CAYMAN ISLANDS
CRIMINAL FORM 18
RULE 50(1) & 51(1)

IN THE COURT OF APPEAL OF CAYMAN ISLANDS

Criminal Appeal CACR006/2011

(Summary Court Appeal No 0025/2010
(C4201/2005))

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

CARLOS EUGENE MINZETT

Appellant

NOTIFICATION TO AUTHORITIES OF RESULT OF APPEAL

To: The Attorney General

This is to give you notice that **CARLOS EUGENE MINZETT** having appealed against the decision of the Grand Court dated **25th day of March, 2011** which dismissed his appeal against conviction and sentence.

The conviction and sentence originally passed upon *him* by the Summary Court on the **30th** day of **June, 2010** were as set out below:

C#4202/2005 (6)
Selling controlled drugs
5 years

C#4202/2005 (7-10)
Selling controlled drugs
5 years concurrent

The Court of Appeal, **having reserved judgment on 5th August 2011**, has finally determined the said appeals, and has this **9th** day of **September, 2011** given judgment therein to the effect following:

1. **Appeal against conviction dismissed.**
2. **Legal aid granted to James Stenning effective 18th July 2011.**
3. **Application to appeal sentence having been abandoned on 5th August. Conviction affirmed and sentence affirmed.**
4. **Written judgment released.**

Dated this 12th day of September, 2011

Registrar

CAYMAN ISLANDS COURT OF APPEAL

IN THE CAYMAN ISLANDS COURT OF APPEAL

CACR 6/2011

BEFORE

The Rt Hon Sir John Chadwick, President
The Hon Ian Forte, Justice of Appeal
The Hon Dr Abdulai Conteh, Justice of Appeal

ON APPEAL FROM THE GRAND COURT
SCA 0025/2010

THE QUEEN

Respondent

-v-

CARLOS EUGENE MINZETT

Appellant

Mr James Stenning of Stenning & Associates appeared for the Appellant, Carlos Eugene Minzett
Ms Tanya Lobban, Senior Crown Counsel, Office of the Director of Public Prosecutions, appeared for the Respondent

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Hearing : 5 August 2011
Judgment delivered: 9 September 2011

JUDGMENT

Sir John Chadwick, President:

1. On 30 June 2010, after a trial before Chief Magistrate Ramsay Hale, Carlos Eugene Minzett was convicted in the Summary Court on five offences of selling controlled drugs contrary to section 3(1)(e) of the Misuse of Drugs Law (No 13 of 1973). He was sentenced to a term of five years

imprisonment in respect of each offence: the terms to be served concurrently. He appealed to the Grand Court against conviction and sentence. That appeal was heard and dismissed by Justice Quin on 25 March 2011. By notice filed on 1 April 2011 Mr Minzett sought leave to appeal. When that application came before this Court for hearing on 5 August 2011, counsel informed us that the application for leave to appeal against sentence was withdrawn on Mr Minzett's instructions. This Court is concerned only with the appeal against conviction.

The underlying facts

2. The offences in respect of which Mr Minzett was convicted were committed on dates between 25 August 2005 and 7 November 2005. In each case, the offence charged was that he, on the dated specified "at 107 Manse Road, Bodden Town, Grand Cayman, without lawful excuse sold to an undercover Police Officer, a controlled drug, namely Cocaine". In each case, the evidence which led to his conviction was that of Police Sergeant Andrew Graham; who, at the time of the offence was a police constable attached to the Drugs Task Force. In each case Sergeant Graham's evidence was that he attended at 107 Manse Road, which he knew to be the residence of Mr Minzett, in plain clothes. He told Mr Minzett that he wanted to purchase an amount of crack cocaine; specifying the value of that amount. The values specified were between CI$25 and CI$200. In each case Mr Minzett handed the officer a piece (or pieces) of what the officer believed to be (and, on later examination, proved to be) crack cocaine in exchange for the money. In each case, shortly after the purchase, the officer handed what had been purchased to his superior, Sergeant McLaughlin, or to another officer. Each item (or items) was placed in a bag and sealed. Later on 7 November 2005 Mr Minzett was stopped in his vehicle, arrested and charged in relation to the supply of cocaine to Sergeant Graham.

