JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 9/00

COR. THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE COOKE, J.A. (Ag).

REGINA VS. VERNON WASHINGTON HEAVEN

Frank Phipps Q.C. and **Arthur Kitchin** for the Appellant
Paula Llewellyn, and **Deneve Barnett** and **Grace Henry** for the Crown

9th, 10th May and 15th June, 2000

COOKE, J.A. (Ag):

On the 26th May, 1999 a cruise ship the "Enchanted Isle" lay docked at the Montego Bay Freeport in Montego Bay. At about 8:00 a.m. that day, Det. Sgt. Errol Graham and another officer of the narcotics division as well as two customs officers of the contraband enforcement team boarded the ship. They are on a special assignment. The chief purser escorts them to the library where there are a number of persons including the appellant who was then a constable attached to the immigration department. A search is effected on the person of all those present. Nothing incriminatory is found. Beside the appellant is a burgundy brief case. He admits to the ownership of it. The briefcase is opened. Two empty brown envelopes are removed

revealing the presence of 16 rectangular packages which weighed 13 ½ lbs. One of the packages had a cut from which it could be discerned that, it contained a white powdery substance. When asked by Det. Sgt. Graham how he came to be in possession of the packages, the appellant replied that a co-worker of his by the name of Norman Malcolm had given them to him the previous evening for him to take on board the ship. At this stage Det. Sgt. Graham forthwith contacted D.S.P Salmon the officer in charge of area I narcotics. By approximately 9:00 a.m. the latter arrived on board. Asked by DSP Salmon if he knew it was cocaine the appellant said "yes". Subsequent scientific analysis, confirmed that the packages did contain cocaine. The appellant is taken to the Summit Police Station where he expressed the desire to "tell how it go". The essence of how it went was that on the previous night a co-worker Malcolm had given him the packages for him to deliver to a man in pink and black who would be looking for him. The prosecution after withstanding very strong objections of the defence tendered an affidavit sworn to by the appellant on the 19th June 1999. This affidavit was in connection with a bail application to be made to the Supreme Court. The relevant paragraphs 5,6 and 7 are set out hereunder:

> "5. That I am 34 years old and I have never been arrested or convicted of any offence whatever: that I am a Christian and worship at Hillview Baptist Church in Montego Bay.
>
> 6. That the case against me is based on the fact that I was found in possession of 13 ½ lbs of cocaine whilst on board the cruise ship SS Enchanted Isle during the course of my official duties on the

25th day of May, 1999; that immediately the said substance was discovered in my attache case, I informed the Police that the said substance had been given to me the night before by an Immigration Officer of senior service to me and a co-worker, one Constable Norman Malcolm, who had instructed me to deliver the same to a person on board the said ship.

7. That the said substance was contained in sixteen (16) parcels which were packaged in such a fashion that I could not have ascertained beforehand the contents thereof without opening the same; that I did not know the said parcels contained an illegal substance and I had no reason to believe or suspect that the packages contained anything other than lawful and **bona fide** material, hence I did not open any of them; that had I been aware of the contents of the said parcels, I would have reported the matter immediately to my supervising officer, Inspector Thompson".

The appellant in his defence made an unsworn statement in which he stated that the contents of the affidavit to which he had sworn was true. This is a synopsis of the material before the Resident Magistrate. He convicted the appellant on the three informations laid which compendiously may be stated as possession of cocaine; dealing in cocaine and attempting to export cocaine. It is these convictions and sentences imposed thereafter which are now subject to challenge.

It was submitted by Mr. Phipps that when DSP Salmon inquired of the appellant if he knew the packages contained cocaine, such query should have been proceeded by

a caution in accordance with Rule II of the Judges Rules. Therefore the admission by the appellant was inadmissible. Rule II states as far as is relevant that:

> As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

Now what does the evidence show? When Sgt. Graham conversed with the appellant pertaining to the packets in the burgundy case there is no evidence that the latter admitted knowledge of the contents of those packages. Sgt. Graham may well have had his suspicion of what the white powdery substance was; hence his call to his superior DSP Salmon. Therefore at the time of the arrival of DSP Salmon an essential aspect of the investigation i.e. knowledge in the appellant cannot be said to have been explicitly satisfied. If this is so then in accordance with Rule 1 which states:

> **"Rule I:** When a police officer is trying to discover whether, or by whom an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it."

it was quite proper for DSP Salmon to ask the appellant if he knew the packages contained cocaine. The answer to the question would have provided useful information. The record does not indicate that at the trial any objection was taken to the question or the answer. In any event it has been established and settled that the Judges Rules are not rules of law but of practice drawn up for the guidance of police officers.

