

10, 1968

IN THE PRIVY COUNCIL

No. 1 of 1967

ON APPEAL FROM
THE COURT OF APPEAL OF JAMAICA

B E T W E E N:

HERMAN KING

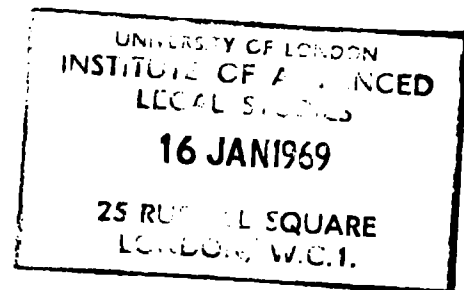
Appellant

- and -

THE QUEEN

Respondent

RECORD OF PROCEEDINGS



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ON APPEAL FROM
THE COURT OF APPEAL OF JAMAICA

B E T W E E N:

HERMAN KING

Appellant

- and -

THE QUEEN

Respondent

RECORD OF PROCEEDINGS

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EXHIBITS

List of Exhibits

ON APPEAL FROM
THE COURT OF APPEAL OF JAMAICA

B E T W E E N:

HERMAN KING Appellant

- and -

THE QUEEN Respondent

RECORD OF PROCEEDINGS

No. 1

No. 1

10

INFORMATION

Information.

REGINA vs. HERMAN KING - POSSESSION OF GANJA -
INF. 496/66

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 70

No. 2

In the Resident Magistrate's Court

20

EVIDENCE OF CLIFFORD GAYLE

Prosecution Evidence

IN THE RESIDENT MAGISTRATE'S COURT FOR THE PARISH OF KINGSTON HOLDEN AT SUTTON STREET ON THE 2nd DAY OF FEBRUARY, 1966, BEFORE HIS HONOUR MR. L.L. ROBOTHAM, RESIDENT MAGISTRATE, KINGSTON.

No.2

REGINA vs. }
HERMAN KING } POSSESSION OF GANJA
INF. 496/66

Clifford Gayle Examination.

In the
Resident
Magistrate's
Court

PLEA: NOT GUILTY

MR. RAMSAY, Q.C. FOR ACCUSED:

Prosecution
Evidence

CLIFFORD GAYLE (sworn)

No.2

Clifford Gayle
Examination
- continued.

Acting Corporal of Police, Harmon Barracks, St. Andrew. On Tuesday 11/1/66 about 5.15 p.m. I went to premises 20 Ladd Lane, Kingston. I was accompanied by Sgt. Isaacs, Acting Corporal Linton and other Police.

Sgt. Isaacs had a search warrant under the Dangerous Drugs Law to search the premises. On arrival Corporal Linton and I went to the eastern end of the premises where I saw two men in an empty room. Accused was one of the two men. 10

Sgt. Isaacs read the search warrant. We were all in plain clothes. I identified myself to accused and told him and the other man that we were there to carry out a search for ganga.

I searched pockets of the other man. I found nothing. I then searched accused's pockets. In his left side trousers pocket I found two small brown paper packets and one white paper packet. 20

I noticed that the white packet was burnt at one end. I opened all three packets in accused's presence and each contained vegetable matter resembling ganga.

I told accused they contained ganga and he said "Lord a the last of Herman now". I arrested him for having ganga in his possession. Cautioned he made no statement. I escorted him along with exhibits to Central Station where in his presence I made One (1) sealed envelope of the three packages and on 12/1/66 I took them and handed them over to the Government Analyst at Hope. 30

I got them back the same day along with this Certificate signed by Mr. Walsh. Certificate in evidence exhibit 1. Breaking seal of envelope these are the two brown paper and one white paper packets I took from accused's pockets - in evidence Exhibit 2.

CROSS-EXAMINED:

I believe a beer garden is in front of 20 Ladd Lane. I saw about two or three people in the yard.

I saw no one gambling in the yard. The people were just standing around. I assumed they lived there. It would be wrong to say I had no interest in anyone but King. That day was the first I was seeing him. I had heard his name before.

10

I knew he once successfully sued the Police. About 10 of 12 of us went there. I don't know if anyone else was searched but accused and the other man. I searched the room in which the two men were. I searched no other part of the premises.

No furniture was in the room. I went no further than that room. Other Policemen went in the other room. I did not see them search. When I entered I went straight to the room where accused was.

