

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CRIMINAL APPEAL NO 7/2018

**BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA**

MARCEL KELLY v R

Appellant appearing in person

Miss Devine White for the Crown

19 March and 5 April 2019

BROOKS JA

[1] This is an appeal by Mr Marcel Kelly against his conviction in the Parish Court for the Corporate Area, on 11 May 2018, for the offences of illegal possession of ganja and dealing in ganja. On 13 July 2018, he was fined \$2,633.00 for the former offence and \$5,265.00 in respect of the latter. He was also ordered to serve 10 days imprisonment in default of payment of either fine. Mr Kelly paid the fines and filed his notice of appeal.

[2] The evidence on which the prosecution relied before the learned Parish Court Judge, was that on 8 March 2017, Mr Kelly was exposing fruits for sale on a handcart in

the Papine area in the parish of Saint Andrew. A police team approached him and accused him of selling in a no-vending area. The police searched his cart and found, in, what was described as, an "igloo" container on the cart, vegetable matter resembling ganja. The police used a scale, which was in the cart, to weigh the item and it was found to weigh over 8 ounces.

[3] They took Mr Kelly, his wares and the vegetable matter, to the Papine Police Station, where a member of the police team, Constable Alrick Bonnicks, arrested and charged him for possession of, and dealing in, ganja. Constable Bonnicks testified that Mr Kelly, in response to the caution, said, "the I haffi hussle fi I yout dem". Other aspects of the evidence suggested that Mr Kelly was of the Rastafarian faith. That manner of speaking would be consistent with his inclination. (Mr Kelly informed this court that he strongly believed that the approach of the police toward him, and his conviction in the court below, was because he was a Boboshanti Rastafarian.)

[4] Constable Bonnicks later took the vegetable matter to the Forensic Laboratory. The forensic scientist there tested it and found it to be ganja, from which the resin had not been extracted. The weight was found to be 10.53 ounces. A certificate outlining the findings of the expert was admitted into evidence at Mr Kelly's trial for the offences.

[5] Mr Kelly represented himself at his trial. The learned Parish Court Judge allowed him time to consider his representation and he confirmed that he wished to represent himself. In presenting his defence, he made an unsworn statement. In that statement, he denied that he had had any ganja in his possession. He accused Constable Bonnicks

of having a grudge against him and of “framing” him with the offence; untruthfully saying that he had found ganja on the handcart. Mr Kelly also said that on the way to the police station, he saw Mr Bonnick hand the item to another police officer. He complained that there was no proper accountability for the item and that Constable Bonnick had had too much control over it.

[6] The issue for the learned Parish Court Judge was essentially one of credibility, that is, whether she believed the account of the police, which was given by Constable Bonnick and one of his colleagues, Constable Damone Delmone, or whether she believed Mr Kelly, or alternatively whether she was in doubt as to who to believe. Another issue, which Mr Kelly raised during the trial, was whether the police had any probable cause for having searched his handcart.

[7] The learned Parish Court Judge fully accepted the prosecution’s account of the events. She found that Mr Kelly had been selling fruits and ground provisions and that he did not have a vendor’s permit or a hawk and peddler’s licence at the applicable time. She identified that the case turned on the credibility of the witnesses and Mr Kelly and she believed that Mr Kelly had the ganja in his possession as the officers testified.

[8] Mr Kelly has advanced four grounds of appeal. They are:

- “(a) Illegal search – lacking probable cause
- (b) Corrupted chain of custody/tampering of [sic] evidence
- (c) Malicious prosecution – threatened by Police Officer prior to search and arrest

(d) Conviction not supported by the evidence”

He filed written submissions supporting these grounds and supplemented them with oral arguments. Each aspect will be addressed in turn.

Illegal search

[9] The essence of Mr Kelly’s complaint for this ground is that the police had no basis for searching his handcart. He said that there was no sign to indicate that he was in a no-vending zone and that he needed no permit to sell the products that he had on display. There was therefore, he maintained, no reasonable cause for searching the handcart, or, in particular, the igloo. He argued that the Dangerous Drugs Act, under which the offences fall, requires “reasonable cause” or “reasonable suspicion” in order for a police constable to effect a search. Based on that, he contended, there should have been no search and the material produced by Constable Bonnicks could not properly be used to ground a conviction. He contended that both the search and the arrest were illegal. He admitted, however, that Constable Bonnicks had also charged him at the same time, with a breach of the Kingston and Saint Andrew Corporation (Sale of Goods in Public Places) Regulations, 1986. He says that nothing came of that charge. He also stated that section 8 of the Hawkers and Pedlars Act exempts the sale of fruits, vegetables and ground provisions, from the requirement for a person to have a licence in order to sell goods in a public place.