It is not being said that the admission by the appellant as to knowledge of the contents of the packages was not voluntary. This is a crucial determination. Of course this is not to say that there may be circumstances where a court might well rule that a breach of the Judges Rules will render a particular piece of evidence inadmissible, see ***R v May*** [1952] 36 Cr.App. R 91; ***R v Prager*** [1972] 56 Cr. App. R 93, ***R v Maurice Freebourne*** SCCA No.92/81(unreported). This ground fails. The evidence as to the appellant's knowledge of the contents of the packages was correctly admitted.

Mr. Phipps further contended that the appellant was denied a fair trial in that the appellant was not allowed an adjournment to call a witness - Norman Malcolm, the person the appellant said had given him the packages. It was argued that when the appellant admitted that the packages contained cocaine such admission was merely a recognition of a substance and as such was equivocal as to whether before then he had knowledge that all along he had cocaine in his physical custody. Therefore the calling of Norman Malcolm could conceivably have been of benefit to the appellant. Mr. Phipps further submitted that it was exclusively for the defence to determine the importance of any witness which was required.

As regards the application for an adjournment the record discloses as follows:

> "Mr. Kitchin says that he needs Mr. Malcolm to be a witness. Just informed that he is no longer in the Jamaica Constabulary Force. Didn't need him before. Has never interviewed him. Does not know where to locate him. Did not need him before as he was a serving Member and would have asked the Court to get him.
>
> Inspector Kerr advises Court that the office staff just told him that Malcolm has resigned. They cannot locate him.

> Mr. Kitchin further states that he was prepared to ask the Court to Summon the witness today as he would have to be at work. Would have to make enquiries to locate the witness.
>
> Application for adjournment refused.
>
> Mr. Phipps advise Court that he has no intention to close case until the witness is called. Mr. Kitchen also stated he was not closing case without the witness.
>
> Direct Clerk to proceed to address the Court."

It was a peremptory refusal of the application for an adjournment. No reason is stated. The appellant relies on section 20(6) (d) of the Constitution which states:

> "(6) Every person who is charged with a criminal offence—
>
> (a)...
>
> (b)...
>
> (c)...
>
> (d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution..."

Miss Llewellyn submitted that the application for the adjournment to call Norman Malcom lacked sincerity. She pointed out that when the case commenced on the 17th August, 1999 the defence were well aware of the role which the appellant said Norman Malcolm played. The defence had the statements. They were in possession of the appellant's affidavit sworn to on the 19th June, 1999. Yet it did not appear that the defence had done anything privately to contact Norman Malcolm; nor had the

assistance of the court been sought. It cannot be denied that there are relevant factors to be taken into consideration in deciding whether or not an adjournment should be granted. However at that stage those factors were not so overwhelming as to preclude the requested adjournment. We are of the view that if there are repeated applications for adjournments which are calculated to frustrate the due and timely administration of justice, then a tribunal would be obliged to refuse such applications. However, there is no evidence that this is the position in this case. It is not enough to attempt to infer from the affidavit of the appellant that Malcolm would have been non-cooperative as Miss Llewellyn sought to do based on paragraph 9 of the affidavit which reads:

> "That I am innocent of the said charges, and I have given the Police a full statement on the matter and stated that I am prepared to give evidence against the said Constable Norman Malcolm at his trial, if and when I am requested so to do".

In all the circumstances an adjournment for a reasonable time ought to have been granted to the appellant. But this is not the end of the issue. Section 305 (3) of the Judicature (Resident Magistrates) Act is as follows:

> "The Court may, notwithstanding it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal, if it considers that no substantial miscarriage of justice has actually occurred".

The appellant was in physical custody of the 16 packages of cocaine. The only question, therefore, is whether he had knowledge of the contents of those packages.

What was before the court ?

(i) the appellant was in possession of the packages from the evening before.

(ii) He put those packages in his burgundy case.

(iii) When the case was opened two empty brown envelopes covered the packages.

(iv) One of the packages was cut revealing presence of white powdery substance. The appellant must have known of the presence of this white powdery substance. He would have put the packages in his case. He either received the packages with one cut, or that package was cut after he received them.

(v) The appellant admitted that the contents of the packages was cocaine.

In view of all the circumstances to say that the appellant was merely indicating a recognition of the contents of the packages is quite unconvincing.

