JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL NO:50/90

BEFORE: THE HON. MR. JUSTICE CAREY, P (AG.)
THE HON. MR. JUSTICE FORTE, J.A
THE HON. MR. JUSTICE GORDON, J.A (AG.)

R E G I N A

V.

ROBERT BIDWELL

Mr. Frank Phipps, Q.C., with
Mr. Hugh Thompson for the Appellant

Mr. Lloyd Hibbert, Deputy Director of Public Prosecutions with Ms. C. Malcolm for the Crown

29th, 30th, 31st May and 26th June, 1991

FORTE, J.A.

The appellant was tried, convicted and sentenced in the Resident Magistrate's Court in the parish of St. James, for the following offences:-

(1) Trafficking in Ganja - nine months hard labour.

(2) Possession of Ganja - eighteen months hard labour.

(3) Attempting to Export Ganja - Fined $50,000 or six months hard labour in addition eighteen months hard labour.

(4) Dealing in Ganja - Fined $50,000 or six months hard labour in addition nine months hard labour.

The learned Resident Magistrate ordered that the sentences in relation to Possession of Ganja and Dealing in Ganja to run consecutively to the sentence imposed for Attempting to Export and Trafficking in Ganja. He appealed against these convictions and sentences, and having heard the argument of counsel on the 29th May, 30th May and 31st May, 1991, we dismissed the appeal, and affirmed the convictions and sentences. These now, are the written reasons then promised.

Arising out of the grounds filed and the arguments advanced at the hearing of the appeal, the following questions are for determination:

(1) Was the appellant in the circumstances of this case entitled to the protection given under section 20(6)(b) of the Jamaica (Constitution) Order in Council 1962, and if so was he deprived of such a right?

(2) Was the principal witness for the prosecution an accomplice, and/or a person with an interest to serve; and if so was it required in those circumstances that the learned Resident Magistrate expressly warn herself as to the danger of acting upon the uncorroborated evidence of that witness? and

(3) Was there 'competent evidence' to prove that the substance was the prohibited drug for which the appellant was charged?

An additional ground, regarding the evidence as to the possession of the drug by the appellant was never argued, and consequently will receive no treatment in this judgment.

Having regard to the grounds of complaint there is no necessity to treat the facts of the case with any detail, but in so far as the second question (supra) is concerned, a brief summary is required.

The recovery of the prohibited drug in this case was as a result of a joint venture between the United States

Customs Service and the Jamaica Constabulary Force, using the services of a Mr. Drury Craig, the owner of a boat named "Standby" and who before this had a reputation in Florida, which connected him to the drug trade. The venture had its birth in Key West, Florida, when Craig met with a man named Scott Germaine in March 1989. After he had discussions with Germaine, Craig consulted with Mr. Steven Moxsary, a United States Customs Service special agent regarding the content of his meeting with Germaine. On the instructions of Moxsary, Craig had several other meetings with Germaine, reporting on each occasion to Moxsary and culminating in the installation by Moxsary of a satellite traffic device on the "Standby". As a result of all these discussions, Craig travelled in the boat to Jamaica arriving in Montego Bay on the 26th May, 1989. When he arrived, having cleared customs and immigration, he met with Germaine (who had travelled independently to Jamaica), at the Verney House Hotel in Montego Bay, as had been pre-arranged. In the meantime Mr. Moxsary, also came to Jamaica on the 25th May, 1989, consulted with Mr. Davis of the United States Embassy, and consequently met with Detective Corporal Hugh Lawrence of the Narcotic Division of the Jamaica Constabulary Force in Montego Bay on the 26th May, 1989. Lawrence had gone to Montego Bay in the words recorded in the notes of his evidence "to carry out surveillance with regard to an illegal drug transaction to take place." Craig also met with Moxsary in Montego Bay on that day.

On the evening of that day, Craig met with the appellant for the first time, through an introduction by Germaine. The evidence thereafter revealed a series of conversations between the appellant and Craig, all of which were testified to, by the witness Craig. In the initial conversations,

the appellant spoke to Craig about the amount of hash-oil to be put on the boat "Standby" and the payment that he (Craig) would receive for shipping it in the boat. On the next occasion, that is, on the following day when they met the appellant drove Craig to Falmouth, and during breakfast again discussed the quantity of hash-oil and ganja to be shipped, and revealed that the boat would be loaded with the prohibited drug in the Falmouth Harbour. Later that evening, it was arranged with the appellant that Craig would take the boat to Falmouth on the following evening. The two men met again on the following morning when the arrangements were finalized, in particular, the time that the boat would arrive in Falmouth for the loading. The plan did not materialize because of the late arrival of the Customs and Immigration officals, who 'cleared' Craig and his boat too late, thus preventing his departure to Falmouth. Consequently, he had to seek out the appellant whom he eventually found early in the morning at the Rumours Club in Montego Bay. At this meeting it was decided to load the boat in Montego Bay. After this meeting, Craig went directly to Moxsary, to whom he had been reporting everyday since his arrival in Jamaica. When he returned to the boat, he found the appellant on board and it was then agreed that the boat would be loaded at 3:00 a.m that morning, and that the drugs would be brought to the boat in a canoe. The appellant then left, followed by Craig who went directly to Moxsary to make his report on what happened, returning to the boat thereafter. Later, but still early in the morning, a canoe approached the boat with two men aboard. The men handed him a number of "red plastic full jugs" and "packages of ganja" which he hid in a secret compartment on the boat. Later that morning at about 6:30 a.m while the boat was

