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In the Grand Court of the Cayman Islands
Holden at George Town on the 26th July, 1979
Before His Lordship, Sir John Summerfield, C.B.E.,Q.C.

Cr. Appeal 17 of 1979.

JIMMY DILBERT

v

REGINA

Mr. M. Alberga for appellant
Mr ~~Ritch~~ Martin for respondent

JUDGMENT

The appellant was convicted of the offence of selling a controlled drug (ganja) without lawful excuse contrary to section 3 (1) (i) (e) of the Misuse of Drugs Law 1973. He was sentenced to 18 months imprisonment and a fine of $5,000.00 or six months imprisonment in default.

The appellant was tried jointly with one Jackie Seymour who was charged with and convicted of the offence of procuring the sale of the same controlled drug. She has not appealed.

A Superintendent of Police received certain information in consequence of which he gave instructions to a police officer to purchase ganja from theappellant. He handed the police officer a five dollar bill for the purpose, having noted the serial number. He gave these instructions because, in his opinion, "it was the only way to catch the defendant because of secrecy".

A police recruit was present for part of the time while these instructions were being given. The police officer in turn gave the five dollar bill to the police recruit with instructions as to where he should go to effect the transaction

Presumably a recruit (who was not a Caymanian) was used as he would not be known and could pass himself off as a member of the public.

The police recruit then went to a house known as Miso's house on Mary Street. He was in plain clothes.

On his arrival at Miso's house he saw Jackie Seymour and told her that he wanted to buy some ganja. She told him that she had some at home and that he should go there with her. He gave her the five dollar bill and she took it.

They then went to her residence on Shedden Road. When they got there he heard her call to a man "Priest" whom the police recruit identified in court as the appellant. Apparently "Priest" is his nick name. The police recruit then saw the appellant. He saw the two speak to each other but could not hear what was said. The three then followed a path into the bushes. The appellant went into the bushes and took out a brown package with a stick of ganja. The police recruit asked him how much it was for the stick. The appellant replied: four dollars. The appellant handed the police recruit the stick of ganja. The police recruit was also given a dollar change but the record does not disclose by whom. He then left with the stick of ganja and returned to the police station where he made a report. The ganja so purchased ammounted to 2.3. grammes.

There was a submission of no case to answer, the grounds being the same as those urged on the appeal, namely:

(i) that there was no sale by the appellant to the police recruit;

(ii) that the Magistrate should have exercised his discretion and excluded the evidence of the police recruit who was clearly an agent provocateur and who had incited the commission of an offence which was not in contemplation before his intervention.

The Learned Acting Magistrate gave a written ruling, supported with reasons, rejecting the submission and holding that there was a prima facie case against both accused.

Their rights having been explained to them by their counsel, neither the appellant nor his co-accused gave evidence or made an unsworn statement. No defence witness was called.

Whether there was a sale by the appellant:

The expression "sells" must, in my view, be given its ordinary, natural meaning in the world or commerce and, indeed, in the ordinary course of affairs generally. At its simplest it means the transfer of property from one person to another for money pursuant to a voluntary agreement (express or implied) so to do. It has been said that the expression sale merely imports the exchange of some commodity or some article for money- See words and Phrases Legally Defined 2nd Edition Volume 5 Page 7.

I do not think it is necessary to examine this aspect too deeply as quite clearly, on the evidence of the police recruit, there was a sale of the stick of ganja. He had gone to buy it and it was sold to him. The only question is whether the appellant was a party to that sale. In my view, there can be no doubt that he was. Among other things he announced the price and handed over the commodity after the money had been received by his accomplice in the transaction.

The proper inference from the facts, as I see it, is that the appellant was the principal in the sale transaction, his accomplice, Jackie Seymour, being the instrument for obtaining customers and, perhaps also, taking money on his behalf. There can be no doubt that the two were acting in concert in effecting this sale and, therefore, each was equally responsible for it. In my view the appellant was at least assisting in the sale, knowingly participating in it, and aiding and abetting it, and, therefore, in terms of criminal law, a party to the offence.

