Privy Council Appeal No. 1 of 1967

Herman King – – – – – – – – – – *Appellant*

v.

The Queen – – – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD APRIL 1968

Present at the Hearing:

LORD HODSON
LORD UPJOHN
LORD PEARSON

[*Delivered by* LORD HODSON]

The appellant was charged as follows:

"Herman King of 4 Anglesea Avenue of the parish of St. Andrew with force at 20 Ladd Lane and within the jurisdiction of this Court unlawfully was found in possession of certain dangerous drugs to wit Ganja.

Contrary to section 7c of Chapter 90."

This Act is called "The Dangerous Drugs Law". The appellant was convicted by the Resident Magistrate, Kingston, Jamaica on 2nd February 1966 and his appeal to the Court of Appeal of Jamaica was dismissed on 29th July 1966.

The case against the appellant was that on 11th January 1966 at 20 Ladd Lane, Kingston, he was searched by a police officer in pursuance of a search warrant, under the Dangerous Drugs Law and ganja was found on him.

The appellant's case was that ganja was planted on him by the police officer who conducted the search. He said that he was first searched and that nothing was found on him whereupon the only other man present, apart from police officers, was sent out of the room. He said that he was then searched again and ganja was produced which the police falsely claimed had been found on him. There was conflict of evidence between the witnesses called on either side and on the appellant being disbelieved the conviction followed.

The Dangerous Drugs Law section 7 provides as follows:

"Every person who . . .

(*c*) has in his possession any prepared opium or ganja . . . shall be guilty of an offence against this law".

Section 21 (2) of the Law provides as follows:

"If a Justice is satisfied by information on oath that there is reasonable ground for suspecting—

(*a*) that any drugs to which this Law applies are, in contravention of the provisions of this Law or of any Regulations made thereunder, in the possession or under the control of any persons in any premises; or

(*b*) that any document directly or indirectly relating to or connected with any transaction or dealing which was, or any intended transaction or dealing which would if carried out be, an offence against this Law or, in the case of a transaction or dealing carried out or intended to be carried out in any place outside the Island, an offence against the provisions of any corresponding law in force in that place, is in the possession or under the control of any person in any premises; he may grant a search warrant authorising any constable named in the warrant, at any time or times within one month from the date of the warrant, to enter, if need be by force, the premises named in the warrant, and to search the premises and any persons found therein, and if there is reasonable ground for suspecting that an offence against this Law has been committed in relation to any such drugs which may be found in the premises or in the possession of any such persons, or that any document which may be so found is such a document as aforesaid, to seize and detain those drugs or that document, as the case may be."

The section thus authorised any constable named in a warrant to enter if need be by force the premises named in the warrant and to search the premises and any persons found therein.

The police search party went to 20 Ladd Lane on 11th January 1966 armed with a warrant which was in the following terms:

"To any Lawful Constable of the Parish of Kingston WHEREAS it appears to me W. Chambers Esquire, one of Her Majesty's Justices of the Peace in and for the Parish of Kingston by the INFORMATION and complaint on oath of Henry R. Isaacs, Sgt. of Police, that there is good reason to believe that Dangerous Drugs to wit:

Ganja

is kept and concealed on the premises of Joyce Cohen of 20 Ladd Lane in the parish of Kingston THESE ARE THEREFORE in Her Majesty's name, to authorise and command you with proper assistance, to enter the said premises of the said Joyce Cohen in the day or night time and there diligently search for the said Dangerous Drugs and if any articles of Dangerous Drugs be found after such search, that you will bring the Dangerous Drugs so found and the body of the said Joyce Cohen before me, or some other of Her Majesty's Justices of the Peace for the said Parish of Kingston to be disposed of and dealt with according to Law.

Given under my hand and seal at 32 Lenearl Street in the Parish aforesaid, this 11th day of January, one thousand nine hundred and sixty-six.

(S) W. Chambers
Justice of the Peace for
the Parish of Kingston."

Although a warrant to search persons as well as premises was contemplated by this section this warrant did not in terms authorise search of any person although it did contemplate the arrest of one person named in the warrant.

In these circumstances the search was not on the face of it justified by the warrant nor in their Lordships' opinion can authority for the search of any person be implied from the language of the section without express authorisation.

In a South African case on consideration of a statutory provision as to the issue of warrants to search premises, persons not being mentioned, it was held at first instance that a search warrant covered persons as well as premises where premises only were mentioned since to hold the opposite would lead to the defeat of the objects of search warrants because persons on the premises would only have to take material documents and conceal them on their persons and defeat the objects of the search.

