

COURT OF APPEAL

28th August, 1991

118.

Before: Sir Godfray Le Quesne, Q.C., (President),  
J.M. Chadwick, Esq., Q.C.,  
A.C. Hamilton, Esq., Q.C.

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The Attorney General

- v -

John Clarkin

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Appeal against conviction.  
Appeal limited to the preliminary point  
of the admissibility of  
evidence in the Court of Trial.

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C.E. Whelan, Esq., Crown Advocate;  
Advocate Mrs. S.A. Pearmain for the Appellant.

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Reasoned Judgment given by Chadwick, J.A.

(Appeal dismissed: 3rd July, 1991).

COURT OF APPEAL

H M ATTORNEY GENERAL

v

JOHN CLARKIN

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JUDGEMENT

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On 21 December 1990 the Appellant, John Clarkin, was charged on indictment with the offence of possession of a controlled drug with intent to supply to another, contrary to Article 6(2) of the Misuse of Drugs (Jersey) Law 1978. He pleaded not guilty to that indictment and his case came before the Royal Court (Inferior Number) for trial on 16 January 1991.

At the commencement of the trial a preliminary point was taken on behalf of the Appellant to the effect that the evidence of possession of the drug had been obtained by an improper use of police powers, and ought to be excluded. The Royal Court heard evidence on the *voire dire* as to the circumstances in which the evidence of possession had been obtained. On the following day, 17 January 1991, the Royal Court ruled that the evidence of possession had been obtained improperly, but that, in the exercise of its discretion, the Court would allow such evidence to be given at the trial. The trial then continued for the

remainder of that day and the relevant evidence was duly called by the prosecution. On 18 January 1991 the Appellant changed his plea to guilty. He was, accordingly, convicted of the offence charged. He has appealed to this Court, with leave, against that conviction. The basis of the appeal is that the Royal Court was wrong to allow the evidence of possession to be given. It is, we think, beyond argument that, if that evidence had been excluded, the Appellant would not have changed his plea and could not have been convicted. Indeed, we did not understand the Crown to suggest otherwise.

The appeal against conviction was heard before this Court on 1 and 2 July 1991. At the conclusion of the argument we considered the submissions which had been made to us and decided that the appeal should be dismissed. We informed the parties of that decision, indicating that our reasons would be put in writing and delivered at later date. Those reasons are now set out in this Judgement.

The circumstances in which the evidence of possession was obtained are described in the reasoned Judgement given by the Royal Court on 5 February 1991 to support its ruling of 17 January 1991. They may be summarised as follows.

On 6 September 1990 Detective Chief Inspector Le Brocq, as he then was, attended on the Bailiff and gave information on oath with the object of obtaining a warrant under Article 17(2) of the

Misuse of Drugs (Jersey) Law 1978 authorising the entry and search of premises known as the Cambridge Bar, Burrard Street, St Helier. The Bailiff signed such a warrant. The warrant is dated 6 September 1990. The warrant, as issued, properly identified the premises to which it related. But, in accordance with what we were told was the usual practice in such cases, the warrant, as issued, did not identify by name those persons upon whom authority to enter and search the premises was intended to be conferred.

On Saturday 8 September 1990 it was decided by the police that the warrant should be executed. Some forty officers were to be involved. They were briefed as to their tasks during the morning of that day. Also, on that morning, the names of Detective Chief Inspector M Le Brocq, Police Inspector T Garrett and Police Sergeant B Brady were inserted, in manuscript, on the warrant. This was done, by Chief Inspector Le Brocq, pursuant to an undertaking given to the Bailiff on 6 September that the names of all the officers who would execute the warrant would be included in the warrant before execution took place. Chief Inspector Le Brocq took the view that it was sufficient to name only those officers who had effective command and supervision of the operation which was to be carried out.