20

I got no information in relation to the accused before going to the premises. I do not know that accused has a child living in that yard.

Accused was standing in the room and the other man sitting down. 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 ganga on him. I did not offer him to be searched in front of a Justice of the Peace.

30

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 kerchief on accused.

It may have been two kerchiefs. 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 pockets. I only learnt accused is a Pilot after his arrest.

40

When I went in I did not know who he was. He looked reasonably decent. I did not ask accused to

In the Resident Magistrate's Court

Prosecution Evidence

No.2

Clifford Gayle Cross-examination.

In the
Resident
Magistrate's
Court

search himself. I searched him. Not true I searched King and found nothing. Not true I sent the other man out the room and then told accused I wanted another search.

Prosecution
Evidence

No.2

Clifford Gayle
Cross-
examination -
continued.

King took nothing from his pockets by himself. I gave him back the other things after the search. I never grabbed accused handkerchief out of his hand and turn away with it, then confront accused saying I had found two brown paper packets and the white packet in the kerchief.

10

I deny that I ever searched King a second time. The other man was sent out of the room when we were about to go off with King. Vincent Price (called into Court) is the other man who was in the room. I don't remember seeing accused with his kerchief in his hand at any time. I never alleged that ganga was found in his handkerchief.

No.3

No. 3

Ezra Linton
Examination.

EVIDENCE OF EZRA LINTON

EZRA LINTON sworn:

20

Acting Corporal of Police. On 11/1/66 about 5.15 p.m. with Corporal Gale I went to 20 Ladd Lane, Kingston.

On arrival Gale and I went to a room on the 2nd premises. There I saw accused and also another man who was sitting on the floor.

Gale said we were police who were on a raid for dangerous drugs. Sergeant Isaacs read a search warrant to a woman in the premises. Gale started to search the other man who was in the room.

30

He found nothing on this man. He started to search accused and from his left side trousers pocket I saw him take two paper packets and one white packet. The white one was burnt at one end. These are they Ex. 2.

Gale opened them in accused's presence and told him they contained ganga. Accused said "Lord is the last of Herman now."

Gale arrested and charged accused for being in possession of ganga.

CROSS-EXAMINED:

Only Gale and I went to this room where accused was. The other Policemen were in other part of the premises.

Isaacs read the search warrant in the yard before a room that was occupied. Gale and I went straight to the room as we entered.

10 I did not pause for Sgt. Isaacs to read the warrant. I saw a handkerchief in accused's hand at one time. Acting Corporal Gale took it from accused's pocket. Gale was holding a part of the kerchief and accused a part. Gale was not trying to grab it away. I don't remember who ended up with the kerchief as there was nothing particular about the kerchief.

20 Not true King had the kerchief in his hand and Gale grabbed it out. I think accused had only one handkerchief. The other man was searched first. King was not allowed to turn out his pockets himself. I don't remember him taking anything from his pockets himself.

The other man remained in the room and could have seen the search of King. When we went in a preliminary search for weapon was made on King and then the other search was made.

30 Not true the other man was sent out of the room and then Gale told King he wanted another search. Only one search was carried out on the accused. The other man was not sent outside for another search to be made on King.

The other man might have left the room when we were leaving. I can't say at what stage he left.

ADJOURNED TO 2 p.m.

XXD contd - 2 p.m.

40 Gale did the talking in the room. He told them we were Policemen here to carry out a search for Dangerous Drugs, after warrant was read Gale said he was going to search them.

In the
Resident
Magistrate's
Court

Prosecution
Evidence

No.3

Ezra Linton
Examination
- continued.

Cross-
examination.

In the
Resident
Magistrate's
Court

I don't remember the direct words he used.
I have been in the Force 9 years. I knew accused
before this day. I remember Harbour View strikes.
I took no part in them. I don't know if King was
leader of these strikes.

Prosecution
Evidence

Accused did say is the last of Herman now.
Accused never said "Don't frame me for you search
me already".

No. 3

Ezra Linton
Cross-
examination
- continued.

No. 4

No. 4

Clifford
Gayle
(recalled)
Cross-
examination

EVIDENCE OF CLIFFORD GAYLE (RECALLED)

10

CLIFFORD GAYLE recalled - (with leave)

CROSS-EXAMINED:

This is the warrant Sgt. Isaacs had - In
evidence Ex. 3. I did not know Herman King before
this day.