anchored about 100 yards off shore Craig saw the appellant on shore and both men waved in acknowledgement to each other.

That same morning, Detective Corporal Lawrence saw the appellant on the same beach, and took him into custody. The appellant when detained, offered the detective a sum of $100,000, when he was told that policemen were on the "Standby" searching it, as it was believed that he had placed drugs on it. In making the offer the appellant said "Please stop them. I will give you $100,000 to share up". When the detective told him "No. I do not take bribe," he insisted that he take the money and stop the men from searching the boat. On request, the appellant was taken to the bank, where he withdrew $100,000, and again made the offer. When refused, he asked to be taken to the Montego Bay Freeport, where he could speak to the person in charge of the operation. This was done and Sergeant Brooks was called off the "Standby" to speak with the appellant. When Sergeant Brooks came, the appellant offered him the money saying "Here is $100 Grand. Please take it and let the boat sail. When it reach its destination you'll get a lot more." Sergeant Brooks then cautioned the appellant and told him that he did not take bribes. The appellant then said "Brooks deal with me straight man." He then wrote a number and the name Bob on a piece of paper and handed it to Sergeant Brooks, who took it along with the $100,000, and at the trial both were tendered in evidence. The boat "Standby" was searched and the drugs, the subject of the conviction, found thereon, and in the place that Craig said he had put it. The drugs were later off-loaded at Discovery Bay where the "Standby" had been taken. The drugs were subsequently tested and found to be the drug in respect of which charges were laid by the prosecution, and this forming as it does one of the complaints of the appellant will be dealt with when that question is considered.

Question 1

Section 20(6)(b) of the Constitution states as follows:-

> "Every person who is charged with a criminal offence:-
>
> (b) shall be given adequate time and facilities for the preparation of his defence."

These words being clear and unambiguous there can be no contention that a person charged with a crime must be given adequate time and facilities to prepare his defence. Mr. Phipps, limited his complaint to the giving of adequate facilities to the appellant, and advanced no argument in respect to the time given in this case for the preparation of the appellant's defence. The facilities of which he contends the appellant was deprived are:-

> "(i) copies of the statements of the witnesses to be called by the prosecution; and
>
> (ii) an opportunity to view the boat "Standby" upon which the ganja was discovered."

In advancing his contention, he relied on the now well quoted dicta of Lord Devlin in Director of Public Prosecutions v. Nasralla (1967) 10 JLR 1 at page 3 where the learned Law Lord noted that Chapter III of the Constitution which deals with fundamental rights and freedoms 'proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing Law'. On this basis, he submits that prior to the coming into effect of the Constitution, in every case where a person was exposed to a term of imprisonment exceeding twelve months he had the right of knowing the witnesses who would give evidence against him and of knowing what evidence was to be given by them. He argued that usually such knowledge is available to defendants by way of proceedings in a Preliminary Examination or by copies of statements being handed to the defence where

a witness had not deposed at the Preliminary Examination and notice to adduce additional evidence is served on the defence.

This argument is predicated upon the fact that prior to the coming into effect of the constitution in August 1962, the sentencing power of the Resident Magistrate was limited to a sentence of twelve months while ignoring the fact that the procedures were determined not by the extent of the sentences a Resident Magistrate could impose, but by the Court in which an accused person could be tried. So, if the charge was one triable in the Circuit Court, then the law required that the prescribed procedure be followed - that is to say (i) a preliminary examination must be held to determine whether a prima facie case is established, so as to require trial in the Circuit Court, or (ii) the statements could be sent to the Director of Public Prosecutions who, if he so decided, based on the content of the statements could prefer a Voluntary Bill of Indictment in the Circuit Court either with or without the consent of a High Court Judge. It is in those circumstances that an accused would, by either or those procedures, become aware of the content of the evidence to be led against him. In other cases, where the Resident Magistrate had jurisdiction to try the case, the procedure would in the case of indictable offences, allow for an application by the Clerk of Courts for an order for an indictment thus requiring him to summarize to the Resident Magistrate the facts upon which the prosecution would rely. In this way the defence would have notice of the evidence but there was no requirement for statements to be given to the defence. In summary trials, however, the Clerk of Courts has never been required by law either to open to the facts of the case, or to serve copies of the statements of the prosecution witnesses on the defence. See, however, R. v. Craigie et al RMCA. 100/85 delivered on the 22nd May, 1986 (unreported) where it was suggested at page 13 that though there is no duty on the prosecution to open to the facts in a case triable in

the summary jurisdiction, it is desirable that in complex cases the prosecution ought to open to the facts).