In the early evening of 8 September 1990, the operation was launched. The team of officers arrived at Burrard Street and entered the Cambridge Bar. One of the members of the team was Mr

Luke Goddard, a customs and excise officer. He went to the back of the premises, saw the Appellant there, told him that he was being detained and handcuffed him. He searched the Appellant's pockets, but found nothing of interest. Mr Goddard then escorted the Appellant out of the Cambridge Bar and into a police van. They were driven to Police Headquarters, together with other officers and detainees. In due course the Appellant was taken to the detention room, where he was required to strip. He was then searched by Police Constable Rotheram. The search was observed by Mr Goddard. He noticed that the Appellant appeared to be concealing something in his hand. On investigation this was found to be a small polythene bag containing a large quantity of small purple discs. These were identified as microdots of the class A drug Lysergide, more commonly known as LSD.

The Royal Court held that the evidence of possession which had been obtained in those circumstances was evidence which had been obtained improperly and, indeed, unlawfully. We agree with that conclusion.

Article 17(2) of the Misuse of Drugs (Jersey) Law 1978 empowers the Bailiff, if satisfied from information on oath that there is reasonable cause to suspect that a controlled drug is in the possession of a person in any premises, to issue a warrant

... "authorising any police officer or other person named therein, at any time or times within one month from the date of the warrant, to enter, if

need be by force, the premises specified in the warrant, and to search the premises and any persons found therein ..."

In our view it is clear that no person can properly be acting under the authority of such a warrant unless he or she is specifically named in the warrant at the time when it is issued. Examination of the legislative history of this Article shows that it cannot be permissible to construe the phrases ..."any police officer"... and ..."other person named therein"... disjunctively: the words ..."named therein"... must qualify both police officers and other persons.

The power to obtain a warrant - un bref de justice - in drugs cases was first introduced by the Loi sur les Drogues Dangereuses of 1923. Under Article 25 of that Law, the person named in the warrant as the person authorised to enter and search would have been the Constable of the Parish. The law was altered in 1954. Article 13(2) of the Dangerous Drugs (Jersey) Law 1954 provided that the person or persons authorised to enter and search under a drugs warrant were to be ..."any officer of police, whether honorary or paid, named in the warrant"... Clearly, under that Article, there was no power to issue a warrant which conferred authority on police officers generally. When the law was re-enacted in 1978, in the form of the present Article 17(2), the power was extended to enable persons other than police officers to be named in the warrant; but we cannot believe that it was the intention of the legislature thereby to remove the existing

requirement that police officers authorised by the warrant should be specifically named therein. The Crown Advocate, rightly in our view, did not contend otherwise.

It follows that there is no power under Article 17(2) to issue a drugs warrant "in blank" - that is to say, without there being a person or persons named in the warrant at the time of issue. The forcible entry and search of premises is a serious invasion of the rights which an owner or occupier can ordinarily expect to enjoy under the law. It is not unreasonable to suppose that, when the legislature conferred upon the Bailiff the power to authorise such an entry and search, it did so on the basis that not only would he be satisfied in each particular case of the need to subject the private rights of the owner or occupier to the greater public interest in the detection of drugs offences, but also he would be concerned in each case as to the identity and number of those who would make such entry and search.

We note that the Deputy Bailiff, in giving the reasons for the Royal Court's ruling on this preliminary point, accepted that the practice of issuing drugs warrants in blank must cease. He referred, there, to instructions which have now been issued to the Chief Officers of the States' Police Force, and of the Customs and Excise, that a list of named Officers must be supplied on an application for a warrant under Article 17(2) of the 1978 Law for inclusion in the warrant at the time of issue. Although those instructions may cause some administrative

inconvenience, we share the Deputy Bailiff's view that this is what the law of Jersey requires. If the position in England is different, that is because the relevant statutory provision, section 23(3) of the Misuse of Drugs Act 1971, is in terms which are materially different from those used in Article 17(2) of the Jersey Law.