The Magistrate found that the appellant had the requisite knowledge. This finding cannot be faulted. So in respect of the possession of cocaine the prosecution had established the two essential ingredients; custody and knowledge. We cannot conceive how the calling of Mr. Norman Malcolm could disturb these two findings - that the appellant had cocaine and he knew he had cocaine. We therefore conclude on this ground that although the Magistrate was in error in not granting the requested adjournment no substantial miscarriage of justice has actually occurred.

Mr. Kitchin complains that the learned Resident Magistrate had no jurisdiction to try the offences for which the appellant was charged and/or impose the sentences given. He contended that section 268 of The Judicature (Resident Magistrates) Act lists the offences cognizable in that court. The offences for which the appellant was convicted are not included in that section. Therefore he concludes the Magistrate had no jurisdiction to conduct the trial. Firstly this contention ignores the fact that section 268 does not purport to set out an exhaustive list of all the offences which may be tried by a Resident Magistrate. The introductory words to the section are "It shall be lawful for the courts to hear and determine the offences hereinafter mentioned". The Resident Magistrate is a creature of statute and as such operates within the jurisdictional limits conferred by Parliament. It cannot be said that in respect of the offences over which the Resident Magistrate presided that he was without a jurisdiction. That is given to him by Section 8A (2) (b) of the Dangerous Drugs (Amendment) Act 1994.

Mr. Kitchin further submitted that:

> The amendments to the Dangerous Drugs Act giving jurisdiction to the Resident Magistrate's Court to try cocaine offences previously triable on indictment was in breach of the Constitution, as it allowed Parliament to interfere with the jurisdiction of the Supreme Court by reducing jurisdiction that was originally exclusively there.

It is inaccurate to say that the jurisdiction to try cocaine offences was originally exclusively in the Supreme Court. The Dangerous Drugs Law of 1948 can be referred to as the mother piece of legislation. In subsequent amendments this is referred to as the "principal law". Well, in that principal law, contraventions of the law pertaining

to cocaine were to be tried only by a Resident Magistrate. It is in 1974 by the Dangerous Drugs (Amendment) Act that cocaine offences were to be tried in a Circuit Court. Even then the Magistrates' Court was not excluded from trying such offences. Rather, it was specifically stated in section 3(1C) of the Dangerous Drugs (Amendment) Act that:

> " (1C). Nothing in this section shall be construed to prevent any regulations made under section 9 from authorising punishment on summary conviction, before a Resident Magistrate, of any offence committed in contravention of any such regulations and which is referred to in subsection (1A) or (1B), and punishment in like manner as authorised by paragraph (b) of subsection (2) may be prescribed by the regulations for offenders so convicted."

Apparently no regulations were ever made. In the Dangerous Drugs (Amendment) Act of 1978 there is concurrent jurisdiction between the Circuit court and the Resident Magistrates Court as regards cocaine offences. Concurrent jurisdiction is the same in the Dangerous Drugs (Amendment) Act 1994. Accordingly the proposition as stated by Mr. Kitchin is untenable.

Also in the area of jurisdiction it was argued that the amendment to the Dangerous Act giving jurisdiction to Resident Magistrates' court to try cocaine cases and impose sentences of 5 years deprived the appellant of having a preliminary enquiry, and trial by jury with a Supreme Court Judge. There is no merit in this submission. In ***Stone v R*** [1980] 35WIR 268 the Judicial Committee of the Privy Council at p.269 said:

> "The entrenched constitutional rights of a person charged with a criminal offence are to be found in section 20 of the

> Constitution. They entitle him to be tried 'by an independent and impartial court established by law'. The section contains no mention of trial by jury although this is where one would expect to find such a right if it were intended to be entrenched."

Finally in this area it is argued that the punishment is so severe, i.e. 5 years imprisonment that, in permitting a Magistrate to impose such a sentence would be to transgress on the jurisdiction of the Supreme Court. Reliance was placed on ***Commissioner of Police v Davis and Another*** [1993] 4 All E.R 476 P.C and ***Hinds v R*** [1975] 13 J.L.R 263. In the ***Commissioner of Police v Davis and Another*** one question that fell to be determined was whether or not empowering a Magistrate in the Bahamas to impose a sentence of 5 years for possession with intent to supply a prohibited drug was within the permissible limit of the jurisdiction of a Magistrate' s court. The answer was in the affirmative.