The trial

3. At the outset of the trial Mr Minzett chose to conduct his own defence. Counsel previously instructed on his behalf (Mr Furniss) formally

withdrew; but remained, at the invitation of the court, as *amicus curiae*. Sergeant Graham identified the items purchased; and identified Mr Minzett as the seller of those items. Mr Minzett did not give evidence. In her Reasons for Decision the Chief Magistrate said this:

> "The defendant's challenge to the case against him was primarily a challenge to Graham's credibility and the strength of the evidence generally.
>
> He asserted that he had never seen PC Graham save for the day of his arrest and denied selling anything to the officer. He explored in cross-examination what he contended were evidentiary lacunae in the Crown's case and established that the transactions that the officer alleged took place were not observed by any other officer nor captured on film nor taped and that the monies which were said to have been paid to him for drugs were not marked and could not be linked in any way to the monies recovered and exhibited.
>
> He questioned the procedure adopted by the police in respect of handling and exhibiting the cocaine allegedly purchased which was sealed outside of his presence."

She directed herself that the matter turned entirely on the credibility of Sergeant Graham. She noted that he had been instructed to "go undercover and purchase drugs from a man previously unknown to him . . ." She accepted his evidence that he had purchased drugs from the person, Mr Minzett, whom he subsequently identified. She said this:

> "The procedure adopted by the police does not cause me to have a doubt about the *bona fides* of their investigation nor to doubt the truthfulness of the witness. I have considered the lack of supporting evidence highlighted by the defendant but do not accept that this lack undermines the case for the Crown."

She concluded by saying that she was satisfied so that she felt sure that the defendant supplied cocaine to the officer. As we have said, she sentenced Mr Minzett to a term of five years imprisonment for each offence to run concurrently.

The appeal to the Grand Court

4. Mr Minzett appealed to the Grand Court against both conviction and sentence. The grounds of appeal, set out in his appellant's notice dated 6

July 2010 were "Unsafe and unsatisfactory; Harsh and excessive". He chose to conduct the appeal in person; rejecting the judge's offer of an adjournment to enable him to seek legal representation. It appears from the judge's note of the hearing that Mr Minzett advanced the following points in support of his appeal: (i) that the RCIPS officer who acted as purchaser was alone; (ii) that the money which the police officer used to purchase the drugs was not marked; (iii) that there was no recording device; (iv) that he was not arrested at the time he sold the drugs; (v) that the drugs were not sealed in his presence; (vi) that there was no corroboration of the evidence of the undercover police officer; (vii) that the officer was lying or mistaken; (viii) that the case was not proved beyond all reasonable doubt; (ix) that there was an absence of physical evidence and the identification evidence was that of a single officer; (x) that no drugs were found at the time of the arrest; and (xi) that the evidence led by the prosecution did not meet the required standard of proof.

5. Justice Quin dismissed the appeal against conviction on the grounds that the Chief Magistrate had believed Sergeant Graham, finding his evidence to be "clear, cogent and truthful"; that she had properly directed herself as to the standard and burden of proof; and that she had given "clear and unequivocal" reasons for her decision. He dismissed the appeal against sentence on the ground that the sentence passed was not harsh or manifestly excessive "in the light of the Appellant's record and the guidelines".

The ground relied upon in the notice of appeal dated 1 April 2011

6. Section 29(1) of the Court of Appeal Law (2006 Revision) provides that any person aggrieved by any judgment given or made by the Grand Court in the exercise of its appellate jurisdiction (including any judgment on appeal from the Summary Court in criminal proceedings) may appeal to this Court "on any ground of appeal which involves a point of law alone, or against sentence, but not upon any question of fact". Rule 54(2) of the Court of Appeal Rules (2004 Revision) requires that the notice of appeal

from a judgment of the Grand Court given in the exercise of its appellate jurisdiction "shall specify the point or points of law relied upon by the appellant as his grounds of appeal".