Defence
Evidence

No. 5

EVIDENCE OF HERMAN KING

No. 5

HERMAN KING (sworn)

Herman King
Examination.

I am living at 4 Anglesea Avenue, Pembroke Hall.
I am a Marine Pilot.

20

On 11/1/66 I was at 20 Ladd Lane. There is a
Beer Garden there and the usual yard around. I
have a boy child living in that yard. He is 1 year
old. The mother lives there.

I went there to see the baby. I was playing
with the boy in the same room the Police saw me in.
When the Police came the maid had the baby feeding.
Vincent Price and I were left in the room after
baby left.

Corporal Gale and Constable Linton came to the room. I saw other Police outside the door. Corporal Gale spoke to us. He said they were there to carry out a search and he wanted to search both of us. I knew both of them before. I saw them during the Harbour View disturbance in 1962-63. I was working there then. They were on duty out there.

In the
Resident
Magistrate's
Court

Defence
Evidence

No.5

Herman King
Examination
- continued.

10 I had successfully sued a member of the Force in 1960 for assault. Price was searched first. Nothing was found on him. They frisked him and then Gale pushed his hands in Price's pockets.

20 I was searched next. They asked me to turn out my pockets. I turned out the side pockets first. I had nothing in either of them. I next turned out both back pockets. I had one kerchief in each of these. I took them out and shook them out. I had cigarettes and matches in my shirt pocket. The Police looked on while I did this. They told Price to leave the room. He left. Gale then said he wanted another search. I was standing with the kerchiefs in my hand. Gale grabbed the one out of my right hand and turned round back and said he had found ganga. He showed me two brown paper parcels and one white one and said he found them wrapped in my kerchief.

I had no ganga in my kerchief. I never said "This is the last of Herman". What I did say was "Dont frame me."

30 CROSS-EXAMINED:

Cross-
examination.

I thought the Police were going to frame me. I was on the alert. I was trying to see but Gale turned his back to me.

It was about a minute or two his back was to me. I did not go around to see what he was doing. I shook out kerchief when I took them out. As far as I know the two Policemen had nothing against me. It is neither Gale nor Linton that I sued.

40 Gale used his right hand to take the kerchiefs. I did not look to see what was in his left hand. When he turned around he showed me the stuff in his left hand. I did not see Gale put his hands in any of his pockets and take out anything. I can't be certain. I think Gale had the three

In the
Resident
Magistrate's
Court

packets somewhere on his person. It might be in his hands.

Defence
Evidence

I went to the premises about 4.30 p.m. I went to the room and saw Price. I had seen Price before around the premises. I was reading a Star in the room. I spoke with Price.

No.5

Herman King
Cross-
examination
- continued.

No.6

Victor Price
Examination

No. 6

EVIDENCE OF VICTOR PRICE

VICTOR PRICE sworn:

Live 17 Fleet Street, Kingston. I am a labourer. On 11/1/66 I was at 20 Ladd Lane when the Police came there. I was sitting down in an empty room. Accused was in the room. Gale and Linton entered the room. They searched me by putting their hands in my pockets after knocking them. They then ask Mr. King to search him and Mr. King pushed his hand in his pockets and turn out the two side pockets first then the two back pockets.

10

He produced two kerchiefs from the back pocket. He also produced a pack of cigarettes, matches and a cheque book. After the search of King the Police chucked me outside.

20

While outside I heard a voice say I want a next search. I did not see that search.

Cross-
examination

CROSS-EXAMINED:

I walked down the passage way when they chucked me out. I went about 7 yards away. They told me to move completely and I left. King flashed the kerchief when he took them out. I dont know what happen to the kerchiefs. They chucked me out same time. I had seen King before. I live beside 20 Ladd Lane.

30

I did not see King come there before. I was in room when King came in. I was reading a book. King came in there and was reading a Star. He came in alone. Both King and I was sitting down on a bench in the room when the Police came in.

In the Resident Magistrate's Court

Nobody came in the room before the Police came. I am sure of that. I was there about 20 minutes before the Police came. I went over there to read a book because a lot of children make noise in my yard.

Defence Evidence

No.6

10

Victor Price Cross-examination - continued.

No. 7

No.7

EVIDENCE OF PHYLLIS REID

Phyllis Reid Examination.

PHYLLIS REID sworn:

I am a bar maid at 20 Ladd Lane. On 11/1/66 Police came there in the evening. They pass some people gambling in the yard and went to an empty room up the top.