In the 1948 Law the maximum term of imprisonment that could be imposed by a Resident Magistrate was 12 months. In the 1987 Dangerous Drugs (Amendment) Act this was increased to 3 years and by the 1994 Dangerous Drugs (Amendment)Act it is now 5 years. It should be noted that in the 1987 amendment for a conviction before a Circuit Court the limit was 25 years and in the 1994 amendment the limit is 35 years. The very great difference between the jurisdiction of the Resident Magistrate and a Judge of the Supreme Court in respect of sentencing is striking. However, this is not surprising as our law makers would have had the benefit of their Lordships' opinion in ***Hinds*** where a critical consideration was the distinction between the higher and lower judiciary, the former having a greater degree of security of tenure than the

latter. See ***Hinds*** p. 273, at C to E (supra). Because of this greater degree of security, a necessary incident of the independence of the higher judiciary, it is to that body that is reserved the jurisdiction to impose severe sentences. In ***Commissioner of Police v Davis and Another*** Lord Goff of Chieveley at pgs. 485 to 486 had this to say:

> "Their Lordships would go further. As they read the judgment of Lord Diplock in ***Hinds v R*** [1976] 1 All ER 353 at 367 [1977]AC 195 at 219 at 222, it is to the effect that, where the jurisdiction over the offences in question is exclusively vested in an inferior court, the question whether the jurisdiction so vested is appropriate only to a Supreme Court depends both on the nature of the offence and on the severity of the punishment which can be imposed; whereas where a concurrent jurisdiction is vested in the inferior court the question depends upon the maximum punishment. It follows that, on the hypothesis that there was no entrenched right to trial by jury in the Constitution of the Bahamas and that the relevant jurisdiction had then been transferred from the Supreme Court to the magistrates' courts, the question under consideration would be whether the offences could be characterised as minor offences and whether the punishment capable of being imposed could be characterised as a minor penalty. If however the jurisdiction so transferred was concurrent with the jurisdiction of the Supreme Court, the question would relate only to the maximum punishment which the inferior court was empowered to inflict. On this approach, their Lordships have no doubt that a maximum sentence of imprisonment for life would inevitably render such transfer of jurisdiction unconstitutional on the principle of ***Hinds v R.*** In such a case, the transfer of the jurisdiction would be unconstitutional per se, though an additional effect would be that, since under the Bahamian Constitution it is a characteristic of offences charged on information in the Supreme Court that the accused is entitled to be tried by jury, by vesting in the magistrates' courts a jurisdiction to try offences which, under the Constitution, are properly triable only in the Supreme Court, the accused would inevitably be deprived of his constitutional right to jury trial.

> However, in the opinion of their Lordships, the same infringement of constitutional rights may occur when, instead of the relevant jurisdiction being transferred from the Supreme Court to the magistrates' courts, the penalties which the magistrates' courts are empowered to impose in the case of offences within their jurisdiction are so increased as to confer upon the magistrates' courts jurisdiction which is appropriate only to a Supreme Court. In such a case the principle in ***Hinds v R*** is as much infringed as in a case where the relevant jurisdiction is transferred from the Supreme Court to the magistrates' courts. (emphasis mine).

So is a sentence of 5 years imprisonment one which is appropriate only to our Supreme Courts? In providing an answer it must be recognised that our society is not static. It is constantly in a state of evolution. In discharging the obligation under s. 48 (1) of our Constitution Parliament in making law for the peace , order and good government of Jamaica cannot be oblivious to the changes which are taking place. There is a responsibility to enact measures to counter increasing criminal activity of any particular kind. That cocaine offences has been and is on the increase is a fact. The various amendments to the principal law of 1948 have been responses to this distressing feature of this increase in cocaine offences. As in the Bahamas we cannot say that the jurisdiction of a Magistrate to impose a sentence of 5 years is in excess of the power which should be enjoyed by the lower judiciary, especially as the much more severe sentences are reserved for the Supreme Court. Accordingly this submission fails.

Before dealing with the question of sentence there was a ground of appeal to the effect that there was no proof that the substance in the 16 packages was

cocaine. It was said that there was no **nexus** between the contents of the packages and the scientific conclusion. Suffice it to say that the evidence demonstrated quite otherwise.

The appellant received the maximum term of imprisonment in respect of each information. There is the complaint that such sentence i.e 5 years imprisonment was manifestly excessive. As would be expected the appellant had no previous convictions. The record shows that the Magistrate took the following into consideration:

He took an oath to uphold the Law.

Exporting of illicit drugs are serious offences.

He used his office to smuggle on board the cocaine.

A long custodial sentence ought to be imposed to act as a deterrent to others.

We cannot say that the Magistrate took into consideration irrelevant factors. We are all aware of what may be termed the cocaine problem. In all the circumstances we are not minded to interfere with the sentences imposed. Conviction and sentences are affirmed. Sentences will commence as of the 5th October, 1999.