JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 28 of 1975

BEOFRE: The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Robinson, J.A.

R. V. FRED ROSENBURG
AND
PHILLIP ROSENBURG

Mr. R. Mahfood, Q.C., and Gresford Jones for the appellants.
Mr. C. B. Orr, Q.C., and L. Parkin for the Crown.

April 23, 24, and May 5, 1975

GRAHAM-PERKINS, J.A.:

The appellants were, on December 20, 1974, convicted in the Resident Magistrate's Court for Trelawny by His Honour Mr. G. Ramsay, on two informations which respectively charged them jointly with the unlawful possession of ganja, and with taking steps preparatory to the exporting of ganja, in breach of the Dangerous Drugs Law, Cap. 90.

The case advanced by the Crown is best described by reference to the evidence of its principal witnessess. The first of these was Asst. Supt. of Police, Clement Shay. This witness testified that he and others, including Capt. Beek of the J.D.F., were on a helicopter flight in the Duncans area of Trelawny at about 8.15a.m. on October 29, 1974 when, on approaching the air-strip at Braco from a westerly direction at what he described as a slow speed, and "flying very low", he saw some bags on the ground and "two white men beside the bags". He observed that the two white men were running away on the approach of the helicopter." These men disappeared into a canefield. Shay "observed (them) for a matter of two or three seconds and

saw their faces" when "the helicopter was flying about 100 ft. above the ground and directly above the two men". Capt. Beek turned the helicopter around and landed it near the bags. Shay counted some thirty bags of what was subsequently found by the Government Analyst to be ganja. Somewhere "in the general area" of the air-strip he saw two Cortina station-waggons, lettered and numbered FN 0276 and FM 9663 respectively. These, together with the bags of ganja, were taken to the Falmouth Police Station. At about 10.30 a.m. Shay proceeded to the Trelawny Beach Hotel where he saw the appellant, Fred Rosenburg (hereinafter called 'Fred'), to whom he identified himself. He told Fred what he had observed at the air-strip earlier that morning and, having cautioned him, he asked Fred "whose ganja it was". Fred replied: "It is my ganja and my cousin Phillip Rosenburg". Capt. Beek, and a Mr. Paul Martin who was not called as a wtwitness by the Crown, were present when this vital admission was made. Shay then detained Fred and took him to the Falmouth Police Station.

At about 12.30p.m. the same day Shay was at the Falmouth Police Station when someone brought Phillip Rosenburg (hereinafter referred to as 'Phillip') there. Shay identified him as one of the men he had seen at the air-strip earlier that day. He cautioned him and asked him "whose ganja it was", and Phillip replied that it belonged to him and his cousin Fred. This admission was made in the presence of Capt. Beek, Paul Martin and Det. Graham. Shay and Graham were the officers in charge of the case. Shay detained Phillip. Two days later, on October 31, 1974, Shay arrested and charged Fred and Phillip with the offences to which the two informations related.

In cross-examination Shay admitted that he had sworn to the two informations on October 29, 1974. He did not, however, "arrest or charge" the appellants until October 31, as he had not, until then, made up his mind to charge them. He did not reduce into writing the admissions made by Fred and Phillip because he had asked Det. Graham to get their statements in writing. Graham had not done so. Shay said, also in cross-examination, that the first time he saw the two men from the helicopter

"they were standing and later they were leaning down beside the bags and looking up", and that "by the time (the helicopter) turned back the men had disappeared". Next, he said: "The men actually stooped down and lean back and were looking up." Later he said: As I saw the men they were leaning down".

The next important witness was Capt. Beek, the co-pilot of the helicopter. He saw what appeared to be parcels in the grass at the western end of the air-strip. He was then flying at 100 ft. and at 46 m.p.h. He saw "a couple of dark shapes which could have been persons". He accompanied Shay to the Trelawny Beach Hotel. In his presence Shay said to Fred: "You are the man who was at the Braco air-strip beside the ganja." Fred did not reply. This witness gave no evidence concerning Phillip.

