store-room which was secured by a padlock fitted into a 'hasp and staple'. Search of the store-room was deferred when it was learnt that the appellant had the keys. At about 5.00 p.m. while the Police were engaged in the search of the garage the appellant arrived driving a brown car. In answer to Corporal Davis he gave his name as James Lewis and admitted he was the occupier of the premises. Asked if he had the key to the store-room he did not reply but subsequently reluctantly handed over to Corporal Davis a bunch of keys which he had in his hand. The appellant watched while Corporal Davis tried the keys in the padlock until one eventually opened it.

Corporal Davis entered the store-room, accompanied by the appellant and Constable Jacobs where the Corporal observed a number of large plastic bags filled with gungo peas. Underneath these bags he saw a white plastic parcel wrapped with brown plastic tape. Corporal Davis opened the parcel and told the appellant that the content was ganja to which he is alleged to have replied 'A nuh really mine sah but we can talk business'. There was no other ganja found. The appellant was arrested and charged with possession of ganja and upon caution he repeated what he had said previously. The appellant and the parcel with the ganja were taken to the Santa Cruz Police Station where the parcel was sealed and labelled in the presence of the appellant. Subsequently Mr. Coates, an analyst from the Forensic Laboratory attended at 230 Spanish Town Road where the ganja was then in safe-keeping and took a sample from the parcel upon the result of examining which he certified the contents of the parcel to be 30 lbs. of ganja.

Corporal Davis described the store-room as a structure of concrete blocks and zinc having one door. He could not recall whether there was any window.

The existence of the store-room was challenged in cross-examination but the Corporal maintained his ground stating that the store-room was about 12' x 14' and was about 20 yards from the garage and was found to contain motor vehicle parts as well. He denied any knowledge of an encounter between the appellant and one Sergeant Creary at the Braes River Square and that as a consequence of that encounter the appellant never reached his home that day but was taken to the home of one Goss, where there were other members of the Police Party, and thence to the Police Station. According to him it was on the way to the Police Station that they stopped at Goss' home. As to why he could not produce the bunch of keys as an exhibit he said that upon request he had handed the keys to the appellant to enable him to lock his car and that the appellant had retained them. Further, he could not recall seeing or speaking to a 'dread' on the premises that day.

Constable Jacobs corroborated Corporal Davis' evidence of the finding of the ganja in the store-room which was opened by the key produced by the appellant. Regarding the 'dread' he was more positive than Corporal Davis. He recalled seeing him but denied that the Police had taken the 'dread' to the adjoining premises where the parcel of ganja was found and that the 'dread' had been forced at gun-point to take it to Lewis' premises.

In his defence the appellant followed up the suggestion in cross-examination that he had been accosted by the Police including Constable Jacobs at the Braes River Square and made to drive to the Goss' home passing his gate in the process but that he did not enter his premises and so, although he admitted having many keys, he was never in a position to give and did not give any keys to the Police. Additionally, he stated that there was no store-room on his premises. A garage yes, in which he had gungo peas stored in kegs but no store-room. He knew of no bags in his garage and he denied using the words attributed to him by the Police. At the end of the appellant's testimony Mr. Phipps applied for the Court to visit the locus in quo for the purpose of establishing that 'there was no store-house separated

from store-room' (sic). The application was refused, the Court ruling that it was prepared to rely on the evidence there being no certainty that the locus was then the same as it was at the time of the incident.

In support of his defence the appellant called Renford McLean who he said was in his car when the Police stopped him at Braes River Square. He supported the appellant in that respect but he left the car at that point and that was as far as he could tell. Merlene Steel, a shopkeeper at Braes River also testified concerning the Braes River Square encounter between the appellant and Police travelling in a white car. Her evidence did not go beyond that point. Finally, the appellant's daughter, Ivorine Lewis testified that she was at the home when the Police arrived and enquired for her father. After a while she saw them in company with a 'dread' who was protesting that they had forced him to go to 'people place go take up people things and carry it in a di man yard'. He put the parcel down but at gun-point was made to take it to the car. She listed the buildings on the premises as the dwelling-house behind which was a building for the helper and a garage made of zinc. Up to the time when she testified on August 28, 1987, one year since the Police visited, she said additions had been made to the house but no building had been pulled down. Then, in support of the appellant's contention that he did not return home on the day the Police visited she said she did not see him that afternoon.

