JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 18/92

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (Ag.)

REGINA vs. ROLERT BROOKS

Earnham Macaulay, Q.C. and Rudolph Francis for appellant

Miss Diana [illegible], Deputy Director of Public Prosecutions for Crown

13th, 14th and 31st. July, 1992

WOLFE, J.A. (Ag.):

The appellant Robert Brooks, an engineer aged 25 years, was on the 27th day of February, 1992 convicted in the Resident Magistrate's Court for the parish of Kingston by Her Honour Mrs. Zaila McCalla, one of the Resident Magistrates for the said parish, for the offences of:

(a) Possession of Ganja

(b) Taking Steps Preparatory to Export Ganja from the Island of Jamaica

(c) Unlawfully Dealing in Ganja.

In accordance with the convictions the learned Resident Magistrate imposed the following sentences:

(a) Fined $15,000 or four (4) months imprisonment at H.L. In addition three (3) months imprisonment at H.L. to run consecutive to sentence on Inf. 6441/91 (Dealing in Ganja) if fines not paid.

(b) Fined $50,000 or six (6) months imprisonment at H.L.

(c) Fined $50,000 or six (6) months imprisonment at H.L.

The appellant now appeals against the convictions and sentences.

The nature of the grounds of appeal makes it necessary to set out in some detail the evidence adduced at the trial. On Tuesday December 24, 1991 at approximately 1:30 a.m. Acting Corporal Ludlow Robinson of the Canine Division, Up Park Camp was on narcotics duty at the Norman Manley International Airport in the parish of Kingston. Accompanying him on his tour of duty was police narcotics detector dog Benjie. In the process of carrying out narcotics check on luggage scheduled for Air Jamaica Flight 015 destined to New York, Benjie alerted Acting Corporal Robinson to two red and brown carton boxes each marked Shell XX 100-50 Monograde Motor Oil. Both boxes were removed to the Canine Post. Following information received from an agent employed to Air Jamaica the police officer proceeded to the immigration outgoing department and then to the Air Jamaica Boarding Desk at gate No. 4, where the appellant checked in to board the Air Jamaica Flight 015 destined to New York. The officer accosted him, after identifying himself as a police officer, and enquired of him if he had checked in any luggage. The appellant replied in the affirmative, stating that he had checked in two boxes for a friend. He was invited to accompany the officer to the Canine Post at the Airport. The appellant obliged.

Upon arrival at the Canine Post he was shown the two boxes referred to earlier and he identified them as the two boxes he had checked in earlier that morning. The officer informed the appellant that he suspected that the boxes contained Narcotics, whereupon the appellant said:

> "...a friend by the name of Gary ask me to deliver them to a friend in New York and they only contain tapes and records."

Both boxes were opened in the presence of the appellant. The first box opened and later labelled "A" contained five (5)

metal reels each marked Ampex 456 Brandmaster, one (1) metal reel marked "Scotch" and a quantity of music records. Each metal reel was pierced with a knife and vegetable matter resembling ganja was observed. The appellant was informed that each reel contained ganja. He made no response.

The other box, which was subsequently marked "B", was opened and contained six (6) metal reels marked Ampex 456 Brandmaster and one (1) metal reel marked "Scotch". Each reel when pierced with a knife was found to contain ganja. Upon being so informed the appellant said:

> "...a friend gave me them to deliver to a friend in New York."

He was arrested and charged for possession of ganja, dealing in ganja and taking steps preparatory to export ganja. When cautioned he said:

> "...Officer a friend by the name of Gary gave me these tapes to deliver to a friend in New York."

At this stage the appellant produced from his pocket a telephone directory and showed the officer a telephone number which he said Gary had given him for the purpose of contacting him, Gary, as soon as he arrived in New York. The appellant along with the two (2) boxes were taken to the Norman Manley Police Station where the boxes were labelled and sealed in the presence of the appellant. He handed over to the police an airline ticket folder, which contained one airline ticket, a PanAm Airline identification card and two airline ticket stubs, marked Air Jamaica JFK, each bearing a number which corresponded with the number on the boxes. In addition he also handed over a United States Alien Resident Certificate.

On December 27, 1991 the sealed boxes were submitted to the Government Chemist for analysis. A Certificate under the hand of David Lee, Government Analyst, Forensic Laboratory and dated the 10th January, 1992 was tendered and admitted into

evidence. As knowledge is an important ingredient of the offence of possession and as the condition and circumstances under which the ganja was found is evidence from which knowledge may properly be inferred, we set out in some detail the contents of the Analyst's Certificate. In respect of the box marked "A" it contained inter alia:

> "Five (5) reels of recording tape, each labelled 'AMPEX 456' and one reel of recording tape labelled 'Scotch', all containing a circular parcel made from transparent plastic material, taped with brown masking tape and containing compressed vegetable matter resembling ganja."