[10] Miss White, for the Crown, submitted that there was nothing wrong with the search that was conducted by the police. She contended that there was a common law power of search incidental to arrest. That is especially so, she submitted, where the

search is conducted on the basis that it is reasonably believed that the person arrested has possession of “evidence which is material to the offence for which he is charged”. Learned counsel cited Halsbury’s Laws of England 4th Ed Vol 11 (1976) paragraph 121 in support of her submissions on this aspect.

[11] She also pointed out that the law in Jamaica does not prevent evidence from being admitted merely because there is a flaw in the way it was secured. Learned counsel submitted that the test for admissibility was whether the evidence was relevant, and whether it was more probative than prejudicial. She argued that the production of the vegetable matter to the learned Parish Court Judge, in this case, satisfied all the tests of admissibility. She relied, for support, on the cases of **R v Sang** [1980] AC 402 and **R v Khan (Sultan)** [1996] 3 WLR 162.

[12] Mr Kelly’s response to these cases was that the courts in Jamaica should cease using English law as guidance.

[13] In assessing the arguments from both sides, it must first be stated that the learned Parish Court Judge pointed out that there was no issue that Mr Kelly had no permit or hawk and peddler’s licence to engage in the activity that attracted the attention of the police officers. It is unnecessary to decide that issue in this case, especially as there were no detailed submissions from any counsel for Mr Kelly.

[14] Even if there were some doubt about Constable Bonnick’s motivations, and whether or not he had probable cause to search Mr Kelly’s handcart, the law governing

the admissibility of evidence is critically relevant. It is the gravamen of the second aspect of Miss White's submission, and is dispositive of the issue raised by this ground.

[15] The common law of Jamaica regarding the admission of evidence is, generally speaking, that evidence is admissible despite the fact that it may have been illegally obtained. The test is whether the evidence is relevant, whether it was obtained in any oppressive or other reprehensible circumstances and whether its probative value exceeds its prejudicial effect. These principles were decided in **R v Sang** and by the Privy Council in **Herman King v The Queen** (1968) 10 JLR 438, on an appeal from this court.

[16] In **Herman King v The Queen**, the police entered certain premises armed with a search warrant. There, they searched Mr King and found a quantity of ganja in his pants pocket. He was arrested, charged and convicted for the offence of unlawful possession of ganja. On appeal, the Privy Council held that the warrant was invalid, as was the search of Mr King. Their Lordships, nonetheless, upheld the conviction. The headnote to the report is reflective of the Privy Council's decision. It states in part:

"...although there was no legal justification for the search, this was not a case in which the evidence had been obtained by conduct of which the Crown ought not to take advantage. The court had a discretion whether or not to admit the evidence and this discretion was not taken away by the protection against search of persons or property without consent enshrined in the Jamaican Constitution. In the circumstances there was no ground for interfering with the way in which the discretion had been exercised. *Kuruma Son of Kaniu v R* [[1955] AC 197] applied."

[17] A similar, if not stronger, stance was taken in **R v Sang**. Lord Diplock's judgment in the House of Lords, in that case, was to the effect that in certain circumstances a trial judge had no discretion to exclude evidence. He concluded his judgment, at page 437 of the report, with these words:

"...(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. The court is not concerned with how it was obtained. It is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of the activities of an agent provocateur...."

In that case, the evidence against Mr Sang was acquired by the activities of an *agent provocateur*, who was working in association with the police.

[18] In **R v Khan**, the police had secretly attached an eavesdropping device to the outside of a house. They used it to record the conversations of its occupants. One of the conversations included an admission by Mr Khan that he had been involved in the illegal importation of heroin. The police charged him with being knowingly concerned with the unlawful importation of the drug. His conviction was upheld despite the fact that the installation of the device constituted a civil trespass and a breach of the occupants' right to privacy under the European Convention for the Protection of Human Rights and Fundamental Freedoms. The headnote accurately records the finding of the court. It states in part:

"(1) that it was an established principle of English law that the test of admissibility was relevance; that relevant

evidence, even if illegally obtained, was admissible; and that, therefore, the evidence of the tape recorded conversation was admissible...