It appears then, that if prior to August 1962, a person charged with a crime triable summarily before a Resident Magistrate had no right to copy statements of witnesses, a point conceded by Mr. Phipps, then that was the settled practice, and therefore not a "facility" afforded to such persons.

In any event the twelve months imprisonment on which Mr. Phipps based his argument, proved to be a fallacy, as even in the course of his own submissions, it was revealed that even prior to 1962, there were circumstances in respect of a second conviction in which the Resident Magistrate could sentence a person to two years, and as submitted by the learned Deputy Director of Public Prosecutions in cases of consecutive sentences - four years imprisonment.

Nevertheless, whether or not a person charged has been afforded adequate facilities for the preparation of his defence must be considered in the context of the particular circumstances of that case. In our view, "facilities" cannot in a general sense be referable to the giving to the defence, of copy statements of all the witnesses the prosecution proposes to call. Conceivably, there may, however, be circumstances where in order to facilitate preparation of the defence, the statement of a particular witness may be necessary, for example, a statement of a witness in favour of the defence and whom the prosecution does not intend to call should be given to the defence. In my view, facilities must relate to anything that will be required by the accused in order to aid him in getting his defence ready to answer the charge, for example, if he is in custody, the facility to communicate with and to interview his witnesses.

The use of the word "facility" in another paragraph of the same subsection in our view demonstrates that the word is used in

the sense of affording "an opportunity" for the relevant matters dealt with in the paragraph. Section 20 (6)(d) states:-

> "shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution;"

In its ordinary meaning to be found in the Concise Oxford Dictionary the word 'facility' is defined (inter alia) as 'unimpeded opportunity (give facilities for action or doing)'. This confirms the opinion that as used in section 20(6)(b) the word places a right in an accused person to be given adequate opportunity to prepare his defence and ties in with the context of the examples already outlined.

In the instant case, was the appellant deprived of any such facility? It is conceded by the Crown that though a request was made, the defence was not given copies of the statements of the prosecution witnesses.

Before the commencement of the trial, Mr. Phipps, appearing for the appellant, complained that though he had requested the copy statements in a letter to the Director of Public Prosecutions, he had not received a reply. He therefore on that basis objected to an application by the prosecution for an amendment to one of the informations, indicating that the amendment would embarrass the defence. He again requested that the defence be allowed to see the statements. In reply, Mr. Hibbert, Deputy Director of Public Prosecutions for the Crown stated thus:-

> "With regards to the production of the statements I cannot say why no reply was given, but I would think that a fair trial might still be heard in the absence of the statements. This is not always done in a Summary Trial."

It appears that this reply was accepted, because, thereafter, there was no further request for the copy statements revealed in the notes of evidence. Instead, what is recorded, is that on the request of counsel for the appellant, Mr. Hibbert opened to the facts upon which the prosecution would rely, presenting at that stage, a summary of the prosecution's case. Here then notification was given to the defence of the content of the case that the appellant had to meet. No application for adjournment at this stage to 'facilitate the preparation of the defence' was made, and so it can be assumed that experienced counsel who appeared, did not think it necessary. The trial thereafter commenced.

However, after the witnesses Craig and Moxsary had completed their testimony, and Corporal Lawrence had commenced his, the defence through Mr. Phipps made the following application:

> "Defence now knows what prosecution intends to lead and ask for an adjournment to facilitate the Defence to fully prepare its case to Wednesday and Thursday, 30th and 31st August, 1989."

This application was acceded to, and the case adjourned accordingly.

The notes of the proceedings, therefore revealed that the appellant, by means of the 'opening' of the case, and the adjournment granted subsequently, was adequately informed in the context of a summary trial, as to the content of the case against him and given an opportunity to prepare his defence even after he had heard the major part of the prosecution's case. In our view, this was an ideal example of the application of section 20(6)(b), and the appellant has no justifiable ground for complaint.

He, however, also complains that he was deprived of an opportunity to view the boat 'Standby' on which the drugs were

discovered. In regard to this, Mr. Phipps also moved the learned Resident Magistrate,but Mr. Hibbert informed the Court that the boat was no longer in Jamaica, and therefore it was not within the powers of the Director of Public Prosecutions to make the boat available for viewing by the defence. The defence of the appellant was a denial of any knowledge of the drugs discovered on the "Standby". In normal circumstances, it would be incumbent on the prosecution to make the boat available for viewing, but in circumstances where it was not within the powers of the Crown to do so, and where having regard to the defence no prejudice or embarrassment to the defence occurs, there can be no valid complaint of a breach of section 20(6)(b).

