1993

IN THE CAYMAN ISLANDS COURT OF APPEAL

HELD AT GEORGE TOWN, GRAND CAYMAN

C.I.C.A. NOS. 13 AND 14/93

BEFORE: THE HONOURABLE MR. JUSTICE ZACCA, PRESIDENT
THE HONOURABLE MR. JUSTICE HENRY, J.A.
THE HONOURABLE MR. JUSTICE KERR, J.A.

BETWEEN: EVERARD DUANE HYDES

vs.

THE QUEEN

MR. G. HAMPSON for the Appellant

MR. A. ROBERTS for the Crown

AUGUST 18, 1993 AND DECEMBER 2, 1993

KERR, J.A.:

These two appeals had been heard together and dismissed by Harre, C.J., exercising the appellate jurisdiction of the Grand Court. They were from convictions in the Summary Court at George Town for the following breaches of the Misuse of Drugs Law, 1973:

(1) possession of ganja with intent to supply on 10th May, 1991, contrary to Section 3(1)(m) of the Law - Appeal No. 13/93; and

(2) refusing to give a sample of urine when required to do so on 24th July, 1991, contrary to Section 4(2) of the Law - Appeal No. 15/93.

Both appeals against convictions were dismissed. The appeal against the sentence for possession of ganja with intent to supply was allowed and the sentence varied to the period already spent in custody by the Appellant, as in the circumstances this was considered adequate. With respect to appeal No. 14/93, the sentence of $800.00 or two months imprisonment was affirmed. Herein are the reasons for our decisions.

In Appeal No. 13, the grounds and submissions were to the effect that having regard to the evidence, the conviction was unsafe and unsatisfactory. The submissions before us were similar in tenor and substance to those before the Grand Court and were, in the main, based upon discrepancies between the evidence of Constable Gillard McLaughlin and Woman Constable Fran General. The arguments were clearly set out and carefully and effectively dealt with by the Learned Chief Justice in his judgment. There was nothing new in the submissions that merited more than approving of the Chief Justice's treatment and affirming the conviction.

In regard to Appeal No. 14/93, a question of mixed facts and law was raised by the following ground of appeal:

> "The learned Chief Justice erred in concluding that the police officers had reasonably suspected the Appellant to have committed an offence under the Misuse of Drugs Law."

In support of the charge, Sergeant Michael Gooding gave evidence to the effect that acting on information received from Sergeant Brad Ebanks, and accompanied by other police officers and a customs officer on the 23rd July 1991, he went to the home of the Appellant and informed him that he received information that he was in possession of ganja. In Appellant's house a quantity of Rizla paper was found. Appellant said that the paper was used for making cigarettes from tobacco for his own use. There was a strong smell of ganja but no ganja was found.

Gooding then told him that Sergeant Brad Ebanks, who had had his residence under surveillance, had informed that he saw the Appellant in his yard with two other men "consuming controlled drugs" which Ebanks suspected to be ganja, and that in the light of that information he was arresting him on suspicion of consuming ganja, and he took Appellant to the West Bay Police Station. There, on the 24th July, 1991, he interviewed him and requested a sample of his urine for analysis. He warned him of the consequences of failing to comply. The Appellant refused and was formally charged.

The lengthy cross-examination elicited that the information from Sergeant Ebanks was given in the early hours of the morning. It could have been in the afternoon, about 3:00 p.m. to 3:30 p.m. that they got to the Appellant's home. One Ellsworth Grant, who was present in the Appellant's yard, was also arrested, but he had nothing to do with Grant's arrest. He arrested Appellant on the grounds of what Ebanks told him and what he saw at Appellant's house that day.

Ebanks in evidence said that along with others he had Appellant's home at Barkers, West Bay, under surveillance from about 11:40 p.m. to about 1:30 a.m. on 23rd July. Towards the end he saw the Appellant and about three other male persons at the corner of Appellant's premises under a floodlight. He saw Appellant do what appeared to be preparing a ganja cigarette. He lit the cigarette and it was passed around, each man "taking a draw". He was about 75 feet away and had the aid of binoculars and was able to identify the Appellant. Defendant's dogs began to bark and approach where they were, and they left the area. He informed Sergeant Gooding of his observations.

In cross-examination, he said that the information he gave Gooding was the same as the evidence he gave the Court. He could not respond to what Sergeant Gooding told the defendant. He was not present when Gooding interviewed the Appellant.

Notwithstanding, he was then shown the written record of the Appellant's interview with Sergeant Gooding on 24th July and adverted to the following questions put by Gooding to the Appellant:

- "How come two cigarettes were lit in your yard?"
- "You smoke two cigarettes at the same time?"

He agreed that someone could roll tobacco cigarettes the same way as one could for ganja smoking. The period of surveillance was approximately two hours. Two policemen and a customs officer were with him. They were not there to inflict any arrest.

Surprisingly, this record of the interview was never put to Sergeant Gooding and, even more surprisingly, a submission of no case to answer was made on the basis that the prosecution's case had been sufficiently discredited.

On a ruling of case to answer, the Appellant gave no evidence but called Oswald Grant to say that he was in the yard and was taken into custody; he refused to give a urine sample but was not charged; that Appellant was only arrested because he was arrested. He was in Appellant's premises until 1:00 a.m. that morning preparing for Emperor Haile Selassie's birthday.

In support of the ground of appeal, Appellant's Counsel referred to the following statement in the judgment of Harre, C.J.:

> "An informant could tell a story to a police officer which carried sufficient conviction at the time to ground a reasonable suspicion yet the informant concerned could subsequently be entirely discredited and the story on which the suspicion was based found to be entirely untrue."