This decision was reversed on Appeal by the Transvaal Provincial Division (1919) S.A. Law Reports 270 in the case of *Seccombe and others v. Attorney-General and others.* Their Lordships see no reason to take a different view of the act in question here which by referring to persons as well as premises strengthens the argument that if a warrant is to cover persons it must say so in terms.

The warrant is defective not only for the reason stated but because the terms of the section were not complied with since no constable was " named " in the warrant.

This in their Lordships' opinion is sufficient to invalidate the warrant since the legislature has been at pains to authorise entry and search only by a constable named. The word " named " is to be taken literally and not to be given a wider meaning, such as " designated " " specified " or " identified ", which it may often bear in an appropriate context. For example the Court has inclined in favour of the wider meaning where the context so requires so as to give effect to the intention of a testator. See *Seale-Hayne v. Jodrell* [1891] A.C. 304 where the words " such of my relatives hereinbefore named " were held not to be confined to relatives of whom Christian names and surnames had been mentioned in a will. In another case *In re Browne's* policy *Browne v. Browne* [1903] 1 Ch. 188 a man with a wife and children effected a policy of assurance on his life under the Married Women's Property Act 1882 s. 11 expressed to be " for the benefit of his wife and children ". The wife died, the man remarried and had a child by his second marriage. It was held that these were entitled to participate jointly with the children of the first marriage.

There are no considerations here which lead to any expanded meaning of the word " named ".

A further point taken in the Court of Appeal of Jamacia that the constable who performed the search was not a lawful constable of the parish of Kingston but of the parish of St. Andrew was not pursued in view of the terms of section s. 13 (2) of the Constabulary Force Law which makes all constables constables in every parish.

In the Jamaica Courts the argument was conducted on the footing that the warrant for the search of the appellant was not justified by section 21 of the Dangerous Drugs Law although justification under this Law has been urged by the respondent before their Lordships who are of opinion that search of the appellant was not justified by that law. Turning to the Constabulary Force Law (Cap. 72) to which the attention of the Jamaica courts was directed. Section 18 reads as follows:

> " It shall be lawful for any Constable, without warrant, to apprehend any person found committing any offence punishable upon indictment or summary conviction and to take him forthwith before a Justice who shall enquire into the circumstances of the alleged offence, and either commit the offender to the nearest jail, prison or lock-up to be thereafter dealt with according to Law, or to take bail by recognizance, with or without security in such amount as such Justice shall direct, for his appearance on such day as he shall appoint, before a Court of competent jurisdiction, to be dealt with according to Law."

Section 22 reads as follows:

> " It shall be lawful for any Constable to apprehend without warrant any person known or suspected to be in unlawful possession of opium, ganga (*Cannabis Sativa*), morphine, cocaine or any other dangerous or prohibited drugs, or any person known or suspected to be in possession of any paper, ticket or token relating to any game, pretended game or lottery called or known as Peaka Peow or Drop Pan, or any game of a similar nature and to take him forthwith before a Justice who shall thereupon cause such person to be searched in his presence ".

There is nothing in the language of section 18 to justify the search here made. The word " found " does not authorise a search although arrest is authorised in the circumstances specified by the section.

Section 22 makes provision for a search in a particular manner where a person is known or suspected of being in position of, *inter alia,* ganga. The person to be searched must be taken before a justice who shall thereupon cause such person to be searched in his presence. This was not done.

Accordingly no legal justification for the search having been established objection was taken to the evidence of the police on the footing that even if it were admissible the Court should in its discretion exclude it.

The magistrate held that even if section 22 of the Constabulary Force Law had not been complied with the evidence was admissible on the authority of the decision in *R. v. Kuruma* [1955] A.C. 197.

The Court of Appeal took the same view in dismissing the appeal. The evidence adduced by the prosecution, if accepted as credible as it was, was relevant and amply sufficient to prove the charge. The following is a summary of the evidence:

On 11th January Sergeant Isaacs, Acting Corporal Gayle, Acting Corporal Linton and other police went to 20 Ladd Lane to search for ganja under the Dangerous Drugs Law. The warrant was read by Sergeant Isaacs on the premises. It was read to a woman on the premises and not apparently directly to the appellant but the appellant and another man, who was also searched, were told that the police were there to carry out a search for ganja. Corporal Gayle searched the appellant and found the ganja in one of his trousers pockets and arrested him. The ganja was subsequently analysed by the Government analyst and a certificate obtained on analysis put in evidence.

Although the search was not authorised by the Dangerous Drugs Law or the Constabulary Force Law there was no evidence that the appellant was wilfully misled by the police officers or any of them into thinking that there was such authorisation.

Corporal Gayle admitted at the trial that he knew the warrant was to search the premises of Joyce Cohen and that it referred to the search of no-one else. He suspected that the appellant might have had ganja on him and did not offer him the opportunity of being searched in front of a Justice of the Peace although he knew of that right of a citizen.

