

10,1968

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No. 1 of 1967

IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

UNIVERSITY OF LONDON
 INSTITUTE OF ADVANCED
 LEGAL STUDIES
 16 JAN 1969
 25 RUSSELL SQUARE
 LONDON, W.C.1.

HERMAN KING Appellant

- and -

THE QUEEN Respondent

CASE FOR THE APPELLANT

10 1. This is an appeal, by Special Leave granted on the 10th day of January 1967, from the Judgment of the Court of Appeal of Jamaica, dated the 29th day of July 1966, whereby the said Court dismissed the Appellant's appeal against his conviction and sentence by His Honour Mr. L. L. Robotham, Resident Magistrate, Kingston, on the 2nd day of February 1966.

Record

2. That the Appellant was charged as follows:-

20 "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".

The learned Resident Magistrate convicted the Appellant upon this charge and sentenced him to 18 months imprisonment with hard labour.

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30 3. The case against the Appellant was that on the 11th January 1966 at 20 Ladd Lane, Kingston, he was searched by a police officer in purported pursuance of a search warrant, said by the police

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to be under the Dangerous Drugs Law, and was found to be in possession of ganja.

The case for the Appellant was that ganja was "planted" on him by the police officer conducting the search. The Appellant gave evidence that he was first searched and nothing incriminating was found upon him, that the only other man present (apart from police officers) was then sent out of the room, that the Appellant was searched again and some ganja was then produced, which the police claimed had been found upon him. The police witnesses denied that there had been a second search but the Appellant called two witnesses who also testified as to his having been searched a second time after the other man had been sent out of the room. 10

4. The principal questions arising in this appeal are as follows :-

- (a) The search warrant was invalid and did not entitle the police purporting to act under it to search the Appellant at all. This appeared clearly in the oral evidence and from the warrant itself, when almost at the end of the prosecution case it was produced, and it was so found by the Court of Appeal. Accordingly, the search made of the Appellant was unlawful. In the absence of a warrant to search him, the Appellant (if he was suspected of having ganja in his possession) could only lawfully have been searched in the presence of a Justice in accordance with section 22 of the Constabulary Force Law 30
- (b) It is submitted that the evidence of the police witnesses as to what was found when the Appellant was searched should have been excluded or ignored. The first of the two police officers who gave evidence stated 40
- (i) that the warrant did not refer to

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a search of the
Appellant;

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(ii) that he suspected the
Appellant of having
ganja on him;

(iii) that he knew of the right
of a citizen in these
circumstances to be
sought in front of a
Justice of the Peace;

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(iv) that he did not offer the
Appellant the opportunity
of being so searched

It is respectfully submitted that, having
regard to this evidence and also to the fact
that the sole issue in the case was whether or
not the police had carried out the search in a
proper and honest manner, it was oppressive and
unfair to the Appellant to admit or to take into
account the evidence relating to what the
prosecution claimed was found in the search.

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5. The following statutory provisions are
material to this appeal:-

Constabulary Force Law (Chapter 72)

Section 18 "It shall be lawful for any
Constable, without warrant, to
apprehend any person found
committing any offence punish-
able upon indictment or summary
conviction and to take him
forthwith before a Justice who
shall inquire into the circum-
stances 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,

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before a Court of competent jurisdiction, to be dealt with according to Law."

Section 22 "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". 10 20

Dangerous Drugs Law (Chapter 90)

Section 7 "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) "If a Justice is satisfied by information on oath that there is reasonable ground for suspecting - 30
 (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 40

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10 "(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 corre-
 sponding law in force in
 that place, is in the
 possession or under the
20 control of any person in
 any premises, he may grant
 a search warrant authori-
 sing 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
30 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 docu-
 ment as aforesaid, to
 seize and detain those
 drugs or that document,
 as the case may be."