The box marked "B" contained inter alia:

> "Six (6) reels of recording tape labelled 'AMPEX 456' and one reel of recording tape labelled 'Scotch', all containing a circular parcel made from transparent plastic material, taped with brown masking tape, wrapped with tan brown paper and containing compressed vegetable matter resembling ganja."

Examination and tests carried out on the vegetable matter revealed parts of the plant Cannabis Sativa from which the resin was not extracted. The analyst therefore concluded that the vegetable matter is ganja. The total weight of the ganja was 37.4 lbs being 17.3 lbs in box "A" and 20.1 lbs in box "B".

When the appellant testified he admitted that he had earlier that night checked in the boxes marked "A" and "B". He however, contended that one Gary had asked him to deliver the boxes to a friend in New York. He swore on oath that he was unaware that the contents of the boxes included ganja. He had been led to believe that the boxes contained tapes and records and that he checked the boxes and satisfied himself that both boxes contained only tapes and records. The appellant said he was shocked when Acting Corporal Robinson advised him that ganja was concealed in the tapes.

The first ground of appeal argued before us sought to

challenge the validity of the Certificate tendered in evidence, pursuant to section 27 of the Dangerous Drugs Act. The challenge was posited thus:

> "The certificate, purporting to satisfy section 27 of the Dangerous Drugs Act, in order to prove the subject matter of the charge as 'ganja', had no evidentiary effect as Dr. David Lee is not a person designated under Section 17 of the Food and Drugs Act, as either a Government Chemist or analyst."

Section 27 of the Dangerous Drugs Act states:

> "In any proceedings against any person for an offence against this Act the production of a certificate signed by a Government Chemist or any Analyst designated under the provisions of section 17 of the Food and Drugs Act, shall be sufficient evidence of all the facts therein stated, unless the person charged requires that the Government Chemist or any Analyst be summoned as a witness, when in such case the Court shall cause him to attend and give evidence in the same way as any other witness."

Section 17 of the Food and Drugs Act states:

> "The Minister may from time to time designate any public officer whether by name or by the title of his office to be an inspector or analyst for the purposes of this Act."

Counsel for the appellant contended that Dr. David Lee did not sign the certificate as Government Chemist and although he has signed as "Government Analyst Forensic Labaratory" he failed to state on the face of the certificate that he has been so designated pursuant to Section 17 of the Food and Drugs Act. Continuing he urged that as the certificate replaced the necessity for viva voce evidence, but for which it would be inadmissible as being hearsay evidence, compliance with the statute must be very strict and there must be proof beyond reasonable doubt that the person purporting to sign the certificate was a person so designated under section 17 of the Food and Drugs Act. Failure

to so state on the face of the certificate, argued Mr. Macaulay, Q.C., rendered it inadmissible. Consequently there was no proof that the vegetable matter was ganja. Support for this proposition was sought in C.A. 40/88 **Glen Stuart v. Vaughan Musgrove** an unreported decision of the Court of Appeal of the Commonwealth of the Bahamas. Musgrove was charged with the possession of dangerous drugs without proper authority and possession of dangerous drugs with intent to supply. At the trial the prosecution tendered the report purporting to have been made by "Analyst Inspector Ferguson" in accordance with the amendment to the Criminal Procedure Code - Section 117 (4) enacted by Act 2 of 1987. Section 117 (1) in so far as it is relevant reads:

> "(1) Any document purporting to be ...
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> (a) a report made under the hand of an analyst on any matter or thing duly submitted to him for an examination and report
>
> shall be receivable in any criminal proceedings in any court as evidence of any matter or things contained therein relating to the ... examination.
>
> (4) In this section the expression 'analyst' means a person employed in the public service as an analyst. ..."

The report, as it is referred to by the Bahamian Statute, was signed by "Elbert W. Ferguson B.Sc." who described himself therein as "Forensic Chemist."

On appeal before the Supreme Court, Appeal side, it was argued that the magistrate erred in admitting into evidence the report as it did not satisfy the provisions of section 117 of the Criminal Procedure Code. Georges, C.J., held:

> "Section 117 make admissible in evidence a document which otherwise would not have been admissible. It specifies the conditions under which the document is admissible. It must be under the hand of an 'analyst' i.e. a 'person employed in the public service as an analyst.' The report does not on the face of it establish that it is such a document ... The report should be signed by a person who states his or her qualification as analyst employed in the public service. Once this is done authority of the signature will be presumed until otherwise established. I find the report is inadmissible for that reason."

The prosecution appealed to the Court of Appeal. The Court in affirming the decision of Georges, C.J., said:

> "For the purpose of determining the authenticity and therefore the admissibility of a document sought to be tendered under section 117, subsection (5) of the section empowers the court to apply two presumptions, namely -
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> 1. that the signature on the document is genuine and
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> 2. that the person preparing or signing it held the qualifications and office which he professed to hold at the time of that preparation or signature.
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> In the case of the 'analyst' as we have indicated he may be one of three descriptions of person. In order to determine whether a particular document is a report made under the hand of an analyst and therefore admissible under section 117 (1) (b), a court must first determine whether the person preparing or signing it falls into one of the three descriptions of persons. Section 117 (5) permits this determination to be made if this person preparing or signing the document states the 'qualification and office' which bring him within one of the three descriptions of persons who qualify as analysts. Unless the person signing so states the presumption for which subsection (5) provides cannot arise and the document would not therefore be admissible. In the present case the person signing did not so state."