It can therefore be said that he should have had the advantage of a search before a magistrate and the choice of this was never offered to him.

The substantial argument on behalf of the appellant was that, in the discretion of the Court, the evidence produced as a result of the search, which was the whole of the evidence against him, ought, though admissible, to have been excluded as unfair to him.

Before referring to *In re Kuruma (supra)* it is convenient to refer to some earlier decisions. *Jones v. Owens* (1870) 34 J. P. 759 was a decision of the Divisional Court of the King's Bench Division. There a constable who had no right to search the person of the appellant did so and finding 25 young salmon in his pocket summoned him under the Salmon Fishery Acts for illegally having these in his possession. The appellant was convicted by the justices and on appeal it was said by Mellor J. (Lush J. concurring)

> "I think it would be a dangerous obstacle to the administration of justice if we were to hold, because evidence was obtained by illegal means it could not be used against a party charged with an offence. The justices rightly convicted the appellant."

This matter has been discussed in a number of Scottish cases which were reviewed in the *Kuruma* case (*supra*).

It should be prefaced that in the Scottish cases to which reference will be made the Court is directing its mind to the admissibility of evidence and in this connection to a discretion to be exercised whether or not to admit evidence in cases where it could be said to be unfair to the accused to do so.

In the English cases the evidence under consideration is admissible in law (whether illegally obtained or not) and the exercise of discretion is called for in order to decide whether, even though admissible, it should be excluded in fairness to the accused. The same end is reached in both jurisdictions though by a slightly different route.

There is a passage in the opinion of Lord Cooper (Lord Justice General) in *Lawrie v. Muir* 1950 J.C. 19 which points to some of the difficulties of the question which is involved. He said at p. 26

> "From the stand point of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come in conflict (*a*) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities and (*b*) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high handed interference, and the common sanction is an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand, the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods."

At p. 27 he proceeded

> "Irregularities require to be excused and infringements of the formalities of the law in relation to these matters are not lightly to be condoned. Whether any given irregularity ought to be excused depends upon the nature of the irregularity and the circumstances under which it was committed. In particular the case may bring into place the discretionary principle of fairness to the accused which has been so fully developed in our law in relation to the admission in evidence of confessions or admissions by a person suspected or charged with a crime. That principle would obviously require consideration in any case in which the departure from the strict procedure had been adopted deliberately with a view to securing the admission of evidence obtained by an unfair trick. . . . On the other hand, to take an extreme instance figured in argument, it would usually be wrong to exclude some highly incriminating production in a murder trial merely because it was found by a police officer in the course of a search authorised for a different purpose or before a proper warrant had been obtained."

In a later case of *Fairley v. The Fishmongers of London* 1951 J.C. 14; another Salmon case, where a prosecution for stealing unclean or unseasonable salmon was brought without a search warrant or other authority, the Lord Justice General applying *Lawrie v. Muir* (*supra*) said that he could find nothing to suggest that any departure from the strict procedure was deliberately adopted with a view to obtaining the admission of evidence obtained by an unfair trick.

On the other hand in *H.M. Advocate v. Turnbull* 1951 J.C. 96 a case in which the accused was charged with making false income tax returns on behalf of a client Lord Guthrie after referring to the two preceding decisions of the Lord Justice General excluded documents which had been illegally obtained on the ground of unfairness to the accused since the legal action of the police was not justified by any circumstances of urgency but was deliberately undertaken in order to obtain from the accused's private papers evidence upon which further charges against him might be founded.

The discretion in criminal cases to disallow evidence if the strict rules of admissibility would operate unfairly against an accused has been emphasised before this Board in *Noor Mohamed v. The King* [1949]

A.C. 182 and in the House of Lords in *Harris v. Director of Prosecutions* [1952] A.C. 694 as was pointed out by Lord Goddard in *Kuruma's* case (*supra*). In that case he said

> "In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained."

He said later in commenting on the Scottish cases to some of which reference has been made

> "If, for instance, some admission of some piece of evidence e.g., a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out."

An instance of the exclusion of evidence on appeal on the ground that it has been obtained unfairly, although clearly admissible, is to be found in *Regina v. Payne* [1963] 1 W.L.R. 637. The defendant was taken to a police station following a car collision. He was there asked if he was willing to be examined by a doctor and it was made clear to him that the purpose of the examination was to see if he was suffering from any illness or disability and that it was no part of the doctor's duty to examine him in order to give an opinion as to his fitness to drive. The defendant then agreed to the doctor's examination. At his trial on charges of driving while unfit through drink and being in charge of a car while likewise unfit, the doctor gave evidence for the prosecution to the effect that the defendant was under the influence of drink to such an extent as to be unfit to drive.