20

King and Price and a baby were in the room. I saw them rush in the room and I heard them say I want a search. They searched Price first. I was at the kitchen door facing the room. They searched King next. They asked him to turn out his pockets and he did so.

30

After they search King, Price was sent outside. I heard one of the Police say to King I want another search. King said you have searched me already. I saw them take a kerchief from him. The Police turned his back and I could not see. After that they said they found something and they took him away.

CROSS-EXAMINED:

Cross-examination

I was near by and could hear the talking. When the man said he found something King said dont frame me. Price left the room and left towards the gate. I could not see Price from where I was by the kitchen door.

In the
Resident
Magistrate's
Court

Defence
Evidence

No.7

Phyllis Reid
Cross-
examination
-continued.

I did not see the Police look out and tell Price to move further away. Price was in the room before King. King came about 40 minutes after Price. King was reading a Star and playing with the baby. The maid took away the baby after the Police came and there was excitement.

King flashed kerchiefs when he took them out. The Police took away one. I could not see what he did with it. When I was at kitchen door the Police back was turn to me. King was facing me.

10

The Police took away the kerchief and turn his back to King. The Police was not facing me then.

COURT:

Joyce Cohen is the name of the baby mother.

No.8

Proceedings
2nd February
1966.

No. 8

PROCEEDINGS

MR. RAMSAY ADDRESSES AND SUBMITS THAT -

1. On totality of evidence there is sufficient to raise a reasonable doubt;

2. Section 22 of Constabulary Force Law Cap. 72 not complied with in that accused was not taken before a Justice of the Peace to be searched. Even if evidence is admissible Court should in its discretion exclude it. States he know of case of KURUMA but R. v. PAYNE - 1963 - 1 A.E.R. p. 848.

20

Court accepts evidence of Corporal Gale and Constable Linton that the ganga was found in accused's pocket. Even if Sec. 22 not complied with evidence admissible on basis of R. v. KURUMA.

30

GUILTY - 2 previous convictions for Assault
18 Months Hard Labour

Verbal Notice of Appeal

Bail in £300 and Surety 1 or 2.

No. 9

GROUNDS OF APPEAL

IN THE RESIDENT MAGISTRATE'S COURT
FOR THE PARISH OF KINGSTON
HOLDEN AT SUTTON STREET

ON APPEAL

REGINA

vs.

HERMAN KING

In the Court
of Appeal

No.9

Grounds of
Appeal
9th February
1966.

10

1. Possession of Ganja

TAKE NOTICE that the following are the Grounds of Appeal on which the Appellant will crave leave to rely, inter alia, at the hearing of the Appeal herein:-

1. That the conviction was unreasonable having regard to the evidence.
2. That the search allegedly conducted by the Police on the Defendant was unlawful, and accordingly any evidence gained thereby was inadmissible, alternatively if technically, admissible, ought to have been excluded by the Magistrate in the exercise of discretion.

20

WHEREFORE THIS APPELLANT HUMBL Y PRAYS:-

1. That his conviction and sentence be set aside.
2. That this Honourable Court may give him such further and other relief as may be just.

DATED the 9th day of February, 1966.

(Sgd.) Ian Ramsay
COUNSEL FOR APPELLANT

30

Filed by Ian Ramsay of No. 53 Church Street,
Kingston, Counsel for the above-named Appellant.

In the Court
of Appeal

No. 10

JUDGMENT

No.10

J A M A I C A

Judgment
29th July
1966.

IN THE COURT OF APPEAL

R.M. COURTS CRIMINAL APPEAL NO. 47/66

BEFORE: The Hon. Mr. Justice Henriques,
Ag. President

The Hon. Mr. Justice Moody

The Hon. Mr. Justice Eccleston

R. vs. HERMAN KING

10

Mr. V.O. Blake, Q.C., }
Mr. I. Ramsay, Q.C., } for the appellant
Mr. M. Tenn }

Mr. I. Forte for the Crown

29th JULY, 1966.

MOODY, J.A.,

The appellant was convicted on the 2nd February, 1966, for the offence of having ganja in his possession contrary to section 7(c) of Cap. 90 of the Revised Laws of Jamaica, and sentenced to 18 months imprisonment with hard labour.