In any event one cannot view participants in this offence over simply in terms of commercial law and, in particular, the law of contract. In strict terms of contract one could say that a sale in a shop is between the proprietor and the purchaser and that if a shop assistant merely hands the goods over on behalf of the proprietor, and at his instance, the assistant is not a party to the sale as principal or agent. In criminal law any person who knowingly participates in an illegal transaction as part of a joint venture is a party to that illegal transaction. In the case of this particular offence a person could be guilty of it albeit that he does not own the controlled drug, or even have possession of it, if he effects the sale of it as broker or agent. However, here, as indicated earlier, the proper inference from the facts is that the appellant was the principal in the transaction.

Whether the evidence obtained by the use of an agent provocateur should have been excluded.

There is a great deal of authority on this point, some of it conflicting. The principal authorities were throughly reviewed by the Court of Appeal in England in R.V. Sang (R.V.Morgan) 1979 2 W.L.R. 439. The comprehensive conclusives were summarized as follows:

(1) "The statements in Noor Mohamed v. The King (1949) A.C.182 and in Harris v. Director of Public Prosecutions (1952) A.C. 694 were directed to principles applicable to the cases there in question, namely "similar fact" cases where the question was whether evidence of littleprobative value but of highly prejudical effect should be admitted.

(2) The courts have and always have had power to exclude such evidence since it is always the duty of the court to safeguard an accused person against the risk of wrongful conviction in consequence of the admission of evidence of that kind, as it is in the case of confessions seemingly improperly obtained.

(3) That principle operates to qualify the otherwise absolute rule that evidence which is relevant is admissible, however that evidence is obtained and whether illegally, unfairly, by trick or other misrepresentation.

(4) That qualification does not, however, justify a judge in refusing to admit evidence of obvious probative value because it has been obtained through the activities of a police officer or an informer, or because theoffence charged would not or might not have been committed but for those activities, and a judge in our judgment has no discretion to refuse to admit such evidence.

(5) To hold otherwise would be to reintroduce into English law the defence of entrapment which it has now been held has no place in our legal system.

(6) Wide words have from time to time been used suggesting the existence of some discretionary power to exclude evidence of the kind referred to under 4 above. Such language has, with respect, sometimes been based upon a misunderstanding of, and of the limits of, what was said in Noor Mohamed v The King (1949) A.C.182, Harris v.Director of Public Prosecutions (1952) A.C. 694 and in other comparable cases.

(7) The fact that despite the use of such wide words, no case save Reg. v.Payne (1963) 1 W.L.R. 637 has been cited to us in which such a discretion has been exercised in favour of excluding evidence of this kind raises doubts in our minds whether such a discretion can truly be said to exist; if the principle upon which such discretion could be exercised is that stated in some of the cases, one would have thought that that discretion must have been exercised the other way in, for example, Kuruma v.The Queen (1955) A.C. 197, Reg v. Murphy (1965) N.I. 138, King v The Queen (1969) 1 A.C.304 and Jeffrey v.Black (1978) Q.B. 490.

(8) If, however, there is a residual discretion of the kind contended for, it can, we think, only be where the actions of the prosecution amount to an abuse of the process of the court and are oppressivein that sense.All courts have an inherent jurisdiction to protect their process against abuse from any quarter. But in the instant case and in the cases cited, the evidence led or sought to be led fell very far short of being oppressive in that sense. Compare the views of Lord Salmon and of Lord Edmund-Davies in Reg. v. Humphrys (1977) A.C. 1 and of Lord Delvin in Connelly v.Director of Public Prosecutions (1964) A.C. 1254, 1360. It will have been observed that the word "oppressive" occurs in a number of the citations we have made.

(9) If a court is satisfied that a crime has been committed which in truth would not have been committed but for the activities of the informer or of police officers concerned, it can, if it thinks it right so to do, mitigate the penalty accordingly".

I appreciate that that case is only of persuasive authority in this court and that the case is on appeal to the House of Lords. Nevertheless I take the view that the principles enunciated in that case are sound and I adopt them.

More important is the case of R.V. Arnough 2 W.I.R. 367, a Court of Appeal case which is binding on this court. That case also reviewed ~~received~~ the principal authorities up to the date of the judgment. It is of assistance to quote the relevant part of the head note setting out the facts and the ground of appeal corresponding to the one in this case:

"A law enforcement officer, J.F., called at the home of one S.B. where he met the appellant. The appellant told J.F. that he had hashish for sale. Later the same day J.F. returned to S.B's home with two empty suitcases. After they were packed with hashish J.F. asked the appellant for some "grass" (ganja). The appellant left and returned with a paper bag with ganja which was placed in one of the suitcases.