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6. The case for the prosecution rested solely

<u>Report</u>	on the testimony of two policemen and a report by the Government Analyst (Exhibit 1) stating the contents of three paper parcels which the police said were found on the Appellant	
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P.2	7. Acting Corporal Clifford Gayle, who was a member of the police search party, testified that on the 11th January 1966 he was stationed at Harmon Barracks, St. Andrew; that at about 5.15 p.m. on the 11th January 1966 he accompanied Sgt. Isaacs and Corporal Linton and other policemen to 20 Ladd Lane, Kingston, that Sgt. Isaacshad a search warrant to search 20 Ladd Lane for dangerous drugs; that on arrival he (witness) and Corporal Linton went into an empty room where they saw the Appellant and another man called Victor Price; that Sgt. Isaacs read the warrant; that he (witness) identified himself to the two men and told them that they were there to search for ganja; that he (witness) thereupon searched the other man (Price) but found nothing. He then searched the Appellant and in his left side trouser pocket found two small brown paper packets and one white paper packet; that he noticed the white one was burnt at one end; that he opened the packets in the presence of the Appellant and found that they contained ganja; that he told the Appellant that the contents were ganja to which the Appellant replied "Lord a the last of Herman now"; that he arrested the Appellant, took him to Central Station, placed the three packets in an envelope and sealed it in the presence of the Appellant. On the 12th January 1966 he (witness) handed over the envelope to the Government Analyst at Hope. The witness further testified that he received the packets back on the same day together with a certificate (Exhibit 1) signed by a Mr. Walsh (This certificate showed that all three packets contained ganja). Under cross-examination the witness said that he had never seen the Appellant before but that he had heard of him and knew that the Appellant had successfully sued the Police. The witness further testified that he did not know if anyone else except the Appellant and Price was searched and that he searched the room where the two men were but no other part of the premises. He said that he	10 20 30 40
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P.3 1.21		

received no information about the Appellant before going to the premises and that he did not know that the Appellant's child lived in that yard.

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He went to say

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10 "The warrant was to search 20 Ladd Lane, the premises of Joyce Cohen. It referred to search of no one else. Suspected accused might have had ganja on him. I did not offer him to be searched in front of a Justice of the Peace. I knew of that right of a citizen. I frisked accused first then I searched him by putting my hands in his pockets. I found one pack of cigarettes, one box of matches and a handkerchief on accused. It may have been two handkerchiefs. He had a cheque book also in his shirt pocket. In some cases it is customary for a person to be asked to turn out his

20 pockets.....I did not ask accused to search himself. I searched him".

8. Ezra Linton, acting police corporal, testified that on the 11th January 1960 at about 5.15 p.m. he went with Corporal Gayle to 20 Ladd Lane, Kingston and that he went into a room on the premises and there saw the Appellant and another man sitting on the floor. Gayle said who they were, and Sgt. Isaacs read a warrant to a woman in the premises. Both men were searched, nothing being found on the other man but three packets being found in the left side trousers pocket of the Appellant - two brown and one white (produced as Exhibit 1). Gayle opened them in the presence of the Appellant, who remarked "Lord is the last of Herman now", and then arrested the Appellant. Under cross-examination the witness said that he and Gayle went straight into the room as they entered and that he did not pause for Sgt. Isaacs to read the warrant.

30 He further said that it was not true that Gayle told the Appellant that he wanted another search but admitted that a preliminary search was made on the Appellant for weapons. The witness went on to say that he knew the Appellant before and that he remembered the Harbour View strikes but that he did not know that the Appellant was the

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leader of those strikes.

9. There is no evidence upon the record that the warrant was looked at until the close of the prosecution case when Acting Corporal Gayle was recalled with the leave of the Court for further cross-examination and produced the warrant as Exhibit 3.

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10. The warrant 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

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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

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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."