Question 2

The facts were outlined to demonstrate for the purposes of the determination of this question the role played by Mr. Drury Craig in the apprehension of the appellant. In our view, Craig's involvement in the events leading up to the charges against the appellant, is clearly established in the evidence, to be as a result of his working with the United States Customs Agent Moxsary, and indirectly with Acting Corporal Hugh Lawrence, in an effort to apprehend Germaine and the appellant. His participation was initiated after his first conversation with Moxsary in Florida, and resulted in equipment being placed in his boat, and his coming to Jamaica to make contact with Germaine, and the appellant, in order to obtain evidence which could lead to their apprehension. The evidence also reveals that he was in constant communication with Moxsary throughout his dealings with the appellant, culminating in that visit to Moxsary after the final arrangement was made to have the drugs loaded unto the boat in Montego Bay. His participation therefore was not as a person

who had the required intention to commit the crime, but as an agent of the lawful forces acting in such a way as to facilitate the wrong-doers to execute their wrongful acts with the purpose of causing their apprehension.

He was, in our view, not an accomplice, but an agent provocateur, for whose evidence no corroboration is necessary or put another way, there is no rule of law or practice that it is dangerous to convict on the uncorroborated evidence of an agent provocateur.

That the learned Resident Magistrate found that the witness Craig was an agent provocateur is evident from her findings in the following paragraphs:-

> "5. That Drury Craig was in communication with both the United States Customs Service Agent (Mr. Moxsary) and the Jamaican Police (Corporal Lawrence) as to his meetings with Scott Germaine and accused Bidwell.
>
> 6. That the United States Agent was interested in Scott Germaine and the Jamaican Police in accused Bidwell.
>
> 7. That the accused arranged for the container with the hash oil and the packages with the compressed ganja to be put aboard the Standby.
>
> 8. That this information was communicated to both Moxsary and Lawrence by Craig."

The learned Resident Magistrate correctly, in our view, did not treat the witness as an accomplice, and there was therefore no necessity to warn herself as to the danger of convicting on his uncorroborated evidence. In any event, the evidence of Craig was corroborated. The statements made by the appellant in the course of his attempted bribery of the police officers would most certainly amount to corroboration

of the testimony of Craig as to the appellant's connection with the drugs found aboard the "Standby". The additional complaint made by the appellant that because the witness had an interest to serve, that is, the return of his boat - the learned Resident Magistrate should have warned herself, in the absence of corroboration, to approach his evidence with caution. For the reason that there was evidence of corroboration accepted by the learned Resident Magistrate this ground must also fail.

Question 3

The contention of the appellant in this regard relates to the 'officer' who signed the certificate which was admitted in evidence and which showed the results of the scientific examination of the substance taken from the "Standby".

The certificate was signed by "Fitzmore Coates Government Analyst Forensic Laboratory" and dated 14th June, 1989. A certificate so signed becomes admissible by virtue of the provisions of section 27 of the Dangerous Drugs Act which reads as follows:-

> "In any proceedings against any person for an offence against this Act the production of a certificate signed by a Government Chemist or any Analyst designated under the provisions of section 17 of the Food and Drugs Act, 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 the Court shall cause him to attend and give evidence in the same way as any other witness."

Section 17 of the Food and Drugs Act states:-

> "The Minister may from time to time designate any public officer whether by name or by title of his office to be an inspector or analyst for the purposes of this Act."

The Minister by notice published in Jamaica Gazette dated 19th August, 1976 designated the Chief Forensic Officer as an Analyst.

When, however, it was sought to tender the certificate at the trial, the defence objected on the basis that there was no proof that the 'Analyst' who signed the certificate, was appointed under the provision of section 17 of the Food and Drugs Act.

The learned Resident Magistrate upheld the objection and refused at that stage of the trial to admit the certificates into evidence. The prosecution then called Mr. Coates, the signator of the certificate, to give viva voce evidence of having examined the substance. It was revealed in his evidence that he was the Acting Chief Forensic Officer, and if that is so, would be entitled to sign the certificate. Mr. Coates testified that was who conducted the examination of the substance in order to determine whether it was an "illegal drug". He maintained that he had recorded on the certificate the result of his finding, and in addition identified his signature which appears on each page of the certificate. The learned Resident Magistrate then correctly admitted the certificate in evidence, there being evidence that the certificate had been signed by an "Analyst" designated under the provisions of section 17 of the Food and Drugs Act. Given the related circumstances, we are of the opinion that there is no merit in this complaint.

In the event, for the reasons detailed above, the appeal was dismissed and the convictions and sentences affirmed.