In cross-examination she said that her father stored peas and yams in the garage but she did not know what were the containers for the peas. Strange though it may seem, she said the garage was not kept locked although according to the appellant car parts were kept there.

The case resolved itself into a straight question of facts and in making his findings of fact the learned Resident Magistrate recorded -

> "I had the benefit of observing the witnesses as they gave their evidence. I noted their general demeanour, the way they answered questions not only the words used but also the expression on their faces; did they look the questioner in the eye or did they hold down their heads; did their answers have or lacked the 'ring of truthfulness'. I took into

> "account the submissions of counsel and paid attention to his submission relating to the absence of the keys. I accepted the evidence of the prosecution witnesses as being the truth and rejected the evidence of the accused and his witnesses."

He found as facts inter alia that -

> 1. Police went to home of accused and searched house and other building - found nothing. One building was locked with padlock and not searched. Accused later arrived driving a brown car.
>
> 2. Bunch of keys was taken from accused and one key was used to open the padlock. Building searched and in presence of accused brown parcel found under bags containing gungo peas. Parcel opened in presence of accused and in it was ganja. Accused told by Police parcel contained ganja said 'a nuh fi me but we can talk business'."

Further, he rejected specifically the defence contention that the appellant had been stopped at Braes River Square as well as that the parcel had been brought on to the appellant's premises by the 'dread' as alleged. In the result he found the appellant guilty and after considering character evidence produced he sentenced him to imprisonment at hard labour for two years.

The appellant produced two character witnesses, Mrs. Carmejita Barriffe, the Principal of the Braes River All-Age School and Miss Daphne Holmes, a Justice of the Peace both of whom spoke well of him.

In dealing with the question of sentence the learned Resident Magistrate recorded -

> "Accused had previous convictions as follows:-
>
> 4 - Possession of ganja - 1983, 1984, 1984, 1984 (Different dates)
>
> 1 - Taking Steps - 29.2.84
>
> 1 - Preparing etc. 25.9.84
>
> 1 - Trafficking - 1.10.84
>
> On one charge of Possession accused and others pleaded 'Guilty' in respect of over 4,000 lbs. of ganja.

> "On two other occasions accused by himself was found guilty of Possession in respect of over 1,000 lb. of ganja. He had never received a prison term.
>
> Although the amount in this case was 'small' about 30 lbs I took the view that accused had been given enough chances which he had abused. In spite of the 'glowing' character evidence given on his behalf, in my view accused had not changed and the only proper sentence was one of imprisonment."

Grounds 1, 2(a) and 4 may conveniently be considered together. Ground 1 complains that 'the verdict is unreasonable and contrary to the evidence in the case'. Ground 2(a) takes issue with a comment attributed to the learned Resident Magistrate. It reads -

> (a) Reference to a similar case which he is presently trying at Halfway-Tree Court in which the police did not produce a key and his finding thereon that this failure was immaterial was brought to bear on his assessment of a similar failure in the instant case.

Ground 4 criticizes the refusal to visit the locus in quo. Matters canvassed in support of these ground were -

> (a) Conflict in the evidence for the prosecution;
>
> (b) Non-production of the keys and the method of dealing therewith;
>
> (c) The refusal to visit the locus in quo.

Conflict in the evidence is a matter to be resolved by the tribunal of fact which saw and heard the witnesses and so is able to assess where the truth lies. The learned Resident Magistrate has recorded that he made use of the opportunity which he had. No reason has been shown for interfering with his resolution of such conflicts as appear. Allied to this contention is the manner in which the key was dealt with. We are of the view that the comment attributed to the Resident Magistrate, would, if true be unnecessary. We are, nevertheless, not agreed that it imports any error into the treatment. We did not refer the matter for the learned Resident Magistrate's comments because it would necessitate a further delay of the hearing of the appeal which had already been delayed for more than a year but more importantly because we did not think the

