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JAMAICA

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL No. 67 of 1972

BEFORE: The Hon. Mr. Justice Fox, Presiding.
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

BUCKLEY WILLOCKS v. R. (No.2)

Alexander for Crown.

Hugh Small for appellant.

15th November 1972; 17th January 1973

FOX, J.A.:

This appeal from a conviction for possession of ganja, raises up important questions concerning the role of the court in reviewing findings of fact in resident magistrates' courts. In view of the advantage which a resident magistrate has in seeing and hearing the witnesses, those findings of fact which depend essentially upon that advantage are seldom disturbed on appeal. This is so because this court lacks that advantage. It neither sees nor hears the witnesses. It comes to an understanding of the issues in the case by reading the printed record of the proceedings at the trial. The court is, therefore, altogether disqualified to assess the truthfulness of witnesses on the basis of their demeanour as they gave evidence before the magistrate. Consequently, those findings of fact, conveniently termed, 'primary facts' which have been determined by the magistrate as a result of his judgment of the veracity of testimony, are, as a general rule, accepted in the court. In reviewing convictions, the role of the court is confined in most cases to testing the validity and the sufficiency of inferences drawn by the magistrate from his findings of the primary facts; and to scrutinising the law applicable to all valid findings of fact, both primary and inferential, so as to arrive at a correct verdict.

Before it can proceed with its intrinsic role of review, the court must undertake an antecedent inquiry. It must ascertain the magistrate's findings of fact. This can be a formidable task because neither the law nor any practice requires magistrates to give reasons for their decisions in criminal cases, and also because the exhortations of this court in this respect over many years have, in the main, been ignored. In this situation, as was pointed out in R. v. Daniel Connell (R.M. Criminal Appeal No. 162 of 1970; October 22, 1971) -

> "the court has never attempted to coerce reform by taking up drastic positions. It has sought to cope with the existing realities - not the least of these being the extreme pressures under which business is likely to be conducted in magistrates' courts in the island - by endeavouring to ascertain from the printed evidence and the verdict of guilty what must, or could have been the magistrate's findings as to those facts which depend upon the truthfulness of the witnesses. For this purpose, the court assumes that the magistrate found all such facts which were in dispute at the trial, in favour of the Crown's case. If these findings of fact so ascertained, are justified by the evidence in that there is nothing glaringly improbable about the story they describe and which the magistrate accepted, or nothing to show that he disregarded or misunderstood an admitted fact which is material, the appeal is considered on the basis of these findings so ascertained. In such a situation, the court has never regarded itself as being entitled to take a contrary view of the evidence, and to substitute its own findings in place of those which could reasonably have been made by the magistrate."

In this appeal, the evidence in support of the Crown's case was given by constable Oldacre and inspector Smith and was to the following effect. At about 10 a.m. on Wednesday, 29th December, 1971, the constable was on guard duty at the Montego Bay police station. He noticed an odour coming from one of the prison cells at the station. In the light of his previous experience, he recognised the smell as that of burning ganja. The constable made a report to the inspector who was then at the station. Both officers went to the prison cell. The inspector also noticed the familiar odour of burning ganja. The prisoners in the cell, including the appellant (5 in number according to the police, 7 according to the appellant), were searched by the inspector. He took a brown paper parcel from the left back pocket of the appellant, opened it, and upon seeing vegetable matter

resembling ganja, told the appellant that it was ganja. The appellant said nothing. The vegetable matter was subsequently identified by the government analyst as ganja.

Giving sworn evidence in his defence the appellant denied that he had been in possession of the parcel containing ganja. He said that whilst he was shopping in Montego Bay on Friday 24th December, 1971, he was accosted by detectives who searched him and took him to Montego Bay police station. One detective told the station guard to charge him for shooting with intent. The station guard searched him, took away all his property and locked him up. The following day, the appellant asked the constable who was on duty at the lock-up to ascertain the offence for which he was charged. That constable told the appellant that he had not been charged but was being detained. The appellant asked to be allowed to communicate with his relatives for the purpose of obtaining bail. His request was ignored. The appellant said that because he was held without being charged, and was denied bail (facts admitted in the Crown's case) he became vexed, made a lot of noise and complained, without result, to inspector Smith. On Wednesday 29th December, five days after he had been taken into custody inspector Smith visited him at the lock-up. He was glad to see the inspector because of the opportunity to repeat his complaint. The inspector told him that he would check and find out why he had been detained for so long. The inspector then ordered him to "drop his trousers and give him a clean search." He lowered his trousers and pulled it back into position. As he did so he heard the inspector say, "I charge you for having ganja in your possession." The appellant denied that a parcel containing ganja was taken from his pocket by inspector Smith.

At the close of the case for the defence, the printed record notes that the appellant admitted three previous convictions for having ganja in his possession, and that he was sentenced to imprisonment with hard labour for three years. The verdict of guilty was noted on the back of the information. No reasons for the decisions were stated. In accordance with usual procedure it is left to this court to assume that the police evidence was believed and that the facts found by the magistrate upon which the verdict of guilty was reached are as disclosed in that evidence. The complaint on appeal, in effect, was that in accepting the police evidence the learned resident magistrate had misunderstood or disregarded material aspects of the defence. In the absence

of reasons for the decision, there is no other way of examining the complaint except by way of an analysis of the evidence in the case with a view to understanding the implications in that evidence.

This is not the usual run of the mill case. The appellant had been tried and was convicted in January, 1972 for the same offence on substantially the same evidence. His subsequent appeal was allowed. A retrial was ordered before another resident magistrate. Written reasons for the court's decision were delivered. (vide R.M. Criminal Appeal 16/1972 R. v. Buckley Willocks, 16th and 24th March, 1972). The present appeal is from the conviction following upon the retrial ordered by this court.