If there was no power under Article 17(2) of the 1978 Law to issue the warrant dated 6 September 1990 in blank, then the entry and search which were purportedly made and done under that warrant were unlawful. In particular the detention of the Appellant, his conveyance to Police Headquarters by Mr Goddard and the subsequent search in the detention room by Police Constable Rotheram were not authorised by any warrant properly issued under Article 17(2).

The Crown Advocate argued before us, as he had before the Royal Court, that in relation to the search by Police Constable Rotheram in the detention room - in the course of which the package containing the LSD was discovered by Mr Goddard - recourse could be had to the power conferred by Article 17(3) of the 1978 Law. That Article empowers a police officer who ... "has reasonable grounds to suspect that any person is in possession of a controlled drug"... to search that person, and to detain him for the purpose of searching him.



We do not doubt that, in a proper case, a police officer, who had himself taken no part in an entry and search of premises which he thought had been properly authorised by a warrant under Article 17(2), might be justified in taking the view that he had reasonable grounds to suspect that a person, who had been detained in the course of that entry and search and who was subsequently presented to him at Police Headquarters, was a person in possession of a controlled drug - on the basis that he had been found on premises which were reasonably suspected of being used for purposes connected with drugs in circumstances which suggested that he was there for those purposes - and so might be justified in exercising his power under Article 17(3) to search that person at Police Headquarters. An indication that the legislature must have contemplated such an inter-relation between Articles 17(2) and 17(3) is found in the proviso to subparagraph (a) of Article 17(3). But the recognition that Article 17(3) powers could be used in conjunction with an entry and search under Article 17(2) is of no assistance to the Crown in the present case. The only evidence before the Royal Court on the *voire dire* was that given by Chief Inspector Le Brocq. He could not, and did not, speak to the basis upon which Police Constable Rotheram was carrying out his search. Accordingly, there was no evidence upon which the Royal Court could have reached the conclusion, at the time when its ruling was given, that Police Constable Rotheram had addressed himself to the appropriate question and had concluded, before he began his

search, that there were reasonable grounds to suspect the Appellant of possession of a controlled drug.

We have examined the circumstances in which the evidence of possession was obtained in the present case in some detail; first, because the proper construction of Article 17(2) of the Misuse of Drugs (Jersey) Law 1978, and its inter-relation with Article 17(3), is a matter of general importance in this Island; and, secondly, because it is against those circumstances that the Royal Court had to consider the exercise of whatever discretion it may have had to exclude that evidence. As we have already indicated, we agree with the conclusion of the Royal Court that the evidence of possession in the present case was obtained improperly and unlawfully. The principal question on this appeal is whether, despite this, the Royal Court was right to allow that evidence to be given at the Appellant's trial.

The Royal Court answered this question by reference to two principles namely:

- "(1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value.
- (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means"...

Those principles are taken from the speech of Lord Diplock in the English case of R v Sang [1980] AC 402.

In that case the question which had been certified as a point of law of general importance for consideration by the House of Lords was this:

..."Does a trial judge have a discretion to refuse to allow evidence - being evidence other than evidence of admission - to be given in any circumstances in which such evidence is relevant and of more than minimal probative value"...

The answer which the House of Lords gave to that question was expressed in the terms which the Royal Court adopted and which we have set out above. Applying those principles, the Royal Court directed itself that ..."we could exercise our discretion to refuse to admit the evidence of the discovery of the drug only if we were satisfied that the prejudicial effect of that evidence outweighed its probative value."... On that basis the Royal Court was bound to reach the conclusion, as it did, that the evidence should not be excluded.