20

On Tuesday the 11th January, 1966, at about 5.15 p.m. Sgt. Isaacs, Acting Corporal Gayle and Acting Corporal Linton of the police force, in plain clothes, went to the premises of Joyce Cohen at 20 Ladd Lane, Kingston, armed with a search warrant under the Dangerous Drugs Law to search the premises for dangerous drugs. On arrival, Isaacs read the search warrant and Gayle and Linton went to the eastern end of the premises and entered a room in which were the appellant and another man. Gayle identified himself to the two men and told them that the police were there to carry out a

30

search for ganja. Gayle searched the other man first and nothing was found on him. He then searched the appellant and found in his left side trousers pocket, two small brown paper packets and a white paper packet, one end of which was burnt. He opened them in the presence of the appellant and found them to contain vegetable matter resembling ganja, and told the appellant it was ganja, whereupon the appellant said, "Lord a the last of Herman now." He arrested the appellant for having ganja in his possession and cautioned him. The appellant made no statement. The Government Analyst subsequently examined the contents of these packets and found the two brown packets to contain together, about 22 grams of ganja and the white packet to contain about 3 grams of a mixture of tobacco and ganja.

In the Court
of Appeal

No.10

Judgment
29th July
1966 -
continued.

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30

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The appellant in his defence gave evidence and was supported by Vincent Price, the other man referred to above. His defence was that he had gone to 20 Ladd Lane - a Beer Garden - to visit his year old son. Joyce Cohen is the mother of his son. Gayle entered the room and told Price and himself that the police were there to search and wanted to search them both. He knew both Gayle and Linton having seen them during a disturbance at Harbour View in 1962-3 when he was working there. Also that he had in 1960 sued a member of the police force for assault. Price was searched first and nothing found on him. They asked him to turn out his pockets: he did so. In each of the back pockets of his trousers he had a handkerchief - he took them out and shook them out - he had cigarettes and matches in the shirt pocket. The police told Price to leave the room: then Gayle told him he wanted another search. While he was holding the handkerchiefs, Gayle grabbed one of them from his right hand and 'turned round back' and said he had found ganja. Gayle showed him the 3 packets saying he found them wrapped in the handkerchief. He had no ganja; he never said, "This is the last of Herman now". What he did say was, "Don't frame me."

At the trial, appellant's counsel submitted to the learned Resident Magistrate -

1. That on the totality of the evidence there was sufficient to raise a reasonable doubt:

In the Court
of Appeal

No.10

Judgment
29th July
1966 -
continued.

2. Section 22 of Cap. 72, the Constabulary Force Law was not complied with in that the appellant had not been taken before a Justice of the Peace to be searched.

The learned Resident Magistrate's findings, as recorded was "Court accepts evidence of Corporal Gayle and Constable Linton that ganja was found in accused's pocket. Even if section 22 not complied with evidence admissible on basis of R. v. Kuruma".

On appeal learned counsel for the appellant stated he did not propose to argue that "The conviction was unreasonable having regard to the evidence", but would argue that the search allegedly conducted by the police on the defendant was unlawful, and accordingly any evidence gained thereby was inadmissible alternatively, if technically admissible ought to have been excluded by the Magistrate in the exercise of his discretion".
He submitted:- 10

1. The warrant was issued pursuant to section 21(2) of Cap. 90 of the Revised Laws of Jamaica - 20

" 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 person in any premises: 30

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 40

aforesaid, to seize and detain those drugs or that document, as the case may be. "

In the Court
of Appeal

No.10

Judgment
29th July
1966 -
continued.

10

The warrant was invalid in that it was not addressed to a named constable; it did not authorise a search of persons found on the premises: it authorised any lawful constable to bring the body of Joyce Cohen before a J.P.: that Actg. Cpl. Gayle was not a lawful constable of the parish of Kingston but of the parish of St. Andrew.

2. In reading of the warrant and in advising the appellant the police were there to search for ganja the police were representing to the appellant that he was obliged to submit to a search and could not in law refuse to be searched.

20

Force was used to carry out the search albeit no more force than was necessary.

The search was oppressive as in any civil case on these facts punitive damages could be asked as the police acting under the colour of authority invaded the plaintiff's rights.

30

Under the Constitution of Jamaica Order in Council 11/8/62 sections 13, 19 & 26(8), security of the person which includes the right of an individual not to be searched, is provided for with certain modifications.

At common law the police have no powers of search of individuals, save where a warrant is issued in respect of stolen goods.