The considerations which moved this court to allow the first appeal must be stated. At the first trial, the prosecution did not show why the appellant had been arrested, why he had been detained for five days without being charged, whether he was ever charged in relation to this original detention, and how the ganja could have come into his possession after he had been searched and imprisoned. The court took the view that these matters should have been probed by the magistrate, not only because the appellant was unrepresented at the trial, but also because the information was vital for a proper understanding of the defence. In effect, the substantial ground for the decision of the court in allowing the first appeal was failure in the learned judge to give adequate consideration to the defence. This is very similar to the complaint which has been made in this the second appeal.

At the retrial in May 1972 the appellant was again unrepresented. This was doubly unfortunate because, as will be seen from the manner in which the prosecution was undertaken, the learned resident magistrate was burdened with the obligation not only to assist the defence, but as well to attempt to elucidate aspects of the Crown's case which had been canvassed in the written judgment of this court allowing the first appeal, but which continued to be neglected by the prosecution in the second trial. In the presentation of its case, at the second trial, the prosecution did not attempt to show the circumstances which made it possible for the appellant to have come into possession of the packet of ganja while he was in police custody. In keeping with its burden to prove the guilt of the appellant, beyond reasonable doubt, it was the duty of the prosecution to show those circumstances. The resident magistrate attempted to supply the deficiency by asking questions of the

prosecution witnesses designed to establish that the appellant could have received the ganja from the man taking meals to the prisoners in the lock-ups three times a day, or from other police men at the station. Objectively assessed, the efforts of the resident magistrate are of doubtful value because the prosecution did not endeavour to rebut or to qualify the significance of the appellant's evidence that the man who brought meals to the prisoners in the lock-ups was accompanied by a constable who supervised the distribution of the meals. The probability of such police supervision was clear and it is difficult to see how the magistrate could have concluded that the appellant was untruthful in making that statement. The outside contact which constable Oldacre said was available to a prisoner in a lock-up was, therefore, on the evidence, a police man, or a civilian supervised by a policeman. To have been able to feel sure that the packet of ganja was taken from the appellant, the learned resident magistrate must have assumed that the appellant obtained it from such a source. In the particular circumstances of this case great care was needed to ensure that such an assumption accorded with the theory that an accused person is deemed to be innocent until his guilt has been established beyond reasonable doubt by evidence. Much would depend upon the extent to which the other evidence in support of the Crown's case was satisfactory, and the demeanour of the witnesses convincing.

The prosecution also seemed content to remain blind to its duty to use all available means to destroy a central plinth of the defence, namely, that the ganja was planted on the appellant because, having been unlawfully arrested, it had become a matter of urgency on the fifth day of his illegal detention to concoct a charge against him which would justify that detention. This suggestion is alarming but it is the crux of the defence. It is supported by facts in the Crown's case and could not be ignored. It was susceptible to a conclusive answer by evidence which satisfactorily explained the grounds of the appellant's arrest on 24th December, and the reasons for his detention without bail thereafter. No such evidence was led. Instead, there was the bald admission by inspector Smith of his ignorance of these matters. The resident magistrate asked no questions of the prosecution witnesses on this aspect of the defence. In the result, the uncomfortable implications in the suggestion that the ganja was planted on the appellant were not countered by the critical evidence to the contrary which should have

been available to the prosecution. These uncomfortable implications could scarcely have escaped attention. They emerged at the first trial and were apparent in the reasons of this court for allowing the first appeal. They questioned the police evidence in the second trial as seriously as they did in the first.

In the light of this analysis of the printed testimony, it is clear that the evidence for the defence raised up substantial doubts concerning the reliability of the evidence for the prosecution. The case presented unusual features. It was a retrial of an issue which is intrinsically simple, but which was complicated by assertions by the defence which could not be dismissed out of hand. In the absence of stated reasons for the verdict of guilty, or any note thereof, and in the peculiar circumstances of this case, we were not prepared to hold that the resident magistrate's assessment of the evidence was correct, or that on that evidence, his directions to himself in relation to the burden of proof in a criminal case were adequate. We took the view that the appellant should have been given the benefit of the doubt. Nothing in the printed record explains why this course was not followed or justifies the contrary. We, therefore, concluded that the court had no alternative but to uphold the appeal, not because the police evidence was shown to be false, but because it was left open to doubts which should have been dispelled.

Before parting with this appeal, one final point must be noticed. The appellant wished to call supporting evidence. He asked the court to subpoenae two witnesses. But he could not give their names. He could tell only that one lived at Content, Saint James, and the other at Sav-la-Mar. The trial was adjourned to 24th May 1972 to enable the police to try to find the witnesses. The appellant was remanded in custody. The note of what transpired at the resumption is to this effect: "On 24.5.72 witness called no answer." Counsel for the appellant complained that the prosecution had not co-operated in assisting the appellant to the extent demanded by the justice of the situation because the witnesses whom the appellant wished to call were obviously two of the persons who had been in the lock-up with him on 29th December, 1971, and their names, certainly, and the whereabouts perhaps, should have been known to the police. The note made by the magistrate does

not state whether or not the witnesses required by the appellant were persons who had been in the lock-up with him. If they were, the complaint was not without substance. Further investigations were therefore indicated. However, in view of our conclusion that, for the reasons stated, the appeal should be allowed, an opinion concerning this particular complaint was not necessary. Consequently, the further investigations which might have been required were not undertaken.