We have been referred to no case in which the question whether, and in what circumstances, a trial Court sitting in Jersey has discretion to refuse to allow evidence to be given has been considered by this Court. A decision of the House of Lords in England must, of course, be regarded as highly persuasive; but

English decisions do not bind this Court, and it is open to us, if we think it appropriate, to decide that the principles set out by Lord Diplock in R v Sang (supra) do not represent the law in this Island. There are, we think, five reasons why this Court ought to re-examine those principles with particular care. First, the decision of the House of Lords in R v Sang represented a change in the direction in which the law in England had been moving since the advice of the Privy Council in Kuruma v The Queen [1955] AC 197, some fifteen years earlier. Secondly, the proposition that a trial judge has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means is one which it has not been found necessary to adopt in other jurisdictions, in particular in Scotland. Thirdly, there are passages in the speeches of other members of the House in R v Sang itself which suggest that they did not give an unqualified assent to that proposition. Fourthly, in the subsequent appeal of Fox v Chief Constable of Gwent [1986] AC 281, the House of Lords clearly recognised the existence of a discretion which went beyond that derived from Lord Diplock's speech in R v Sang. Fifthly, and finally, the decision in R v Sang has, in England, been overtaken, and largely abrogated, by the provisions of section 78 of the Police and Criminal Evidence Act 1984.

Kuruma v The Queen [1955] AC 197 was an appeal from the Court of Appeal for Eastern Africa. It has been followed by the Royal Court in this Island - see Attorney-General v Clarke (1963)

Jersey Judgements 243. The primary question in Kuruma was whether evidence which had been obtained illegally was admissible in a criminal trial. The illegality in that case, as in the present case, consisted of an unauthorised search of the appellant by the police. Lord Goddard, delivering the advice of the Privy Council, said this (at page 203)

..."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"...

It is, however, clear from subsequent passages in his speech that Lord Goddard intended to qualify that proposition in at least two respects. First, he expressly accepted (at page 205) the rule that

..."a confession can only be admitted if it is voluntary, and therefore one obtained by threats or promises held out by a person in authority is not to be admitted".

Secondly, he said this (at page 204)

..."No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. This was emphasised in the case before this Board of Noor Mohamed v The King [1949] AC 182, 191-2, and in the recent case in the House of Lords, Harris v Director of Public Prosecutions [1952] AC 694, 707. 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. It was this discretion that lay at the root of the ruling of Lord Guthrie in H M Advocate v Turnbull"...

[It seems likely that in the third sentence just quoted Lord Goddard intended to say 'or some piece of evidence', and the word 'of' in place of 'or' is a misprint.]

Kuruma was followed and, perhaps, extended by decisions of appellate courts in England in Callis v Gunn [1964] 1 QB 495-see, in particular, at 501/2 - and Jeffrey v Black [1978] QB 490. Jeffrey v Black was a decision of the Divisional Court presided over by Lord Widgery CJ. The appeal was by case stated from a decision by justices that evidence of possession of drugs which had been obtained during the course of an unauthorised search of the appellant's room was inadmissible. The Lord Chief Justice, with whom the other members of the Court agreed, followed the decision in Kuruma and endorsed the proposition that an irregularity in obtaining evidence does not render the evidence inadmissible; but he went on to recognise that admissibility, in the strict sense, was not the only matter for a trial court to consider. He said this (at pages 497G-498D)

..."Whether or not the evidence is admissible depends on whether or not it is relevant to the issues in respect of which it is called.

At this point it would seem that the prosecutor ought to succeed in his appeal because at this point what he appears to have shown is that the justices were wrong in failing to recognise the law as stated in Kuruma v The Queen [1955] AC 197. But