The power of search derived from statute.

40

The only authority the police had was under the warrant issued addressed under section 21(2) of Cap. 90 of the Revised Laws of Jamaica. In the absence of this the search of the appellant was in direct contravention of section 19 of the Constitution.

In the Court
of Appeal

No.10

Judgment
29th July
1966 -
continued.

3. Learned counsel for the appellant conceded that the only other way the police could have proceeded was under section 22 of Cap. 72 of the Revised Laws of Jamaica. -

" 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, "

and submitted that where the provisions of a statute are mandatory and the section can be construed as providing for the conditions in which evidence becomes admissible then any evidence obtained in breach of the statute is inadmissible.

Section 22 of Cap. 72 is mandatory in so far as it prescribes what is to take place where a constable wishes to search a person suspected of being in unlawful possession of ganja. 'Known' in this context means from information received or found committing in the sense of having been seen with the drug and running away.

In the case of R. v. John Wallace, 5 J.L.R. 38, it was not argued that the evidence was inadmissible and the court failed to consider that there was a difference between the opening provisions of section 22, cap. 72, which were enabling and the later power which was mandatory.

Further facts in Wallace's case were different. If Wallace's case rightly decided appellant should be discharged as no explanation was given as to why appellant was not taken before a J.P.

The object of section 22, Cap. 72, is not only to enable the police to apprehend on suspicion but also to deal with the circumstances under which evidence to justify suspicion can be obtained. The fact that the police is protected from a civil suit does not affect the circumstances under which evidence can be obtained. It affects the guilt or innocence of the accused and goes to the weight and credibility of the Crown's case, e.g. if no drug is found the J.P. can be called as a witness to say so; section 22 of Cap. 72 is mandatory when evidence relating to the suspicion is to be procured.

In the Court
of Appeal

No.10

Judgment
29th July
1966 -
continued.

10

4. If the evidence is admissible it ought to be excluded.

20

The test is relevance. If the evidence is relevant the method by which it is obtained is immaterial in so far as technical admissibility is concerned; Kuruma's case, 1955, 1 A.E.R. 236 decides this.

Where however evidence though technically admissible is being obtained by oppression, force, false representation, trick, threat, bribe or the like the Court ought in exercise of its discretion to exclude it.

30

Where the facts surrounding the case are as consistent with oppression etc. as with the absence of it or the like the accused should be given the benefit of the doubt and the evidence excluded. R. v. Payne, 1963, 1 A.E.R. 848. Callis v. Gunn, 1963, 3 A.E.R. 677.

The learned Resident Magistrate ought to have excluded the evidence.

40

There is no evidence that the police searched appellant for any other reason than in pursuance of the warrant.

The circumstances are ambiguous; the inference in favour of the appellant must be drawn.

In the Court
of Appeal

No.10

Judgment
29th July
1966 -
continued.

Learned counsel for the Crown submitted:

Section 22 of Cap. 72 is wholly enabling and does not provide for the conditions under which evidence becomes admissible.

Even if this section is mandatory the evidence of the search is admissible.

If the evidence is admissible the learned Resident Magistrate rightly exercised his discretion in admitting the evidence.

10

On the facts there is no evidence of any oppression or false representation or trick or threat as would warrant the learned Resident Magistrate in excluding the evidence. The police suspected the accused might have had ganja and so searched him. This search had nothing to do with the warrant. The appellant offered no objection to the search.

The police would have been entitled to search under section 22 of Cap. 72 if the warrant was defective.

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Counsel for the appellant was heard in reply:

Those who are concerned with the preparation and/or issuance of a document which affects the liberty of the citizen ought to take care to ensure that such a document is prepared and issued in strict conformity with the section of the law which authorises its issue. The warrant in this case which purports to have been issued under the authority of the provisions of section 21(2) of Cap. 90 of the Revised Laws of Jamaica falls so far short of observing those provisions as to amount to no more than a vulgar display of slovenliness. The warrant is clearly invalid and did not entitle the police acting under it to search the appellant although the section 21(2) of Cap. 90 does provide for the search of any persons found in premises named in the warrant.

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The record does not reveal that any objection

was taken by counsel at the trial when the evidence of the search was being tendered on the ground that it was inadmissible or if admissible that the learned Resident Magistrate ought to have exercised his discretion and excluded it on the ground that such evidence would operate unfairly against the appellant, nonetheless such a submission was made by counsel in his closing address.