(2) That in the circumstances, including the facts that the trespass and damage were slight and that the criminal conduct being investigated was of great gravity, albeit the evidence constituted a breach of article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953), the invasion of privacy with the attendant trespass and damage was outweighed by the public interest in the detection of crime, and could not be regarded as having such an adverse effect on the fairness of the proceedings that the judge ought to have excluded the evidence of the conversation in the exercise of his discretion under section 78 of the *Police and Criminal Evidence Act 1984...*"

As these cases demonstrate, Jamaican law is similar to English common law in this regard.

[19] In applying the principles in those cases to the present case, it must be held that even if Constable Bonnick's search of Mr Kelly's igloo was improperly motivated, and whether or not he had probable cause to search Mr Kelly's handcart, the evidence of the result of the search was admissible and it was for the learned Parish Court Judge to decide whether it was credible.

[20] This ground must fail.

Chain of custody

[21] In his written arguments Mr Kelly stated that the evidence was that Constable Bonnick had sole custody of the exhibit throughout the various stages before it was taken to the Forensic Laboratory and afterward. He suggested that the current practice

of allowing the investigating officer so much control over an intended exhibit was dangerous. He contended that Constable Bonnicks evidence was not to be accepted in the light of the fact that he and Constable Bonnicks had had previous confrontations. Mr Kelly argued that those interactions suggested that Constable Bonnicks had opportunity to tamper with the evidence. Indicative of that, Mr Kelly contended, is the fact that the forensic analysts certificate stated that the ganja was parcelled in two plastic bags; one within the other, while Constable Bonnicks evidence was that the ganja was in one plastic bag.

[22] Miss White quite properly argued that this complaint is purely speculative. We agree with her submissions on this point.

[23] The issue raised is whether the learned Parish Court Judge believed the prosecution's evidence. The Learned Parish Court Judge stated unequivocally that she did so. She specifically dealt with the discrepancy concerning the plastic bags. She found that it was not sufficient to undermine the prosecution's case. She said, about the discrepancy:

"I am not of the view that the inconsistency with the plastic bags – one bag as opposed to double bags or a bag within a bag takes away from the credibility of their evidence or creates a flaw in the chain of custody."

[24] There was no issue concerning the difference in weight revealed by Mr Kelly's scale versus the Forensic Laboratory's measurement of the weight. That also would be a matter of fact for the learned Parish Court Judge.

[25] Where there is credible evidence, on which the tribunal of fact in the court below, may properly rely, this court will not disturb that court's findings of fact. This is especially so when the tribunal of fact, which, in this case, is the learned Parish Court Judge, explains its basis for arriving at its conclusion. This aspect will be expanded upon below in the last two grounds.

[26] This ground also fails.

Malicious Prosecution and Conviction not supported by the evidence

[27] These two grounds may be dealt with together.

[28] Mr Kelly's contention that this was a malicious action by Constable Bonnicks also relates to the issue of the credibility of the prosecution's case, including the evidence of Constable Bonnicks. Another factor, which Mr Kelly relies upon, is that he asserts that Constable Bonnicks made a patently untrue statement. According to Mr Kelly, Constable Bonnicks's evidence of what Mr Kelly said when he was cautioned, that is "the I haffi hussle fi I yout dem" was obviously false. Cautioned Mr Kelly, upon arresting him, Mr Kelly said "the I have to hustle fi I yout them". To this court, Mr Kelly said that he has no children so he could not have made such a statement.

[29] This was an issue for the learned Parish Court Judge. She believed Constable Bonnicks. She was entitled to do so.

[30] The learned Parish Court Judge, having believed:

- a. Constables Bonnick and Delmore that the vegetable matter was in an igloo under the control of Mr Kelly;
and
- b. the expert evidence that the vegetable matter was ganja and that it weighed over 10 ounces,

she was entitled to find that Mr Kelly was in possession of and dealing in ganja in contravention of the Dangerous Drugs Act. There is no basis on which to disturb her findings of fact. It is to be noted that section 22(7)(e) of the Dangerous Drugs Act deems a person in possession of more than 8 ounces of ganja to be dealing in ganja. Mr Kelly has provided no explanation that would displace the presumption created by the section.

[31] These grounds also fail.

Disposition

[32] Although Mr Kelly sought to impress on the court that a conviction would severely prejudice his future prospects, the above reasoning compels that the appeal must be dismissed and the convictions and sentences must be affirmed. It is so ordered.