that is not in fact the end of the matter because the justices sitting in this case, like any other tribunal dealing with criminal matters in England and sitting under the English law, have a general discretion to decline to allow any evidence to be called by the prosecution if they think that it would be unfair or oppressive to allow that to be done. In getting an assessment of what this discretion means, justices ought, I think, to stress to themselves that the discretion is not a discretion which arises only in drug cases. It is not a discretion which arises only in cases where police can enter premises. It is a discretion which every judge has all the time in respect of all the evidence which is tendered by the prosecution. It would probably give justices some idea of the extent to which this discretion is used if one asks them whether they are appreciative of the fact that they have the discretion anyway, and it may well be that a number of experienced justices would be quite ignorant of the possession of this discretion. That gives them, I hope, some idea of how relatively rarely it is exercised in our courts. But if the case is exceptional, if the case is such that not only have the police officers entered without authority, but they have been guilty of trickery or they have misled someone, or they have been oppressive or they have been unfair, or in other respects they have behaved in a manner which is morally reprehensible, then it is open to the justices to apply their discretion and decline to allow the particular evidence to be let in as part of the trial. I cannot stress the point too strongly that this is a very exceptional situation, and the simple, unvarnished fact that evidence was obtained by police officers who had gone in without bothering to get a search warrant is not enough to justify the justices in exercising their discretion to keep the evidence out"...

The question was considered again by the Privy Council in King v The Queen [1969] 1 AC 304 - an appeal from Jamaica. That, again, was a case where evidence of possession of drugs had been found in the course of an unauthorised search. The advice of the Board was given by Lord Hodson who, after reviewing the English and Scottish authorities, said this (at page 319G)

..."This is not in [the Board's] 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"...

In the course of his review of the authorities Lord Hodson compared the position in England with that in Scotland. He said (at page 315A-C)

..."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"... [our emphasis]

The conflicting interests of the state in securing evidence of the commission of crime, and of the individual in being protected from an unauthorised invasion of his rights of privacy, were addressed in a passage in the opinion of Lord Cooper (Lord Justice General) in the Scottish case of Lawrie v Muir 1950 JC 19, which was cited by Lord Hodson in King v The Queen (supra) and which seems to us to illuminate the problem in words which we are happy to adopt.



..."From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into 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."

Lord Cooper went on:

"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 developed so fully 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."....

The principle identified by Lord Cooper in Lawrie v Muir (supra) in the passage cited by Lord Hodson at [1969] 1 AC 304, 315D-316B was followed in Scotland in the subsequent cases of Fairley v the Fishmongers of London 1951 JC 14 and H M Advocate v Turnbull 1951 JC 96.

The Scottish cases were considered by two members of the Committee in R v Sang (supra). Lord Fraser of Tullybelton recognised that the law in Scotland differed from that in England - [1980] AC 402, 448F -but went on to say this

"But the principle of fairness to the accused applied by Lord Guthrie in H M Advocate v Turnbull 1951 JC 96 seems to be the same as that stated by Lord Widgery CJ in Jeffrey v Black [1978] QB 490"....

He then cited from the passage at pages 497/8 in Jeffrey v Black which we have set out above, and continued (at p.449A)

"That was the principle that seems to have been recognised by Lord Goddard [in Kuruma] in his reference to H M Advocate v Turnbull 1951 JC 96 and treated by him as applicable in England"....

Lord Scarman, too, referred to Lawrie v Muir and H M Advocate v Turnbull, and to ..."the discretionary principle of fairness to the accused"...., with approval. He expressed the view, at [1980]

AC 402, 457F, that, although differences of emphasis and scope were acceptable, it would be unfortunate if that principle was not recognised in all the criminal jurisdictions of the United Kingdom.

In the present case the Royal Court exercised its discretion on the basis, which it extracted from R v Sang, that it could refuse to admit evidence only if satisfied that its prejudicial effect outweighed its probative value. There is support for this approach in the speeches of Lord Diplock and Viscount Dilhorne - see at pages 436/7 and at page 441G. But, although each agreed with the answer to the certified question which was proposed in the speech of Lord Diplock, there are passages in the speeches of the other three members of the court which suggest that they did not regard the discretion as limited in that way. Lord Salmon said this, at pages 444G to 445A.

..."In my opinion, the decision as to whether evidence may be excluded depends entirely upon the particular facts of each case and the circumstances surrounding it - which are infinitely variable.

I consider that it is a clear principle of the law that a trial judge has the power and the duty to ensure that the accused has a fair trial. Accordingly, amongst other things, he has a discretion to exclude legally admissible evidence if justice so requires"...