In the Court
of Appeal

No.10

Judgment
29th July
1966 -
continued.

10 In our view the evidence was relevant and admissible and the learned Resident Magistrate acted quite rightly in following the test laid down in *Kuruma v. Reginam* 1955, 1 A.E.R. 236 at 239, in deciding whether the evidence was admissible.

Before leaving this part of the appeal, we would like to say that in our opinion the police could also have acted under section 18 of Cap.72:

20 Section 7(c) of Cap.20 of the Revised Laws of Jamaica provides that "every person who has in his possession any prepared opium or ganja shall be guilty of an offence against this Law." Thus, merely having ganja in one's possession is an offence whether the offence has been detected or not. Accordingly when an individual who has ganja in his possession is searched and ganja is found in consequence of the search, such a person is found committing the offence and liable to be apprehended without a warrant notwithstanding
30 that the constable had no prior knowledge or suspicion that on searching he would find ganja within the meaning of section 22 of Cap. 72 of the Revised Laws of Jamaica.

When the Court observed that the police might have acted under section 18, learned counsel replied that there was no evidence that the appellant was 'found committing' an offence. For the reason just stated "we do not agree there was no evidence that the appellant was found
40 committing the offence." The evidence is the same as that sought to be excluded on the ground that it was obtained by oppression, force, misrepresentation or the like.

So far as this case is concerned, the powers

In the Court
of Appeal

No.10

Judgment
29th July
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continued.

of search given to the police are under the Dangerous Drugs Law, Cap. 90, and the Constabulary Force Law, Cap.72. Under section 22 of Cap.72, power is given to any constable to apprehend any person known or suspected of being in unlawful possession of ganja and to take him forthwith before a justice of the peace who shall cause such person to be searched in his presence. This section is designed primarily to afford protection to a constable in circumstances which would otherwise constitute a trespass and unless a constable strictly complies with the conditions specified in the section, he is liable to an action for trespass or is deprived of the protection he would otherwise have. The section makes no provision as to evidence or the admissibility of evidence or the exercise of discretion by the trial judge to admit or disallow evidence resulting from a search under this section which does not comply strictly with the conditions specified. It is well known that in every criminal case, a judge has a discretion to disallow evidence, even if in law relevant and therefore admissible, if admissibility would operate unfairly against an accused. In considering whether admissibility would operate unfairly against an accused one would certainly consider whether it had been obtained in an oppressive manner, by force or against the wishes of the accused or by false representations, trick, threats or bribes or anything of that sort. *Callis v. Gunn*, 1963, 3 A.E.R. 677, at 680. Therefore we are of the opinion that failure to take the appellant before a justice of the peace to be searched in his presence does not affect the admissibility of evidence resulting from a search otherwise than as provided in section 22, Cap. 72 of the Revised Laws of Jamaica. Furthermore, it is only if failure to take the appellant before a justice of the peace amounted to or was evidence of oppression, force, false representations, trick, threats or the like, that a trial judge could be asked to exclude the evidence resulting from such a search. For these reasons it seems unnecessary to decide whether section 22 of Cap. 72 is enabling or mandatory or partly enabling and partly mandatory.

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We agree that if a person who is suspected of having ganja in his possession is searched in the

presence of a justice of the peace and evidence as a result of such search was forthcoming, the justice of the peace could be called as a witness and his evidence would be corroborative of the evidence of the investigating constable.

In the Court
of Appeal

No.10

Judgment
29th July
1966 -
continued.

10 The question whether a constable had reasonable cause to suspect a person of being in possession of ganja is immaterial as it is the fact of possession that constitutes the offence and not the conduct of the accused. The fact that the police may have innocently believed they had authority to search was immaterial.

20 We cannot agree that in the circumstances of this case the reading of the warrant was a false show of authority or that in reading of the warrant the police represented by conduct they had authority to search and consequently caused the appellant to feel he was obliged to submit to a search or that there is any evidence that the search was carried out in an oppressive manner. If the appellant had heard the warrant read he would have realised the police were not thereby authorised to search him thereunder. In cross-examination, Gayle who effected the search stated that the warrant did not authorise a search of anyone else beside J oyce Cohen's premises and also that he suspected the accused might have ganja on him. These answers do not suggest that there was doubt whether Gayle was acting under
30 the warrant or not when he searched the appellant.