7. It is difficult, from the terms in which the only ground of appeal against conviction is stated in the appellant's notice of 1 April 2011, to identify the point or points of law on which the appellant seeks to rely. The ground advanced is: "That reliance on one witness without corroborating evidence in a case of this nature is highly irregular and therefore renders the conviction unsafe and unsatisfactory".

8. It is important to keep in mind that, on a second appeal under section 29(1) of the Court of Appeal Law, it is not open to the Court of Appeal to allow an appeal against conviction unless satisfied that the judgment of the court before whom the appellant was convicted should be set aside "on the ground of a wrong decision on any question of law": that is to say, the only ground upon which, on a second appeal under section 29(1), the Court of Appeal can allow an appeal against conviction is that set out in section 9(1)(b) of the Court of Appeal Law. There is no scope, on a second appeal, for the Court of Appeal to act under sections 9(1)(a) or (c) of that Law. In particular, on a second appeal, the Court cannot allow an appeal against conviction because it thinks that in all the circumstances of the case the verdict is unsafe or unsatisfactory (section 9(1)(a) of the Law) unless it is satisfied that the reason why the verdict is unsafe or unsatisfactory is that the trial judge reached that verdict on the basis of a wrong decision on some question of law. The contention that the trial judge's reliance on the uncorroborated evidence of single witness "is highly irregular and therefore renders the conviction unsafe and unsatisfactory" is not enough to bring the matter within section 29(1) of the Court of Appeal Law. It would be necessary to contend that, as a matter of law, it was not open to the trial judge to convict on the uncorroborated evidence of a single witness "in a case of this nature".

9. If that were the ground which the appellant sought to advance by his notice of appeal dated 1 April 2011 – which, in the light of the submissions made by his counsel, both orally and in writing, at the hearing of the appeal, we think unlikely – it would be necessary to ask what meaning should be given to the phrase "in a case of this nature". It is not clear whether that phrase is intended to have the meaning of "a case where the accused is charged with the offence of selling controlled drugs"; or is intended to have the more specific meaning of "a case where the offence of selling controlled drugs with which the accused is charged involves the sale of such drugs to an undercover police officer".

10. If the phrase "a case of this nature" is understood in the wider sense – that is to say, as meaning "a case where the accused is charged with the offence of selling controlled drugs" then, as it seems to us, the ground cannot be said to "involve a point of law alone". It cannot be said that, as a matter of law, a court cannot (in any circumstances) act on the uncorroborated evidence of a single police officer in a case where the accused is charged with the offence of selling controlled drugs. The most that can be said is that, in such a case and on the particular facts, it may be unsafe and unsatisfactory to do so. But, as we have explained, it is not open to this Court, on a second appeal in criminal proceedings, to substitute its own view of the facts for that of the trial judge in the Summary Court.

11. If, however, the phrase "in a case of this nature" is understood to mean "in a case where the offence of selling controlled drugs with which the accused is charged involves the sale of such drugs to an undercover police officer", then it could be said that the ground does involve a point of law alone. This Court could be asked to decide, on a second appeal, whether, in such a case, the Summary Court ought, as a matter of law, to have excluded the evidence of the undercover police officer.

12. If that were the question raised by the notice of appeal dated 1 April 2011, the answer would plainly be "No": see *R v Sang* [1980] AC 402. There is no defence of "entrapment" known to English law; and "this being the

substantive law upon the matter, the suggestion that it can be evaded by the procedural device of preventing the prosecution from adducing evidence of the commission of the offence does not bear examination" (*ibid*, 432A-D, *per* Lord Diplock); and see observations to the like effect in the speeches of Viscount Dilhorne (*ibid*, 441E-F), Lord Salmon (at 443C-D) and Lord Scarman (at 452F-G).