His acquiescence in the answer proposed by Lord Diplock was expressly qualified by the proviso that the judge has an overriding duty to ensure a fair trial, and that the class of

cases in which evidence may be excluded by the exercise of judicial discretion ... "is not and never can be closed except by statute"... Lord Fraser expressed a similar view at page 450B-C. Lord Scarman, too, referred to the duty of the trial court

... "to have regard to legally admissible evidence, unless in their judgement the use of the evidence would make the trial unfair. The test of unfairness is not that of a game: it is whether in the light of the considerations to which I have referred the evidence, if admitted, would undermine the justice of the trial"... (at page 456D-E).

That this was the basis on which the majority of the House in R v Sang concurred with Lord Diplock's answer to the certified question is, we think, confirmed by the approach of that House in the subsequent case of Fox v Chief Constable of Gwent [1986] AC 281. The appellant in that case had been convicted in July 1983 - before the enactment of the Police and Criminal Evidence Act 1984 - of driving with excess alcohol in the breath. The appellant had been required to provide the specimen of breath upon which the conviction was founded at a time when he was held at a police station under an unlawful arrest. The Divisional Court certified, as a point of general public importance, the question whether in those circumstances the justices had been right to convict. The House of Lords answered that question in the affirmative. Lord Fraser of Tullybelton, with whom the other members of the Committee all agreed, referred to the "well established rule of English law ... that ... any evidence which is relevant is admissible"...; and cited R v Sang and Kuruma in

support of that rule. But he clearly recognised the existence of a discretion to exclude evidence (admissible under that rule) which went beyond the limits set by Lord Diplock in R v Sang. At page 293 A-D, Lord Fraser said this

..."An alternative submission for the appellant was made to your Lordships to the same effect as that made in the Divisional Court, namely that, even if the specimen was legally admissible, it should have been excluded by an exercise of the justices' discretion.

I have already explained my reasons for rejecting that submission. Of course, if the appellant had been lured to the police station by some trick or deception, or if the police officers had behaved oppressively towards the appellant, the justices' jurisdiction to exclude otherwise admissible evidence recognised in Reg v Sang [1982] AC 402 might have come into play. The police officers did no more than make a bona fide mistake as to their powers, and it is, in my opinion, in accordance with the principle stated most clearly in Kuruma v The Queen [1955] AC 197, that such a mistake does not render the evidence inadmissible"...

Lord Elwyn-Jones adopted the approach of Lord Cooper in Lawrie v Muir (supra), and cited the passage which we have set out above. Lord Bridge also recognised the need to reconcile the two conflicting interests; at page 298G-A he said

..."I should perhaps add, lest the contrary may be suspected, that I am fully conscious of the court's duty to protect the citizen against invasions of his civil liberties which Parliament has not expressly authorised. But the conflict between this principle and the equally well established principle that relevant evidence is not necessarily to be excluded merely on the ground that it was obtained by unlawful means can only be resolved by

an appropriate exercise of discretion in each case"....

The position in England is now subject to the provisions of section 78 Police and Criminal Evidence Act 1984. Section 78(1) enacts that

..."(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it"...

That section has, of course, no force of law in Jersey. But it is relevant, we think, in showing that, whatever may have been the true principle to be derived from R v Sang itself - and whether or not that principle survived the subsequent decision of the House of Lords in Fox v Chief Constable of Gwent - the law in England has now been restored to what Lord Widgery CJ had declared it to be in Jeffrey v Black; and ..."the discretionary principle of fairness to the accused"... which has been applied in Scotland, following Lawrie v Muir, and which was said by Lord Fraser in R v Sang to have been recognised by Lord Goddard in Kuruma, does now, unequivocally, form part of the law of England.