Indeed the submission of learned counsel at the trial was on the footing that the police had acted under section 22 of Cap. 72 of the Revised Laws of Jamaica.

Accordingly the appeal is dismissed and the conviction and sentence affirmed.

In the Privy
Council

No.11

No.11

ORDER GRANTING SPECIAL LEAVE TO APPEAL TO HER
MAJESTY IN COUNCIL.

Order granting
Special Leave
to Appeal to
Her Majesty
in Council.

(L.S.)

AT THE COURT AT SANDRINGHAM

The 30th day of January, 1967

30th January,
1967

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

MR. BOTTOMLEY
MR. PEART

MR. MULLEY
MISS BACON

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WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 16th day of January 1967 in the words following, viz.:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 13th day of October 1909 there was referred unto this Committee a humble Petition of Herman King in the matter of an Appeal from the Court of Appeal of Jamaica between the Petitioner and Your Majesty Respondent setting forth that the Petitioner desires to obtain special leave to appeal to Your Majesty in Council against a Judgment of the Court of Appeal of Jamaica dated the 29th July 1966 whereby the said Court dismissed the Petitioner's appeal against his conviction and sentence by the Court of the Resident Magistrate Kingston on the 2nd February 1966 on a charge of having been found in possession of dangerous drugs: And humbly praying Your Majesty in Council to grant him special leave to appeal to Your Majesty in Council from the Judgment of the Court of Appeal of Jamaica dated the 29th July 1966 and for further or other relief:

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"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in

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support thereof and in opposition thereto
Their Lordships do this day agree humbly to
report to Your Majesty as their opinion
that leave ought to be granted to the
Petitioner to enter and prosecute his appeal
against the Judgment of the Court of Appeal
of Jamaica dated the 29th July 1966:

10 "And Their Lordships do further report
to Your Majesty that the authenticated copy
under seal of the Record produced by the
Petitioner upon the hearing of the Petition
ought to be accepted (subject to any objec-
tion that may be taken thereto by the
Respondent) as the Record proper to be laid
before Your Majesty on the hearing of the
Appeal."

20 HER MAJESTY having taken the said Report into
consideration was pleased by and with the advice
of Her Privy Council to approve thereof and to
order as it is hereby ordered that the same be
punctually observed obeyed and carried into
execution.

Whereof the Governor-General or Officer
administering the Government of Jamaica for the
time being and all other persons whom it may
concern are to take notice and govern themselves
accordingly.

W. G. AGNEW

In the Privy
Council

No.11

Order granting
Special Leave
to Appeal to
Her Majesty
in Council -
continued.

30th January,
1967

Exhibits

E X H I B I T S

Search
Warrant

5120
SEARCH WARRANT

11th January,
1966

Petty Sessions (Form B)

JAMAICA SS.

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:

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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.

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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.

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1. ANALYST'S CERTIFICATE

Exhibits

J A M A I C A

1.
Analyst's
Certificate

CERTIFICATE

12th January,
1960

No. Z562/66

The Dangerous Drugs (Amendment)
Law, 1954, Law 28 of 1954.

10 I, the undersigned, Government Analyst, do hereby certify that I received on the 12th day of January, 1966 from Actg. Cpl. C. Gayle exhibits for analysis contained in a sealed envelope. The seals were intact on delivery.

Regina vs. Herman King for Breach of the
Dangerous Drugs Law.

The envelope contained two brown paper packets and another paper packet which was burnt at one end.

The two brown paper packets together contained about 22 grains in weight of ganja.

20 The other paper packet which was burnt at one end contained a mixture of tobacco and ganja.

The amount of ganja in this paper packet was about 3 grains in weight.

As witness my hand this 12th day of January, 1966

At the Government Laboratory, Kingston 6.

(S) N. O. WALSH
Government Analyst

Appointed under the provisions
of Section 12 of the Adulteration
of Food and Drugs Law.

IN THE PRIVY COUNCIL

No. 1 of 1967

ON APPEAL FROM
THE COURT OF APPEAL OF JAMAICA

B E T W E E N:

HERMAN KING Appellant

- and -

THE QUEEN Respondent

RECORD OF PROCEEDINGS

T.L. WILSON & CO.,
6 Westminster Palace Gardens,
London, S.W.1.
Solicitors for the
Appellant.

CHARLES RUSSELL & CO.,
37 Norfolk Street,
London, W.C.2.
Solicitors for the
Respondent.