13. That remains the position in England and Wales notwithstanding the enactment of the Police and Criminal Evidence Act 1984 ("PACE"). Section 78 of that Act reversed the decision in *R v Sang* that the courts had no power to exclude evidence which had been obtained "unfairly"; but it did not alter the underlying principle that there was no rule of law which required that the evidence of the undercover police officer in an "entrapment" case must be excluded. As Lord Nicholls of Birkenhead observed in *R v Loosely* [2001] UKHL 53, [12]; [2001] 1 WLR 2060, 2066*G-H* : "the fact that the evidence was obtained by entrapment does not of itself require the judge to exclude it".

14. It follows, in our view, that – even if, by interpreting the ground advanced in the notice of appeal dated 1 April 2011 in favour of the appellant, it is possible to take the view that that ground does raise some point of law – an appeal on that ground must fail. As a matter of law it was open to the Chief Magistrate to convict the appellant of the offences with which he was charged notwithstanding that the only evidence that those offences had been committed was that of the undercover police officer to whom the drugs were sold.

The application to rely on other grounds of appeal

15. Rule 54(3) of the Court of Appeal Rules provides that "except with the leave of the Court [meaning the Court of Appeal] the appellant shall not be entitled at the hearing of an appeal to rely on any grounds of appeal not specified in the notice of appeal." Recognising, perhaps, the difficulties with which he would be faced in relation to the ground of appeal advanced

in the notice of appeal itself, when the matter came on for hearing before this Court counsel for the appellant – who, it seems, had been instructed at a late stage – sought leave to advance three further grounds:

> "[2] That the Conviction of the Appellant was unsafe due to appointed *amicus curiae* not presenting proactively and/or to a sufficient extent the Appellant's case and defences (procedural and otherwise) so as to be properly presented and considered by the Summary Court. As a result a fair trial did not take place, resulting in an unsafe conviction.
>
> [3] That the Grand Court's reaffirmation of conviction of the Appellant is unsatisfactory and/or unsafe as the Grand Court Judge erred in failing to appoint *amicus curiae* to present the Appellant's case at the appeal. As a result the Appellant did not have a fair hearing as his case was not adequately presented.
>
> [4] That the Summary Court Magistrate and the Grand Court Judge that heard the appeal of conviction . . . erred (for the reasons cited in paragraphs 1 and 2) in not considering whether PC Graham's evidence should have been excluded and/or whether there were sufficient grounds to find that there was an abuse of process of the Summary Court which went to a material irregularity causing the subsequent conviction to be unsafe and unsatisfactory."

16. In our view the grounds which we have numbered [2] and [3] cannot be said to "involve a point of law alone" within the meaning of section 29(1) of the Court of Appeal Law. Accordingly, we do not give leave to rely on those grounds. But, as it seems to us, the ground numbered [4] can be said to involve a point of law: should the Chief Magistrate have considered whether the evidence of the undercover police officer to whom the drugs were sold ought to be excluded: either in the interests of a fair trial or on the more general ground that it was necessary to do so in order to protect the criminal process from abuse?

17. To put the point in another way: if (as we have held) there is no requirement, as a matter of law, that the evidence of the undercover police officer to whom the drugs were sold must be excluded, did the trial judge err in law in failing to consider whether, as a matter of discretion, she should exclude that evidence. Further, giving the words used in the ground

numbered [4] an interpretation favourable to the appellant, did the trial judge err in law in failing to consider whether the trial should be stayed *in limine* on the ground that there were sufficient grounds to find that there was an abuse of process of the Summary Court?

Did the trial judge err in law in failing to consider whether the evidence of the undercover police officer should be excluded?

18. In her Reasons for Decision the Chief Magistrate expressed the view that "the procedure adopted by the police does not cause me to have a doubt about the *bona fides* of their investigation nor to doubt the truthfulness of the witness". She stated that she had considered the lack of supporting evidence highlighted by the defendant; but that she did not accept "that this lack undermines the case for the Crown". She did not say, in terms, that she had considered whether or not to exclude the evidence of Sergeant Graham on the grounds that he was the undercover police officer to whom the drugs were sold; and, if she did consider that question, she did not explain why she had decided against excluding that evidence.