The next witness was Det. Graham. He was at the Falmouth Police Station when Phillip was brought there on October 29, at 12.30 p.m. He asked Phillip if he was one of the men "who had run from Braco that morning". Phillip did not reply. He asked Phillip further questions. The resident magistrate upheld objections to these questions on the ground that Phillip had not been cautioned. The witness said that Phillip was being detained on October 29, but he "had no evidence on which to arrest and charge him."

There was other evidence (documentary) to the following effect. On October 26, 1974 a car, lettered and numbered FN 0276, was hired out by Avis Rent-a-car of Montego Bay to a Fred Rosenburg for two days. On October 27, 1974 another car, lettered and numbered FM 9663, was hired out by Avis Rent-a-car to a P. Rosenburg for one day. No attempt was made, however, to identify the appellants with the contracts of hire either by evidence that the appellants were the persons to whom the cars were handed over by Avis Rent-a-car, or by evidence that they had signed the contracts. This Court is unable to detect the ground, if any, on which these contracts were admitted in evidence. There was certainly no evidence that the appellants, or either of them, had driven these cars or had been seen in them, on October 29, 1974.

Each appellant made an unsworn statement in answer to the charges. Each denied every material allegation in the Crown's case. They have challenged their convictions on several grounds. These relate to the evidence of Shay as to their identification as the men he saw at the air-strip, the admissions they are alleged to have made, and the use made by the resident magistrate of certain items of evidence which he described as circumstantial evidence.

In recording his findings the learned resident magistrate says:

> "Having regard to the demeanour of ... Shay and .... Beek this Court is satisfied that they are witnesses of truth, and found no material conflict of the evidence of one with the other."

It is desirable, therefore, to examine the evidence of Shay, Beek and Graham so as to ascertain whether the view taken by the magistrate is reasonable and capable of being sustained by the evidence.

Let it be said at once that Shay's evidence, in the view of this Court, so manifestly abounds in demonstrable inconsistencies and contradictions as to make it quite difficult for this Court to avoid the conclusion that, by finding a verdict averse to the appellants on the basis of that evidence, the resident magistrate quite clearly failed to take advantage of the opportunity he had of seeing and hearing the witness.

<u>The identification of the appellants</u>.

Shay puts the two white men (Beek describes them as dark figures) he saw from the helicopter in four different situations in the two or three seconds during which he claimed to have observed them. The first situation is one in which they "were running away on the approach of the helicopter." In this situation (and this is the situation that, as will appear later, the magistrate appears to have accpeted) it is clear that Shay would have had no opportunity to see the faces of the men since, on his own evidence, their faces would have been turned away from the helicopter and towards the canefield to which he says he saw them running.. Mr. Orr suggested that when Shay described a "running away on the approach

of the helicopter" the magistrate may have taken him to be referring to the second approach, i.e., when the helicopter turned to come back to land. If this is so, it is clear that the magistrate would have misinterpreted Shay's evidence. Not only does any such conclusion find no support in the evidence of Shay; it is directly contradicted by that evidence, as Shay makes it clear that "by the time the helicopter turned back the men had disappeared."

The second situation described by Shay is one in which the men "were standing and later they were leaning down beside the bags and looking up." If, as he says, Shay saw these men for only two or three seconds - and we are here dealing with an officer who, by his training, must be regarded as having an appreciation of time - during which they were running towards a canefield, his evidence that when he first saw them they were standing beside the bags and that at some later moment of time he saw them leaning down and looking up becomes somewhat less than fanciful, and poses a severe challenge to common sense. The third situation is that in which "as (he) saw the men they were leaning down." The fourth is one in which they "actually stooped down and lean back and were looking up". These latter situations were those in which the men were seen when the helicopter was directly above them at a height of 100 ft. There is no suggestion that the helicopter, when directly above the men, was stationary. On Beek's evidence it was travelling at 46 m.p.h., a speed of over 70 ft. per second. In three seconds it would have passed the men by over 200 ft. Whatever were the relative distances of the helicopter from the men at any given points during the time they were observed by Shay the one thing that is unmistakably clear is that the helicopter could not have been directly above the men for two or three seconds as Shay asserted. The very significant fact about Shay's evidence is that every one of the several contradictions and inconsistencies therein - and we have cited some only - remained unexplained when he left the witness box. What then is the learned resident magistrate to be understood to mean when he says that he accepted Shay as a witness of truth? In his findings of fact the magistrate says that he found that both men "ran on the approach of the helicopter". The clear implication of this finding