matter complained of was in any way prejudicial. Instances abound in the authorities where judges refer to experiences they had had touching matters similar to those with which they were then engaged. The evidence of the prosecution witnesses which the learned Resident Magistrate accepted as true answered the question why no keys were before the Court. Indeed, inasmuch as the evidence was that there was a bunch of keys, the Police might have been criticized as being oppressive had they seized and retained the bunch of keys. Nor would the problem have been any easier had the evidence been that the Police did take possession of the keys but had mislaid them. Not too dissimilar was the case where the Police claimed to have found ganja in circumstances where the defence denied the presence of any ganja and the exhibit presented to the Court turned out to be grass. The issue was resolved on the evidence. See R. v Jadusingh (1964) 8 J.L.R. 407. We see nothing exceptional about the explanation given for the absence of the keys viz. they were handed to the appellant at his request to enable him to lock his car and he retained them. But even if the keys had been presented at the trial what was at issue before the Resident Magistrate was possession not of the keys but of ganja and the presence of the keys would not resolve the issue because the denial of the defence could not thus be silenced.

It would be wrong to visit the locus in quo merely as a concession to the defence. Rather must it be based upon a perceived necessity in the endeavour on the part of the tribunal to resolve issues which cannot be adequately dealt with on the viva voce evidence. The reason given by the Resident Magistrate for his refusal cannot, in our view, be faulted. More than a year had passed since the incident and as it transpired the appellant was no new-comer to the arena. It is to be noted that in his findings of fact the Resident Magistrate was content to say 'One building was locked with a padlock and not searched'. He did not persist in treating it as a store-room. In fact it was the Police who called it a store-room. But whatever it was called the question remained - Did the Police speak truthfully when they testified

that a parcel containing ganja was found in that building? That question was concluded against the appellant and we see no reason for interfering with that finding.

Ground 3 complains that the Resident Magistrate had placed an onus of proof on the appellant by stating during the course of his summation in rejecting the defence when he stated that he could see no reason why the Police would tell a lie about the search at Braes River cross roads or about the actual whereabouts of the parcel of ganja. However, upon the Court indicating that such reasons can appear on the prosecution case that ground was not pursued.

In our opinion the appeal against conviction fails and the appeal is dismissed.

Ground 2(b) contends that in dealing with the question of sentence the Resident Magistrate mentioned that this offence was committed while the appellant was on bail on similar charges which had not yet been adjudicated upon and Ground 5 criticizes the sentence as excessive. The information about outstanding charges could only have been included in the appellant's antecedents for which the Resident Magistrate could not be held responsible. However, the appellant's record of convictions under the Dangerous Drugs Act is such that that disclosure was obviously not a determinant of the sentence imposed. It is manifest that the pecuniary penalties which up to then had been imposed upon the appellant had had no deterrent effect. We are therefore in complete agreement with the Resident Magistrate that the time was ripe for the appellant to suffer incarceration. He had demonstrated his utter contempt for the law and the efforts which are being made to stem the ever swelling tide of drug trafficking. Nor had he profitted in this regard from the counselling by Miss Holmes, the Justice of the Peace. Persons who are so minded should get the message that they make it increasingly difficult for their cries about sentence to be accommodated. Since the trial of this case Parliament has found it necessary, because of the inadequacy of the prevailing penalties, to drastically increase those

penalties and yet incidence of breaches of the Dangerous Drugs Act show no tendency to diminish.

We have taken the opportunity to indicate the Court's attitude about such offences in order to emphasize the point that in our opinion the sentence on this persistent offender is not a day too long.

The appeal is accordingly dismissed and the conviction and sentence affirmed.

Before parting with this case we wish to call attention to a practice, which is both unnecessary and undesirable, of some Resident Magistrates who, in an apparent endeavour to comply with Section 291 of the Judicature (Resident Magistrates) Act requiring the Resident Magistrate to 'record or cause to be recorded in the notes of evidence, a statement in summary form of his findings of fact on which the verdict of guilty is founded', embark upon a re-hash of the evidence occupying several pages separate and apart from the notes of evidence before actually recording the findings of fact. It should be obvious that what the section requires is a brief statement of the facts found. In the instant case the notes of evidence occupy 17½ pages which were thereafter condensed to 4½ pages before the findings of fact which occupy 1 page were given. Compliance with the requirement of the Section would result in obvious economy of judicial time as well as of paper. It is therefore recommended that Resident Magistrates adhere to the requirement of the Section.