19. We think it clear that, as the law now stands in England and Wales following the decision of the House of Lords in *R v Loosely* (*supra*), a judge before whom a case of this nature came for trial in that jurisdiction would need to address the question whether, as a matter of discretion, the evidence of an undercover police officer in an "entrapment" case ought to be excluded under section 78 of PACE. Failure to address that question would, we think, be an error of law.

20. It does not follow that that is the position in this jurisdiction. Section 78(1) of PACE is in these terms:

> "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, *including the circumstances in which the evidence was obtained*, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." [emphasis added]

Section 78(1) of PACE has no counterpart in the legislation of the Cayman Islands. We were taken to section 40 of the Evidence Law (2007 Revision). That section is in these terms:

> "Nothing in this Law derogates from the power of a court in any criminal proceeding to disallow evidence otherwise admissible which, in the opinion of the court, would, if allowed, operate unfairly against an accused person."

It is plain that that section preserves the existing power of a court to exclude evidence, otherwise admissible, if to allow that evidence to be given would or might lead to the trial being unfair. But, importantly in the present context, section 40 of the Evidence Law does not purport to extend that power. In particular, it does not include the words of section 78(1) of PACE which we have emphasised: "including the circumstances in which the evidence was obtained".

21. It is important to have in mind the question which had been referred to the House of Lords in *R v Sang* (*supra*) and the answer which was given to that question. The question referred asked:

> "Does a trial judge have a discretion to refuse to allow evidence – being evidence other than evidence of an admission – to be given in any circumstances in which such evidence is relevant and of more than minimal probative value?"

The House of Lords answered that question in these terms:

> "(1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained. It is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of the activities of an agent provocateur."

As we have said, section 78(1) of PACE reverses the decision of the House of Lords in *R v Sang*: see the observations of Lord Nicholls of Birkenhead in *R v Loosely* (*supra*, at [11]). It does so by the words to which we have

already drawn attention: "including the circumstances in which the evidence was obtained". Absent those words, the position remains as stated by the House of Lords in *R v Sang*: the trial judge has no discretion to exclude admissible evidence on the ground that it was obtained by improper or unfair means.

22. That, as it seems to us, is the position in this jurisdiction. The court is not concerned with how the evidence was obtained: it is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of an undercover operation. It follows that the Chief Magistrate did not err in law in failing to consider whether the evidence of the undercover police officer should be excluded. The law as it is in the Cayman Islands did not allow her to exclude that evidence.

Did the trial judge err in law in failing to consider whether there were sufficient grounds to find that there was an abuse of process of the Summary Court such that the trial should be stayed?

23. As Lord Nicholls explained in *R v Loosely* (*supra* at [11], [13]) the criminal law in England and Wales had undergone a second, non-statutory, development since the decision in *R v Sang*:

> "[13] . . . In *R v Horseferry Road Magistrate's Court, Ex p Bennett* [1994] 1 AC 42 your Lordship's House held that the court has jurisdiction to stay proceedings and order the release of the accused when the court becomes aware there has been a serious abuse of power by the executive. The court can refuse to allow the police or prosecuting authority to take advantage of such an abuse of power by regarding it as an abuse of the court's process. . . ."

He went on:

> "[16] Thus, although entrapment is not a substantive defence, English law has now developed remedies in respect of entrapment: the court may stay the relevant criminal proceedings, and the court may exclude evidence pursuant to section 78. In these respects *Sang* has been overtaken. Of these two remedies the grant of a stay, rather than the exclusion of evidence at the trial, should normally be regarded as the appropriate response in a case of entrapment. . . .
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> [17] I should add that when ordering a stay, and refusing to let a prosecution continue, the court is not seeking to exercise disciplinary powers over the police, although staying a prosecution may have this effect. As emphasised earlier, the objection to criminal proceedings