In those circumstances we must ask ourselves whether there is any compelling reason why that discretionary principle of fairness to

the accused should not be recognised as part of the law of Jersey. We are satisfied that there is no such reason. We doubt whether the discretion to exclude evidence under the common law of England was ever restricted to the narrow limits encapsulated in the principles which the Royal Court extracted from R v Sang; but even if that were so, we do not think that there is any principle that requires us to hold that the discretion exercisable by Courts in Jersey is subject to the same restriction. In our view, we are at liberty to hold that the law in Jersey is more truly reflected in the Privy Council cases of Kuruma and King v The Queen, and in the English cases of Jeffrey v Black and Fox v Chief Constable of Gwent. We are encouraged in this view by the consideration that the principles to be extracted from those cases are consistent with those applicable in Scotland, and are also consistent with the present position in England following the 1984 Act.

It follows that the Royal Court was wrong, in our judgement, to regard its discretion to exclude the evidence of possession as being exercisable only if it were satisfied that the prejudicial effect of that evidence outweighed its probative value. The correct principle is that a discretion to exclude evidence, otherwise admissible, should be exercised when, having regard to all the circumstances (including the circumstances in which the evidence was obtained), the trial Court is satisfied that the use of that evidence would undermine the justice of the trial. The power to exclude evidence on that basis is a necessary incident

to the overriding duty of the trial court, which is to ensure that the accused has a fair trial.

In the present case we have no doubt that, if the Royal Court had directed itself in accordance with the correct principle, it would, necessarily, have reached the conclusion that the evidence of possession ought not to be excluded. There was no suggestion that the police officers concerned had been guilty of trickery or oppression, that they had acted unfairly towards the Appellant, or that they had acted in a manner which could be thought morally reprehensible. They had acted under the purported authority of a warrant issued by the Bailiff. The fact that that warrant could subsequently be seen (upon a proper analysis of the statutory provisions) to be invalid does not justify a conclusion that the justice of the Appellant's trial was in danger of being undermined if the prosecution were allowed to give evidence of the search by Police Constable Rotheram and Mr Goddard.

In these circumstances we dismissed the appeal against conviction.



Authorities

Archbold, (43rd Ed'n), paras 15-83, p.1292.

Cross on Evidence (5th Ed'n) pp. 324-6.

Phipson on Evidence (14th Ed'n), pp. 11, 693-705.

Halsbury's Statutes of England (3rd Ed'n), Continuation Vol. 54(1), 1984: General note to s.78 of the Police and Criminal Evidence Act 1984.

Misuse of Drugs Act 1971: S.23(3).

Misuse of Drugs (Jersey) Law, 1978, Article 17.

R. -v- Sang (1980) A.C. 402.

Kuruma, son of Kaniu -v- R. (1955) 1 All ER 236.

In the matter of Representation of Quinn, Blenkinsop, and Follain (1985-86) JLR 425.

Carter -v- Nimmo and King (1968) JJ 1007; (1969) JJ 1257.

A.G. -v- Clarke (1963) JJ 243.

A.G. -v- Kelly & Ors. (1982) JJ 275 at p.295.

A.G. -v- Melia (26th July, 1989) Jersey Unreported.

Police and Criminal Evidence Act 1984: S.78(1).

H.M. Advocate -v- Turnbull (1951) J.C. 96.

Fairley -v- The Fishmongers of London (1951) J.C. 14.

Lawrie -v- Muir (1950) J.C. 19.

Callis -v- Gunn (1964) 1 Q.B. 495 at 501/2.

Renouf -v- A.G. (1936) A.C. 445 at pp. 472-7.

A.G. -v- Makarios (1979) JJ at p.85.

A.G. -v- Fogg (8th April, 1991) Jersey Unreported C. of A.

Walker & Walker: Law of Evidence in Scotland: pp. 2-4.

A.B. Wilkinson: The Scottish Law of Evidence: pp. 118-122.

Johns -v- Hamilton (1988) S.C.C.R. 282.

Lam Chi-Ming & Ors. -v- The Queen (1991) 2 WLR 1082.

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