He submitted that on the basis of that statement the Learned Chief Justice did not give sufficient or any consideration to the discrepancy between the evidence of the informer, Ebanks, and the requester, Sergeant Gooding, as to the

information Gooding received from Ebanks; that the information which Gooding said to have received was not sufficient to establish reasonable suspicion.

Waving aside for the moment the uncertainty and dubious existence of any discrepancy between the witnesses or inconsistency in the evidence of Ebanks, we are of the view that this statement of Harre, C.J., was clearly an obiter observation, since neither the Magistrate nor the Chief Justice found that no information was given to Sergeant Gooding, or that the information given was a fabrication, or that it was insufficient to be the ground for reasonable suspicion. Nor do we interpret this statement as saying that the evidence of the informer was irrelevant. On the contrary, immediately prior to this statement, Harre, C.J., quoted with approval the following statement of Collett, C.J., in the Grand Court appeal of R. v. McLaughlin and Burke:

> "...it is no answer to say of evidence which leads an officer to suspect the commission of an offence that it is based entirely on hearsay. The purpose of that evidence is not to show that the defendant committed the offence as suspected but rather to show that the officer's suspicion was a reasonable one..."

and for himself said:

> "That does not, of course, absolve the Court from considering the quality, as opposed to the source, of what the officer was told and deciding whether it was the basis for a reasonable suspicion. It is not a question of assessing how the evidence fared in court but whether at the time the information was passed on it was the basis for a reasonable suspicion. Factors such as the anonymity of the officer imparting the information and his failure to arrest an individual on the occasion he is alleged to have observed him might be factors leading a court to the conclusion that the suspicion was not reasonable.
>
> "In this case Sgt. Ebanks explained why no arrest was made at the time of his own observations. He said that the police and customs officers who were making observations were there because of an

> ongoing operation and were not supposed to let the appellants know that they were in the area.
>
> "It is the reliability of the source at the time the information is imparted which is a relevant factor in the assessment of the reasonableness of the suspicion, and I am very mindful of a danger inherent in this situation."

Section 4 of the Misuse of Drugs Law, so far as is here relevant, provides:

> (1) "A constable or customs officer may arrest without a warrant a person who has committed or whom such constable or customs officer reasonably suspects to have committed an offence under this law.
>
> (2) "A person who has been arrested under sub-section (1) may, while at a police station, hospital or other convenient place, be required by a constable to provide a specimen of his urine for a laboratory test and, if such person, without reasonable excuse, fails to provide such a specimen he shall be guilty of an offence.
>
> (3) "When requesting any person to provide a specimen for the purpose of subsection (2) the constable shall warn such person of the possible consequences of failure to supply such specimen.
>
> (4) ....."

Notwithstanding that the arresting officer must "reasonably suspect" that an accused has committed an offence against the law, this does not imply that his suspicion should be subject to a purely objective test.

In Henry Walters v. The Queen [1969] 2 W.L.R. 60, Lord Diplock, speaking of "reasonable doubt", in the context of directions on the standard of proof to be attained by the prosecution in proof of guilt, said at p. 63:

> "The expressions 'objective test' and 'subject test' are currently in popular use among lawyers, sometimes in contexts in which they are helpful in indicating a meaningful contrast. But in the context of 'doubt', which cannot be other than personal to the doubter, it is meaningless to talk of doubt as 'objective' and otiose to describe it as 'subjective'."

By parity of reasoning the same may be said of "suspicion". It is the genuineness or reality of the suspicion that is the essential issue. In that regard, the tribunal of fact is entitled to take into consideration the absence of grounds in determining whether there was a bona fide suspicion by the requesting officer, who in the absence of evidence to the contrary, must be presumed to be a normal person not suffering from mental defect or deficiency of mind.

Therefore, where the suspicion is based solely upon information received by the officer requesting a specimen of urine, the following subsidiary issues may arise for consideration:

(1) whether or not information was in fact received by the requesting officer;

(2) whether or not, on the face of it, the information was at the time credible and relied upon by the requesting officer;

(3) whether such information was sufficient to cause the officer to reasonably suspect that the accused had committed an offence against the Misuse of Drugs Law.

It follows that in relation to these subsidiary issues, the evidence of the informer would be relevant.

Accordingly, where there are serious, inexplicable or irreconcilable differences between the evidence of the informer as to the information communicated by him to the requesting officer, and the evidence of the requesting officer as to the information received from the informer, although it is open to the tribunal of fact to prefer the evidence of one witness to another, to do so in such circumstances would be clearly unsafe.

In the instant case, immediately after the criticised passage, the Learned Chief Justice considered this aspect of the matter and reasonably concluded:

> "But in this case Sgt. Gooding was given information by a police colleague of the rank of Sergeant who had been accompanied by others in the Police Force and Customs Department. That information was that the Appellant had been observed the previous evening smoking what in the view of Sgt. Ebanks was ganja. Unless I conclude, which I emphatically do not, that Sgt. Gooding was party to a conspiracy to "get" the Appellant I find that the suspicion which led to his calling for the urine sample was a reasonable one and consequently the refusal to provide that sample was unlawful."

In any event, we are of the view that such discrepancy as may be said to have existed is of a peripheral detail and could not affect the basis upon which Sergeant Gooding's suspicion rested, and which basis was concisely identified in the judgment of Harre, C.J., in the passage quoted above.

For these reasons this appeal was dismissed and the conviction and sentence affirmed.