> founded on entrapment lies much deeper. For the same reason, entrapment is not a matter going only to the blameworthiness or culpability of the defendant and, hence, to sentence as distinct from conviction. Entrapment goes to the propriety of there being a prosecution at all for the relevant offence, having regard to the state's involvement in the circumstance in which it was committed.
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> [18] A further point of principle should be noted. As observed by Auld LJ in *R v Chalkley* [1998] 2 Cr App R 79, 105, a decision on whether to stay criminal proceedings as an abuse of process is distinct from a determination of the forensic fairness of admitting evidence. Different tests are applicable to these two decisions. Accordingly, when considering an application by a defendant to exclude evidence under section 78, courts should distinguish clearly between an application to exclude evidence on the ground that the defendant should not be tried at all and an application to exclude evidence on the ground of procedural fairness. Sometimes a defendant may base his application under section 78 on both grounds. Then the court will need to reach a separate decision on each ground."

24. That the jurisdiction to stay on grounds described by Lord Griffiths in the *Bennett* case (*ibid*, 62B-C) as the prevention of abuse of executive power could be exercised in an entrapment case had been treated by the House of Lords in *R v Latif, R v Shahzad* [1996] 1 WLR 104 as settled. Lord Steyn (*ibid*, 112) said this:

> "It is plain that a fair trial was possible and that such a trial took place. In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: *Reg v Horseferry Road Magistrate's Court, Ex p Bennett* [1994] 1 AC 42."

He went (*ibid*, 113A-B) to say that:

> "General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those who are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means."

Those passages were treated as a definitive statement of the law by the United Kingdom Supreme Court in its recent decision in *R v Maxwell* [2010] UKSC 48, [14], [93] [2011] 1WLR 1837, 184 *A-D,*1862*H*-1863*B*.

25. It is important to appreciate that the question whether a criminal trial should be stayed on the ground that to allow it to continue would be to condone an abuse of executive power is distinct from the question whether evidence, otherwise admissible, should be excluded in the interests of a fair trial; not withstanding that, under the law of England and Wales as it now stands, the same underlying facts may give rise, in some cases, to the need to consider both questions. The distinction is of importance in this jurisdiction because the need to address the first question will arise in an entrapment case notwithstanding that, absent any provision comparable to section 78(1) of PACE in the legislation of the Cayman Islands, the need to address the second question will not arise.

26. In the present case the Chief Magistrate did not address the question whether the trial should be stayed on the ground that to allow it to continue would be to condone an abuse of executive power. She was not asked to do so, either on behalf of Mr Minzett (understandably, perhaps, as he was conducting his defence on the basis that the sales of controlled drugs in respect of which he was charged had never taken place) or by counsel assisting the court as *amicus curiae*. In those circumstances it is necessary to ask whether, in failing to consider that question, the Chief Magistrate erred in law.

27. Had this matter been tried before a judge of the Grand Court, we would have taken the view that failure to consider whether there should be a stay in a case of entrapment was an error of law. But we would be reluctant to reach that conclusion in the present case. We have in mind the observations of Lord Griffiths in the *Bennett* case (*supra,* [1994] 1 AC 42, 64B-C. After affirming the power of the magistrates, whether sitting as committing justices or exercising their summary jurisdiction, to exercise control over their proceedings through an abuse of process jurisdiction, he went on:

> "However, in the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the

> particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. . . . I adhere to the view I expressed in *Reg v Guildford Magistrates' Court, Ex parte Healy* [1983] 1 WLR 108 that this wider responsibility for upholding the rule of law must be that of the High Court and that if a serious question arises . . . a magistrate should allow an adjournment so that an application can be made to the Divisional Court which I regard as the proper forum in which such a decision should be taken."

The Chief Magistrate was not asked to adjourn the matter to the Grand Court. The appellant does not suggest, in his original or proposed additional grounds of appeal, that she should have done so of her own motion. The issue has not been raised and we do not think it necessary to decide it.

