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In the Grand Court of the Cayman Islands
Held at George Town on 1st August, 1979
Before His Lordship, Sir. John Summerfield, C.B.E., Q.C.

Cr. Appeal No 15 of 1979

DARVIN D. McLEAN

Vs.

REGINA.

Mr. R. Alberga for petitioner
Mr. Martin for respondent

JUDGMENT

The appellant was convicted of the offence of resisting a lawful search contrary to section 11 of the Misuse of Drugs Law, 1973. He was fined \$300.00 or 6 months imprisonment in default.

A police officer attached to the Traffic Department was travelling along Pedro Road when he saw a motor cycle, driven by the appellant, travelling behind him. He noticed that the appellant had his left hand closed and the back of his hand resting on the grip of the handle bar. The police officer slowed down his vehicle to allow the appellant to overtake him.

When the appellant had overtaken him the police officer turned on his siren and stopped him.

The police officer told the appellant that he suspected him of having drugs and that he would like to search him. The appellant refused. He was asked three times but still refused. The police officer attempted to search the appellant's pants but the appellant pushed the police officer's hands away. The appellant was then arrested, taken to the police station and searched. Nothing was found on him.

It should be noted that, a short time earlier, the police officer had seen the appellant on the road and had in fact passed him. The police officer did not then suspect that the appellant had drugs in his possession.

The police officer stated in evidence that his reason for suspecting the appellant to have drugs in his possession was the fact that he had his hand closed and it was resting on the handle bar grip. It does not appear in evidence that the police officer asked the appellant to open his hand at any stage of the initial encounter.

It was conceded that the police officer suspected that the appellant had a controlled drug in his possession and that the appellant resisted the search. It was contended that the grounds for his suspicions were not reasonable and that, therefore, the search was not a lawful one. In consequence, it was argued, the appellant was entitled to resist the search and no offence was committed.

The relevant parts of section 5 (1) of the Misuse of Drugs Law provides:

"If a constable has reasonable grounds to suspect that any person is in possession of any controlled drug in contravention of this law he may without warrant detain and search such person".

For all practical purposes one can ignore the words "in contravention of this Law" because, except in exceptional cases, such as in the case of a person known to be a doctor, the possession by any person of a controlled drug would be in contravention of the Misuse of Drugs Law. Section 11 of that Law provides:

"whoever resists any lawful search is guilty of an offence".

In my view the test for determining whether "reasonable grounds to suspect" within the meaning of section 5 (1) exist is an objective one. All the known circumstances of the case have to be examined dispassionately and assessed objectively according to the standards of a reasonable man to determine the existence or absence of such grounds. I respectfully adopt the reasonings and conclusions in this regard of their Lordships in the case of *Bodoo v. Joseph* 7 W.L.R. 373, applying the principles on *Cedeno v. O'Brien* 7 W.L.R. 192, in relation to the interpretation of a substantially similar provision. These cases were quoted with approval in *R.V. Melvin Spragg* 23 W.I.R. 371.

There is nothing in the Privy Counsel case of *Shaaban Bin Hussien and Others v Ching Fook and Another* P.C. 1970 942, cited by learned counsel for the respondent, which in any way conflicts with the principles enunciated above.

Applying this test the question is: was the police officer's suspicion based on reasonable grounds?. The Learned Magistrate held that it was. One would not lightly differ from such a conclusion. This Court is, however, in as good a position to determine that aspect from the facts found by the trial Magistrate as the latter.

Here the sole ground for suspicion was that the appellant's left hand was closed and the back of his hand was resting on the handle bar grip. That might induce an ordinary reasonable man to suspect that the appellant had something in his hand. It might make an ordinary reasonable man suspect other things too, such as careless driving. But why would it induce an ordinary reasonable man to suspect that a person so behaving had a controlled drug

in his possession?. What is there suspicious about it all?. Is it any different from, say, driving along with one hand in his pocket?.

With all due respect to the Learned Magistrate I cannot accept that that simple fact would induce an ordinary reasonable man to entertain a reasonable suspicion that a person so behaving had a controlled drug in his possession. It might be otherwise if there was evidence, or it was a matter of notoriety, that traffickers in drugs habitually behaved in such a manner for some reason or other, or if part of a small brown paper packet in which ganja is habitually dispensed was seen sticking out from the hand.

I am of the opinion that the evidence did not disclose reasonable grounds for suspicion that the appellant was in possession of a controlled drug. Accordingly the search was not a lawful one. It follows that resistance to the search could not constitute an offence against section 11 which specifically predicates a lawful search.

The appeal must therefore be allowed, the conviction quashed and the sentence set aside. It is so ordered.

I should, perhaps, make it clear that nothing in this judgment affects the admissibility of any evidence obtained in the course of a search which turns out to have been unlawful.

SIR. JOHN SUMMERFIELD

Chief Justice

1st August, 1979.