11. The Appellant testified that he did not have any drugs in his possession, that he had gone to 20 Ladd Lane to visit his one-year old son who lived there, that while he and Price were in the room Gayle and Linton rushed in and there and then demanded to search them. The Appellant said that he knew both policemen, having seen them on duty during the Harbour View strikes in 1962-63 and that he had successfully sued the Police for assault in 1960. The Appellant testified that Price was searched and nothing was found on him. He himself was searched next. He turned out his side pockets which were empty. In his back pockets were two handkerchiefs which he removed and shook out. He had cigarettes and matches in his shirt pocket. He stated that the police looked on while he emptied his pockets. Price was then told to leave the room, which he did, and then Gayle said he wanted another search. Gayle then grabbed one of the handkerchiefs, turned his back and said that he had found ganja. He then showed the Appellant three packets - two brown and one white. The Appellant testified that he at once denied having those packets and said "Don't frame me".
12. One Victor Price testified that on the 11th January 1966 he was at 20 Ladd Lane when the police arrived. They searched him first. "They then asked Mr. King to search him". After the search of the Appellant they chucked him (witness) outside. While he was outside he heard someone say "I want a next search" but he did not see the second search.
13. One Phyllis Reid testified that she was a barmaid at 20 Ladd Lane and that she was there on the 11th January 1966 when the police arrived. She saw the police rush into the room and heard them say they wanted a search. She was at the kitchen door facing the room. The police searched Price first, then the Appellant. They then sent Price out of the room and told the Appellant that they wanted another search, to which the Appellant replied that they had already searched him. She said that she saw them take a handkerchief from the Appellant, heard them say

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that they had found something, and that they took the Appellant away. When one of the men said that he had found something she heard the Appellant say "don't frame me".

14. It appears to have been accepted in both courts below that the search warrant was patently bad. It was bad, it is submitted, for reasons which went far beyond mere defects of form and were basic. They are as follows:-

- (a) The warrant was not, and did not purport to be, a warrant to search any person. It purported only to authorise a search of premises. 10
- (b) No constable was named in the warrant, as the section required, and therefore no authority to search was conferred on anyone.
- (c) It purported to confer an authority upon "any lawful constable of the Parish of Kingston", but Acting Corporal Gayle (and presumably the other police officers, but there was no evidence about this) was not "of the Parish of Kingston" but of St. Andrew. 20
- (d) Even if the warrant did authorise the search of anyone, it did not authorise the search of the Appellant because he was nowhere named or referred to in it.

15. The learned Resident Magistrate was addressed on the Appellant's behalf on the basis that he was searched without any valid warrant and it was submitted that section 22 of the Constabulary Force Law had not been complied with in that the Appellant had not been taken before a Justice of the Peace to be searched. It was argued that the evidence of what was alleged to have been found upon the Appellant, even if not inadmissible, should be excluded as a matter of discretion. The note in the record of the learned Magistrate's finding reads as follows:- 30 40

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"Court accepts evidence of Corporal Gayle

and Corporal Linton that the ganja was found in accused's pocket. Even if section 22 not complied with evidence admissible on basis of R.v. Kuruma "

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16. The Court of Appeal held on the authority of Kuruma v. The Queen, 1955 A.C. 1967 that the evidence resulting from the search was relevant and admissible, and that, there being no "evidence of oppression, force, false representations, tricks, threats or the like", the Court could not be asked to exclude this evidence. It is respectfully submitted that in so holding, the Court applied too narrow a test, that the prosecution evidence itself showed that the police officers who conducted the search knowingly violated the Appellant's rights and deprived him of the protection of the law. Having regard to the nature of the case and the evidence on both sides it was a grave injustice to the Appellant to admit this evidence or (if it was once admitted) to take it into account. It is further submitted that the Court of Appeal was in error in thinking, as it appears to have done, that section 18 of the Constabulary Force Law had any relevance to the matter. This section merely empowers the police to arrest a person "found committing" an offence. Since the Appellant could not have been "found committing" any offence except on the basis that the evidence resulting from the activities of the police should be admitted, the section, it is submitted, cannot in reason be relied upon to justify the actions of the police and so prove that the evidence (the admission of which had already been assumed in order to invoke the section) should properly be admitted.

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The Appellant submits that this Appeal should be allowed for the following among other

REASONS

1. That the search made of the Appellant was unlawful.
2. That the evidence of the police witnesses as to what was found when the Appellant was

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searched, was inadmissible.

3. That alternatively, if admissible, then by reason of having been obtained by a violation of the Appellant's rights and by false representation, the learned Magistrate failed to exercise his discretion judicially by admitting the evidence.

M.P. SOLOMON

DESMOND de SILVA

No. 1 of 1967

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B E T W E E N :

HERMAN KING Appellant

- and -

THE QUEEN Respondent

CASE FOR THE APPELLANT

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