is that the magistrate must have rejected the evidence of Shay that he observed the faces of the men when the helicopter was 100 ft above them. It is, too, of supreme significance that nowhere in what he describes as his"Notes for the Court of Appeal" does the magistrate find that Shay was at any time able to identify the appellants as the men he claimed to have seen at the air-strip. It is, perhaps, of some significance also that none of the other four ior five people in the helicopter could assist in the identification of the appellants. When Shay's evidence, is examined, as this Court has examined it, it becomes clear that in so far as it seeks to place the appellants at the air-strip it failed rather hopelessly.

The admissions by the appellants.

Shay's evidence describes a situation in which, in Room 104 at the Trelawny Beach Hotel and in the presence of Beek, having told Fred what he had observed some two hours earlier at the air-craft, he asked him whose ganja it was. To this enquiry Fred replied that the ganja belonged to him and his cousin. On Shay's evidence this was the only question he addressed to Fred in Room 104 concerning the ownership of the ganja found at the air-strip and this question evoked a ready reply, by way of a vital admission. On Beek's evidence, however, Fred made no reply to the one question he says Shay addressed to Fred in the room. Mr. Orr sought to explain this conflict in this critical area of the case by suggesting that Beek may not have heard Fred's reply. This suggestion becomes untenable when it is appreciated that Beek did not say that he did not hear Fred's reply. Beek said that Fred made no reply. Which of these witnesses was being truthful? Certainly not both. The magistrate, nevertheless, by some process which this Court finds some difficulty in grasping, found that there was no conflict between Shay and Beek.

With regard to Phillip the situation is not entirely dissimilar. On Shay's evidence Phillip, on October 29, at the Police Station at Falmouth, admitted joint ownership of the ganja found at the air-strip. Here again the admission was made in the presence of Beek, Martin and Graham. Neither Beek nor Graham was, however, able to testify as to this

admission by Phillip. What is very significant is that Graham swore that he was unable to arrest or charge Phillip on October 29, because he "had no evidence on which" to do so. The implications of Graham's evidence must, obviously, have escaped the resident magistrate.

But even more startling is the evidence of Shay. Here is an Asst. Supt of Police who had identified the appellants as the men he had seen at the Braco air-strip on the morning of October 29. He had seized thirty bags of ganja beside which he had seen them standing, or leaning or stooping, or from which he had seen them running. Four hours later he had obtained free and voluntary admissions from these men that the ganja was theirs. In spite of this clear evidence Shay says: "I did not arrest or charge them until October 31, 1974 as I had not, until then, made up my mind to arrest them." To describe this state of things as incredible may well be an understatement. It is far from easy to understand what other evidence Shay could have needed in order to justify a charge of unlawful possession of ganja. Certainly no other evidence as to possession was led at the trial. The record does not disclose that by October 31, Shay had come into possession of any further information than that which he had at 12.30 p.m. on October 29. Indeed, the real bases of the magistrate's verdict were Shay's evidence as to the appellants' admissions, and the items of circumstantial evidence to be noticed presently. Surely, every constable knows that it is his clear duty, in circumstances in which he has sufficient evidence to justify a charge against a person for an offence, to prefer that charge without delay. Perhaps the Clerk of the Courts who conducted the prosecution in this case was less than fair to Shay in permitting him to leave the witness box without ascertaining from him why he had not made up his mind to charge the appellants until October 31. Be that as it may, Shay's failure to charge the appellants on October 29, undoubtedly leaves open to question, in the absence of a reasonable explanation, whether either of the appellants had made the admission attributed to him as to the ownership of the ganja. The same observation may legitimately be made of with regard to Graham's failure to charge Phillip on October 29. On the totality of the evidence concerning the alleged admissions by the appellants this Court is not in the least doubt that a conviction founded thereon must be regarded as manifestly unsafe and

and unreasonable.