On appeal against conviction although the doctor's evidence was clearly admissible it was held that in the exercise of his discretion the Chairman of London Sessions should have refused to allow it to be given since had the defendant realised the doctor would give evidence as to his fitness or unfitness to drive he might have refused to allow himself to be examined. The appeal was allowed and the conviction quashed.

Callis v. Gunn [1964] 1 Q.B.D. 495, is another case where the *Kuruma* case was considered. It was held that evidence of finger prints was relevant and admissible. It had been excluded by Magistrates and on appeal by the prosecutor, which was allowed, it was held by the Divisional Court that, while the court had an overriding discretion to disallow evidence if its admission would operate unfairly against a defendant there were no representations by the police officer who took the finger prints and nothing to justify the justices in excluding the evidence.

Lord Parker L.C.J. in referring to the discretion said that as he understood it, "it would certainly be exercised by excluding the evidence if there was any suggestion of it having been obtained oppressively, by false representations, by a trick, by threats, by bribes, anything of that sort."

In the case of *Regina v. Murphy* 1965 Northern Ireland Law Reports 138 Lord MacDermott L.C.J. giving the judgment of the Courts-Martial Appeal Court made valuable observations on circumstances which will or will not render it unfair to allow admissible evidence to be given against an accused person.

There the appellant a soldier serving in the Army was charged before a district court-martial with the offence of disclosing information useful to an enemy, contrary to section 60 (1) of the Army Act 1955. The substance of that case against him was contained in the evidence of police officers who had posed as members of a subversive organisation with which the authorities suspected the appellant to have sympathies, and had elicited the information the subject of the charge, by asking the appellant questions about the security of his barracks. The appellant was convicted and appealed on the ground that the court-martial ought, in its discretion, to have rejected the evidence.

The appellant relied in his argument on the use of the word "trick" which appears in *Kuruma's* case (*supra*) and *Callis v. Gunn* (*supra*) and in other cases as well. The court reviewed these and other authorities and commenting on the passage in Lord Parker L.C.J.'s judgment to which their Lordships have already referred used this language

> " We do not read this passage as doing more than listing a variety of classes of *oppressive* conduct which would justify exclusion. It certainly gives no ground for saying that any evidence obtained by any false representation or trick is to be regarded as oppressive and left out of consideration. Detection by deception is a form of police procedure to be directed and used sparingly and with circumspection; but as a method it is as old as the constable in plain clothes and, regrettable though the fact may be, the day has not yet come when it would be safe to say that law and order could always be enforced and the public safety protected without occasional resort to it. We find that conclusion hard to avoid on any survey of the preventive and enforcement functions of the police but it is enough to point to the salient facts of the present appeal. The appellant was beyond all doubt a serious security risk; this was revealed by the trick of misrepresentation practised by the police as already described; and no other way of obtaining this revelation has been demonstrated or suggested. We cannot hold that this was necessarily oppressive or that Lord Parker of Waddington intended to lay down any rule of law which meant that it was the duty of the court-martial, once the trick used by the police had been established, to reject the evidence that followed from it."

Their Lordships agree with the judgment of the Courts-Martial Appeal Court in holding that unfairness to the accused is not susceptible of close definition. See at page 149:

> " it must be judged of in the light of all the material facts and findings and all the surrounding circumstances. The position of the accused, the nature of the investigation, and the gravity or otherwise of the suspected offence may all be relevant. That is not to say that the standard of fairness must bear some sort of inverse proportion to the extent to which the public interest may be involved, but different offences may pose different problems for the police and justify different methods."

The appellant relied in support of his submission that the evidence illegally obtained against him should be excluded on the argument that it was obtained in violation of his constitutional rights and reference was made to an Irish case of *The People (A.G.) v. O'Brien* 1965 I.R. page 142 where the point was discussed by the Supreme Court of Eire. The provision of the Jamaican Constitution is scheduled to the Jamaica Order in Council No. 1550 of 1962 (paragraph 19) gives protection to persons against search of persons on property without consent.

This constitutional right may or not be enshrined in a written constitution but it seems to their Lordships that it matters not whether it depends on such enshrinement or simply upon the common law as it would do in this country. In either event the discretion of the court must be exercised and has not been taken away by the declaration of the right in written form.

Having considered the evidence and the submissions advanced their Lordships hold that there is no ground for interferring with the way in which the discretion has been exercised in this case.

This is not in their opinion a case in which evidence has been obtained by conduct of which the Crown ought not to take advantage. If they had thought otherwise they would have excluded the evidence even though tendered for the suppression of crime.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed.

In the Privy Council

HERMAN KING

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DELIVERED BY
LORD HODSON

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