In the Grand Court of the Cayman Islands
Holden at George Town

Before the Hon. Chief Justice, Sir John Summerfield,
C.B.E., Q.C., J.P.

On the 27th May 1985.

16-09-85

Case No. 1296 of 1984
Summary Court Appeal 44 of 1984.

GORDON MITCHELL MACRAE DILBERT
and
JAMES MITCHELL EBANKS

v

REGINA

Mr. David Ritch for first appellant
Mr. Michael Alberga for second appellant
Miss L. Dilbert for respondent.

JUDGMENT

The first appellant (Dilbert) was convicted of the offence of procuring the sale of ganja. The second appellant (Ebanks) was convicted of the offence of selling the ganja. The amount of ganja involved was 2.5 gms. Both appellants were sentenced to 9 months imprisonment together with a fine of $2000 or a further 3 months imprisonment in default for these offences. An additional charge of possession of the same ganja had been laid against the second appellant but appears to have been overlooked in both the verdict and sentence as set out in the learned Magistrate's record.

The first appellant appealed against conviction and sentence. The second appellant appealed against sentence only.

The learned Magistrate accepted the evidence of the principal prosecution witness, Constable Woods, and rejected the defences of both appellants. The salient facts appear in the evidence of Constable Woods.

On the evening of 24th August 1984 Constable Woods, acting on instructions of a senior officer, went to the Club Inferno, West Bay. In his pocket was a $25.00 note the serial number of which had been recorded. In a conversation with the first appellant Constable Woods mentioned that he occasionally liked a smoke. The first appellant asked him if he wanted one there. Constable Woods replied that he had some friends coming from the States who might and when they came they would all have a smoke together. Later, as he was about to leave, he told the first appellant that he thought that he had better buy some smokes there so that when his friends arrived he would not have to bother to go looking for some.

It would appear that the first appellant and Constable Woods knew each other well, having attended the High School together, but there is nothing to suggest that the first appellant knew that Constable Woods had joined the Police Force.

In response to Constable Woods' remarks the first appellant replied: "OK. I will help you get some good ones." Constable Woods handed him the $25.00 note. They went together to the left side of the Club Inferno building where the first appellant asked three different persons if they had any ganja. Each said that he did not have any; that he had sold out. They then approached the second appellant who was standing in the parking lot. The first appellant asked the second appellant for some ganja and the latter asked how much he wanted. Constable Woods replied: "three $5.00 portions". At this the second appellant seemed reluctant to continue with the deal. Constable Woods asked the first appellant to return his money, adding that he would get it elsewhere, thereupon the second appellant said: "Hold on, hold on". The $25.00 note was then handed over to the second appellant who gave Constable Woods a $5.00 note and five single dollar notes by way of change. The second appellant then took from his left front a plastic bag containing vegetable matter resembling ganja. He opened it and gave Constable Woods a portion. That portion was later analysed and found to be ganja.

The remainder of Constable Woods' evidence is not relevant to the grounds of appeal. The transaction was concluded at that stage. Despite

a later search the $25.00 note was not recovered.

It was urged on behalf of the first appellant that the facts relied on by the Crown did not support the charge of procuring the sale of the ganja. It was conceded that they might support a charge of procuring a dealing in ganja but not the charge laid. It was argued that when the second appellant showed reluctance to continue with the deal that withdrawal brought to a conclusion what, if anything, the first appellant had procured and the subsequent sale was divorced from the earlier acts of the first appellant. Reference was made to the Attorney-General's Reference (No.1 of 1975) 1975 2 All E. R. 684 and to R v Beck 1985 1 All E. R. 571.

With respect to learned counsel for the first appellant I think he is asking this Court to place too narrow a construction on what constitutes the procurement of any act or omission constituting an offence. In my view this Court must look to the reality and substance of what occurred. To use the definition advanced in the Attorney-General's Reference (No.1 of 1975) at p 121:

> "To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate step to produce that happening."

In Beck's case Watkins L.J. put it this way at p 576:

> "It is a word in common usage which, in our view, a jury can be relied on safely to understand. The most common meaning attached to it in our experience is to cause or to bring about."

Put another way, to procure means to bring about an intended result by design.

On any reasonable view the actions of the first appellant brought about the sale of the ganja by the second appellant to Constable Woods. Had it not have been for the deliberate action of the first appellant, aimed at and designed towards effecting a sale of ganja between the second appellant and Constable Woods, there would have been no sale. The fact that there may have been some initial reluctance on the part of the second appellant does not alter

the position any more than if there had been some intervening bargaining.

In my view the learned Magistrate properly came to the view that the charge had been made out against the first appellant on the facts he accepted.

On sentence it was urged that neither appellant had any previous conviction of any kind; that the quantity of ganja was small; and that the sentence imposed was out of line with sentences imposed for offences involving similar quantities. It was further emphasised that the offences were incited by an agent provocateur and that that fact should, in the circumstances of this case, operate as a substantial mitigating factor in accordance with the guidelines given in R v Sang 1979 2 All E. R. 1222, but that the learned Magistrate appeared to overlook this factor. It was suggested that Constable Woods had exceeded his brief and had deliberatly incited the commission of an offence which would not otherwise have been committed.

I certainly agree that the fact of and degree of incitement can properly be taken into account as mitigating factors on the basis put forward in Sang's case. However, it is apparent that the learned Magistrate gave full weight to this aspect. In written notes which unfortunately were not typed up as part of the record for appeal purposes the learned Magistrate specifically adverted to Sang's case and went on to say:

> "Regarding sentence I view the selling of ganja as a very serious offence and apparently so do the legislators, hence the severety of the sentence prescribed. However, considering the nature of the evidence, the obvious activity of Constable Woods as an agent provocateur resulting in this conviction I treat this as a mitigating factor in considering sentence.
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> Consequently the sentence of this court is
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> Dilbert for procuring the sale of ganja 9 months imprisonment and $2000.00 or 3 months.
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> Ebanks for selling ganja 9 months imprisonment and $2000.00 or 3 months.".

That approach accords with my own. The sale and other dealing in controlled drugs go to the root of drug abuse and the evils that stem from it. While a more lenient approach is acceptable in the case of possession of small quantities of ganja which appear to be for the offender's own use, and the consumption of small quantities, leniency is out of place for those engaged

in the distribution and supply of controlled drugs even where the quantities are small. All that Constable Woods did was to trigger off a train of events which would obviously have occurred had it been any other person who showed interest in the purchase of ganja. It is clear from their conduct that neither appellant was dipping his toe into this evil venture for the first time as a result of any entreaty by Constable Woods. Both were well aware of the ropes.

Having given careful consideration to the able submissions of counsel I find that I am unable to say that the sentence was either wrong in principle or manifestly excessive.

The appeals against conviction and sentence are dismissed. Due account is to be taken of any period of imprisonment already served for these offences. The appellants are given a further 2 days from today to surrender to their bail to complete their sentences.

Sir John Summerfield.

Dated the 27th day of June 1985.