JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL NO. 39/97

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

REGINA vs. PATRICIA HESLOP

Raphael Codlin , instructed by Frank Phipps, Q.C., for appellant

Miss M. Malahoo for Crown

December 5. 1997 and February 16. 1998

PATTERSON. J.A.:

The appellant, Patricia Heslop, appealed against convictions on charges of possession of cocaine, dealing in cocaine and taking steps preparatory to exporting cocaine. We dismissed the appeal after hearing arguments, and we now give our reasons for so doing.

The facts, in so far as they are material to the appeal, may be summarised as follows: On November 13, 1994, a police party searched the appellant's home at 65 Coral Way, Harbour View, St. Andrew, by virtue of a written authorisation under the Dangerous Drugs Act. In the presence of the appellant, a constable took a handbag from the top of a closet in the

appellant's bedroom. The unusual heavy weight of the bag caused the officer in charge of the police party to ask the appellant what was in the bag. The appellant said there was nothing in it and that it was just her ordinary bag. The officer opened the bag and although it was empty, the sides felt "bulgy". The officer cut open the inside lining on both sides of the bag and found a parcel concealed in each side. The officer opened each parcel, showed the contents to the appellant, cautioned her and then told her it was cocaine. He asked her what she was doing with it. She said, "Officer, ah Rusty give me the bag to keep." It was only at this stage that the appellant denied ownership of the bag. She had earlier told the officer that she was a flight attendant and that the bag was one of those she travelled with. The officer then asked the appellant who Rusty was. She said she did not know where he lived nor did she have a telephone number for him, but that she knew him. She was arrested and when cautioned she said, "Them really set me up."

The main thrust of the defence was that a man named Rusty, whom she had known for about four months prior to the search, brought the bag to her the day before the search and asked her to keep it, and that one Angella Wilson would collect it. She looked into the bag and nothing was in it. She placed it on top of the closet in her bedroom. Before the police showed her the parcels concealed inside the bag, she was not aware that anything was in it. She knew Angella Wilson who sells household and personal products,

and she expected her to collect the bag. She said she did not tell the police that she travelled with the bag to the United States the week before. She also denied that the weight of the bag was alluded to by the police and that she told the police that it was just her ordinary bag. But she admitted telling the police that nothing was in the bag.

Undoubtedly, the essence of the defence was that although the appellant had custody and control of the bag, she had no knowledge that cocaine was concealed in its lining. Therefore, she lacked the mens rea necessary to establish the charge. At the close of the defence, Mr. Phipps, Q.C., who appeared in the court below, made a somewhat unusual request. He requested the court to direct the prosecution to call as a Crown witness the police officer who had issued the written authority to search the defendant's premises. He further requested that the defence be told the nature of the information and the identity of the informant that constituted the basis for the written authority to search the premises. The request was refused. Before us, Mr. Codlin argued that the refusal caused the appellant to be denied a fair trial resulting in a substantial miscarriage of justice. He submitted that, as a general rule, the source of information given to investigators ought not to be allowed by a court to be disclosed. However, there is a greater public interest which must be served if the disclosure of such information is capable of providing evidence to assist the defence in presenting its case. He said that in the instant case, the information was

sought and not given. Therefore, the appellant was deprived of a reasonable opportunity of putting before the court evidence that could have affected the outcome of the case. He referred the court to the case of ***Regina v. Vincent Raymond Agar*** [1990] 90 Cr. App. **R.** 318. In that case, the defendant was charged with possession of drugs which the police alleged they saw him throw away as he arrived at a house where they were. The essence of the case that the defendant wished to project was that the evidence against him was a fabrication. He denied ever having the drugs on his arrival at the house and that he had thrown it away. His instructions to counsel were that the drugs had been planted on him by the police and the owner of the house who had caused him to arrive while the police were there. The judge did not allow defence counsel to cross-examine the prosecution witnesses along those lines, which might elicit that the owner of the house had informed the police of the defendant's intended visit. The defendant was convicted, and on appeal his conviction was quashed. The decision of the court, as stated in the headnote, reads:

> **"Held,** that although there was a clear and well established rule that the identity of police informants should be kept secret; there was even stronger public interest in allowing the appellant to put forward a tenable case in its best light. By adhering to the judge's ruling counsel was forced to emasculate his client's attack on the police. As it was impossible to say that if a different course had been taken, the jury might not have felt enough unease about the whole affair to reach a different verdict, the appeal must be allowed and the conviction quashed. Dictum of Lord Esher, M.R. and of Bowen, L.J. in ***Marks v. Beyfus***

[1890] 25 Q.B.D. 494, 498, 499 and ***Hallett*** [1986] Crim. L.R. 462 applied."

That case is easily distinguishable from the instant case. The appellant in the instant case admitted possession, but denied knowledge of the contents of the handbag. The issue the Resident Magistrate had to decide was whether the necessary mens rea had been proven, and there was ample evidence to support her finding on that score.

The question that arises, therefore, is whether the refusal of the Resident Magistrate of the request by defence counsel resulted in evidence being excluded which could have affected the outcome of the case. It is a well established general principle of public policy that the courts need to protect the identity of informers "not only for their own safety but to ensure that the supply of information about criminal activities does not dry up" (see ***Marks v. Beyfus*** [supra]). However, the courts will depart from the general principle in cases where the defendant shows that there is a good reason that the protection of his liberty should prevail over the protection of the informer. Where the prosecution knows of relevant evidence which could be of help to a defendant's case, then, generally speaking, the prosecution is duty bound either to lead such evidence or make it available to the defence. This is clearly borne out by the ***Agar*** case (supra). But that does not mean that in every case where it is suspected that there is an informer, the defence has a right to elicit his identity. Mustill, L.J. made this quite clear in the ***Agar*** case (supra) when he said (at page 324):

> "Now it is certainly not the case that a defendant can circumvent the rule of public policy so as to find out the name of the person who had informed on him, for his own future reference and possible reprisal, simply by pretending that something is part of his case, when in truth it adds nothing to it. And it may be - and we emphasise 'may' - that if the defence is manifestly frivolous and doomed to failure the trial judge may conclude that it must be sacrificed to the general public interest in the protection of informers."

We were satisfied that in the present case it was not shown that the general principle of public policy should have been departed from. In our view, there was no way in which the refusal of the request by the Resident Magistrate affected the outcome of the case. The appellant did not allege, as we have said before, that the cocaine was planted on her. She readily admitted to the police that the handbag in which the cocaine was eventually found was hers. Reference to a named man whom she later said gave her the bag to keep came after the cocaine was discovered in the lining of the bag. The issue was purely whether or not the appellant possessed the mental element of knowledge required to establish the charges. Accordingly, we held that the ground argued by Mr. Codlin was without merit, that there was no miscarriage of justice, and we dismissed the appeal.

One other point arose. The appellant had been liberated upon entering into recognizance in the sum of $200,000 with a surety, in a like sum, pending the hearing of the appeal. She did not attend the court personally on the hearing of her appeal, but she was represented by

counsel. When the appeal was dismissed, she was not present to surrender herself forthwith into custody to undergo the term of imprisonment adjudged. We were told by Mr. Codlin that he had been informed that the appellant was in custody in another jurisdiction. However, the surety, Lindon Haynes, who is her father, was present in court. He moved the court for the penalty of his recognizance to be remitted in whole or in part. He urged that the appeal had been pending for over thirty months and during that period he had exercised supervision over the appellant, meeting her frequently, and otherwise keeping in touch with her by telephone. It was only in September, 1997, that he was informed that the appellant had left the jurisdiction, and was in custody in the United States of America. He in no way assisted or facilitated her departure from the island, and in fact, he informed the police of what he had learnt shortly after her departure.

We were of the view that in the special circumstances of this case, the surety had shown cause which was sufficient for us to remit the penalty in part. Accordingly, in exercise of the power conferred on us by section 2 of the Recognizances and Sureties of the Peace Act, we remitted the sum of $100,000 and ordered the surety to pay a penalty of the remaining $100,000.