Items of circumstantial evidence.

We need not dwell at any considerable length on this aspect of the case. In dealing with those items which he described, quite unhappily in our view, as circumstantial evidence the magistrate said (after dealing with the evidence of Shay and Beek):

> "In any case the following pieces of circumstantial evidence taken together with the admissions left no area of doubt in the Court's mind that both accused were men Supt. Shay saw at Braco."

The learned magistrate then catalogues eight "pieces of circumstantial evidence." It appears, however, that in the magistrate's view these pieces of evidence had no probative value - notwithstanding the label he attached to them - unless they were "taken together with the admissions". It may be that he viewed the admissions in the same light. It is, perhaps, to state the obvious to say that circumstantial evidence must, by its very nature, be demonstrably capable of performing a particular function. If it manifestly cannot perform that function - to point unequivocally and unmistakably to a particular conclusion and to no other conclusion - then it is questionable whether it performs any function at all as evidence. If it requires to be supplemented by, or to have superimposed upon it, some other kind of evidence in order to invest it with a capacity to perform its function then it is really a futile exercise in words to describe it as circumstantial evidence. It is unnecessary to refer, in this context, to more than three or four of the items detailed by the magistrate.

> "(a) The Supt. saw two white men in the middle of the bags at Braco and who ran before the helicopter landed.
>
> (b) He saw two cars Reg. Nos. FN 0276 and FM 9663 at the Braco air-strip.
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> (g) (The contracts of hire in relation to the cars) are evidence that those same cars were in the hire of two U.S. nationals who gave their names as Fred Rosenburg and P. Rosenburg at the material time.
>
> (h) Neither accused has in fact denied that (the contracts of hire) relate to them respectively in the statements they chose to make in their defence."

We have already noted our concern as to the asadmissibility of the contracts of hire in relation to the acars seen by Shay, not, be it observed,

"at the Braco air-strip" but, according to Shay, "in the general area" of the iar-strip. Shay had said earlier that he did not see anything "in the immediate vicinity" of the air-strip. Of equal concern is the use made by the magistrate of these contracts and other "pieces of evidence". There was certainly no evidence before the resident magistrate from which he could find "that those same cars were in the hire of two white U.S. nationals" or that they were, by virtue of the contracts of hire, in the possession or control of the appellants, or either of them, on October 29, 1974. As noted earlier in this judgment the contracts of hire were, respectively, for one day and two days. In each case, therefore, the contract was in respect of a period which would have expired prior to October 29, 1974. What then was the relevance of the two documents in the particular circumstances of this case? As this Court sees it, precisely none.

With regard to item (h) the implication here is singularly unhappy. A document is put in evidence by the prosecution. The prosecution does not attempt to identify this document with the appellants. Each appellant makes an unsworn statement in which he does not specifically deny this document related to him at some time prior to October 29. By what process of logic can a conclusion follow from these premises that the appellants' failure to deny a relationship which had not been established against them proves some fact in issue. To hold that any such failure is to be regarded as an item of circumstantial evidence, is, in the view of this Court, not only to ignore the fundamental character and functions of evidence, but, more importantly, to misplace the onus of proof in a criminal trial.

The items at (a) (b) (c) and (h), taken either singly, or cumulatively with the other items adverted to by the magistrate can hardly be described at all as evidence going to any real issue in this case. Indeed, it is, we think, fair to say that Mr. Orr did not, in the end press this question of circumstantial evidence.

We hold that the convictions of the appellants cannot, for the reasons we have given, be allowed to stand. The convictions and sentences are set aside.