He asked J.F. how and when he wanted the suitcase delivered. J.F. told him that they should be delivered at the parking lot at the Mahoe Bay Club at 9 p.m. The appellant was seen to drive a car into the parking lot and park it shortly after 9 p.m. He got out of the car, opened the trunk and removed a suitcase which was later discovered to contain a paper bag with ganja. On appeal against his conviction for possession of, and transporting, ganja it was argued that (i) J.F. had instigated, incited, encouraged and procured the commission of the offences of which the appellant was convicted and that his evidence should, therefore, have been excluded on the ground of public policy".

In that case it was held that the most that can be said of the evidence of a police officer who incites or encourages the commission of an offence in order to obtain evidence of its commission is that the evidence is illegally or improperly obtained, but that did not render that evidence inadmissible.

Their Lordships went on to observe:

"On the alternative submission, it was contended that there was massive trick and deception. It was said that Fortier went beyond permissible bounds and involved himself in a crime for which he was not charged: that the evidence was obtained by Fortier by false representation and trick and ought to have been excluded. The only trick, deception or false representation we were able to detect (since none was specifically identified during the argument) was that Fortier represented himself as a foreigner who was interested in, and willing to buy, hashish and ganja. We do not think that this is the sort of trick or false representation which was intended to be referred to in the case relied on. This is the recognised way in which spies or agents provocateurs operate to detect offences which it is otherwise impossible or difficult to detect. This is what was done with approval in the Murphy case (7). There was no merit in this submission".

There were other grounds of appeal taken in that case of no concern to this one. After dealing with those grounds the appeal was dismissed.

The facts in Arnough's case as they relate to this ground of appeal bear a strikingly close resemblance to the facts in this case. In fact one could say that there was less "incitement", if any, in this case than in Arnough's case. The police recruit merely announced his wish to buy ganja to Jackie Seymour - not to the appellant and not even in his presence. He then demonstrated his means to pay by handing over to her the five dollar bill. How can the appellant say that it was he who was incited or encouraged to commit the offence by an agent provocateur?. All the police recruit did in the presence of the appellant was to enquire about the price of the stick of ganja. The appellant told him the price and then handed it to him.

Much was said about inciting the commission of an offence which would not otherwise have been committed. Here one must keep a sense of proportion and one's feet on the ground.

If a total stranger goes up to a person at his home or elsewhere and tells that person that he wishes to buy some ganja, what is the likely reaction of that person to such an announcement?. Is it conceivable that that person would set in train the events described in evidence which led to the sale - unless that person, alone or with others, was engaged in trafficking ganja?.

If an ordinary member of the public, intent on purchasing ganja for his personal use, had gone up to Jackie Seymour in the same way as the police recruit did, what would have happened?. One knows from general knowledge that ordinary members of the public do this - otherwise the machinery to meet their needs would not exist. Can there be any doubt that the same course of events would have followed or that the same offence would have been committed?. The only difference is that it would probably not have been detected. It is for the purpose of flushing out traffickers in drugs who would not otherwise be apprehended that resort is made to these measures however distaseful they may be.

This aspect was considered in Arnough's case and the conclusions are succintly set out in the extract quoted above.

I should make it abundantly clear that the judicial strictures as to the limits to the use of agents provocateurs and similar methods apply equally to these Islands and the courts will be vigilant in protecting the public against any abuse.

That this is not a case where the courts should intervene is plain from Arnough's case.

It was urged that this court should, in any event, intervene and reduce the sentence on the principles expressed in R.V. Birtles 1969 2 All E.R. 1311 and other English cases and as was done in Arnough's case. The appellate court reduced the sentence on the ground that there was a possibility that the appellants in those cases were encouraged to commit an offence which they otherwise might not have committed.

I do not think that that is the case here for reasons I have already given. In any event it is clear from the record that the Learned Acting Magistrate was fully aware of Arnough's case and would have had it in mind in assessing sentence.

Trafficking in drugs is always regarded by the courts as serious, calling for deterrent sentences. Although not on the record it was agreed from the Bar that the appellant had other convictions for contraventions of the Misuse of Drugs Law and that the Acting Magistrate had been so informed. In my view there are no grounds for intervention.

The appeal against both conviction and sentence is dismissed.

SIR. JOHN SUMMERFIELD

Chief Justice

26th July, 1979.