28. We do not think it necessary to decide that issue because, even if we were persuaded that the Chief Magistrate erred in law in failing to consider whether there should be a stay of the trial in this case in order to avoid the perception that the court was condoning an abuse of executive power, we are satisfied that no substantial miscarriage of justice actually occurred, Accordingly, this would be a case for the application of the proviso to section 9(1) of the Court of Appeal Law:

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

29. We take that view in the circumstances that we are satisfied that, had the Chief Magistrate addressed the question whether there should be a stay in this case – or whether she should, of her own motion, remit that question to the Grand Court – she would have been bound to conclude that this was so obviously not a case for a stay that the proper course was to proceed with the trial which was before her.

30. In reaching that view we have in mind the observations of Lord Bingham of Cornhill, Chief Justice, when giving the judgment of the Divisional Court in *Nottingham City Council v Amin* [2000] 1 WLR 1071, 1076 H-1077 (cited with approval by both Lord Hoffman and Lord Hutton in *R v Loosely* (*supra,* [53] and [99])) that:

> "On the one hand it has been recognised as deeply offensive to ordinary notions of fairness if a defendant were to be

> convicted and punished for committing a crime which he only committed because he had been incited, instigated, persuaded, pressurised or wheedled into committing it by a law enforcement officer. On the other hand it has been recognised that law enforcement agencies have a general duty to the public to enforce the law and it has been regarded as unobjectionable if a law enforcement officer gives a defendant an opportunity to break the law, of which the defendant freely takes advantage, in circumstances where it appears that the defendant would have behaved in the same way if the opportunity had been offered by anyone else."

After citing that passage Lord Hutton went on to say this (*R* v *Loosely*, [102]):

> "In considering the distinction (broadly stated) between a person being lured by a police officer into committing an offence so that it will be right to stay a prosecution, and a person freely taking advantage of an opportunity to commit an offence presented to him by the officer, it is necessary to have in mind that a drugs dealer will not voluntarily offer drugs to a stranger, unless the stranger first makes an approach to him, and the stranger may need to persist in his request for drugs before they are supplied. Therefore, in my opinion, a request for drugs, even if it be persistent, need not be regarded as luring the drugs dealer into committing a crime with the consequence that a prosecution against him should be stayed. If a prosecution were not permitted in such circumstances the combating of the illegal sale of drugs would be severely impeded, and I do not consider that the integrity of the criminal justice system would be impaired by permitting a prosecution to take place. In my opinion a prosecution should not be stayed where a police officer has used an inducement which (in the words of McHugh J in *Ridgeway v The Queen* 184 CLR 19, 92) 'is consistent with the ordinary temptations and stratagems that are likely to be encountered in the course of criminal activity'. This is in conformity with the approach taken by the United States Supreme Court in *Sorrells v United States* (1932) 287 US 435, 441 where the court stated:
>
> > 'It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises . . . . The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the

> illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law. A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.'
>
> See also *United States v Russell* (1973) 411 US 423, 435 and 436."

There is, as it seems to us, much good sense in the observation of the trial judge in *R* v *Latif*, cited by Lord Steyn in that case ([1996] 1 WLR 104, 110F-G) that:

> "Though no court will readily approve of trickery and deception being used, there are some circumstances in which one has to realise, living in the real world, that this is the only way in which some people are ever going to be brought to trial, otherwise the courts will not get to try this sort of offence against people who are seriously involved in it."

Conclusion

31. We think it right, in the circumstances of this case, to give leave to rely on the additional ground of appeal (which we have numbered [4]; but, for the reasons which we have set out, we dismiss the appeal and confirm the convictions.

Conteh JA

32. I agree that the appeal should be dismissed for the reasons so lucidly stared by Chadwick P. The so-called defence of "entrapment" was never part of the defence: the appellant manifestly willingly sold the drugs on a number of occasions to the main prosecution witness, Officer Graham. The appellant's undoing was that he did not know at the times he sold the drugs

that Officer Graham was a police officer in plain clothes. In the circumstances, the purported ground of entrapment sought to be advanced on behalf of the appellant, I agree is without any merit.

Chadwick P

Forte JA

Conteh JA