A careful comparison of the local statute and the Bahamian Statute indicates that both statutes are not in pari materia. The Bahamian Statute describes the three categories of persons who for purpose of section 117 are to be regarded as analyst whereas section 27 of the Jamaican statute speaks only of "any analyst designated under the provisions of section 17 of the Food and Drugs Act." Consequently once a person signs a certificate as "Government analyst", as in this case, that is prima facie evidence that he is an analyst within the meaning of section 17. In this case there was no evidence to the contrary to displace the application of this presumption. We are of the view that the signatory to a certificate under section 27 of the Dangerous Drugs Act, who signs as Government Analyst is not required to further state on the face of the certificate that he has been so designated under section 17 of the Food and Drugs Act. Any doubt of the competence of the Analyst can be addressed by requiring him to attend and give evidence.

Secondly, in **Musgrove's** case the signatory signed as "Forensic Chemist" a creature unknown to the relevant statute. The phrase "Forensic Chemist" could not activate the presumptions contained in section 117 (5). In the peculiar circumstances of **Musgrove's** case we respectfully agree with the judgment of the Bahamian Court of Appeal. However, we hold that in this case the certificate was properly admitted into evidence pursuant to section 27 of the Dangerous Drugs Act and was adequate proof that the substance the subject matter of the charge was ganja within the meaning of the Dangerous Drugs Act. This ground of appeal therefore fails.

Before parting with this ground it is interesting to note that within three (3) months of the decision in **Musgrove's** case the Bahamian Legislature enacted an amendment to section 117 of the Criminal Procedure Code Act by inserting immediately after subsection (5) the following subsection -

> "(6) Notwithstanding anything to the contrary in this or any other law, any document purporting to be a report of an analysis, test or examination carried out by a person employed in the public service in the capacity of an analyst, Chemist or laboratory technician or medical practitioner shall be receivable without proof of the signature, qualification, employment or office of the person by whom the report purports to be issued, in any proceedings of a criminal nature as prima facie evidence of the results of such analysis, test or examination, as the case may be." [Emphasis supplied]

The second ground of appeal I will summarize because of its prolixity. It was mooted that in concluding that the appellant had the necessary mens rea the learned Resident Magistrate proceeded on the basis that once the appellant admitted physical possession then knowledge of the contents is presumed unless the contrary is shown by the appellant. In such circumstances the learned Resident Magistrate misdirected herself on the onus of proof.

In **R. v. Nicholson** [1971] 12 J.L.R. 568 at page 571 D-G **Luckhoo, J.A.,** said:

> "... We are in agreement with the view taken by the Court of Appeal in R. v. Cyrus Livingston [1952], 6 J.L.R. 95 that mens rea is a necessary ingredient in proof of a charge of possession of ganja. Once the prosecution adduces evidence in proof (i) of the 'fact of possession', that is that the accused person had the thing in question in his charge and control and knew that he had it, and (ii) that the thing is ganja, it may be inferred that he knew that the thing he had was ganja. This inference if drawn is in the nature of a rebuttable or provisional presumption arising from the fact of possession of a substance the possession of which is prohibited and may be displaced by any fact or circumstance inconsistent therewith whether such fact or circumstance arises on the case for the prosecution or for the defence. If displaced by reason of any fact or circumstance inconsistent therewith on the case for the prosecution then a prima facie case is not made out. Where a

> "prima facie case is made out, the evidential burden shifts to the defence to displace the inference of knowledge in the accused person even though the legal burden of proof remains throughout on the prosecution."

Further in **R. v. Connel** [1971] 12 J.L.R. 578 at page 581 Fox, J.A., in an analysis of the judgment of O'Connor, C.J., in **R. v. Cyrus Livingston** (supra) opined that:

> "The function of the court was to weigh all the facts and arrive at a decision in accordance with the incidents of the burden and of the degree of proof in criminal cases."

Against the background of these decided authorities, how did the learned Resident Magistrate approach the question of mens rea? The learned Resident Magistrate in addressing the question of whether the appellant had the necessary knowledge that what he had was ganja, said:

> "The Court carefully examined, assessed and considered all the evidence presented in order to determine the crucial question of whether he could be believed when he said he did not know ganja was contained in Exhibits 4 and 5 and whether the Crown had discharged the burden of proof to the standard required."

So clearly as the above extract indicates, the Resident Magistrate was ever mindful of the fact that the burden of proof as to knowledge rested upon the Crown.

How did she approach the task of ascertaining whether or not the prosecution had satisfactorily proved that the accused had knowledge? She said:

> "Bearing in mind that:
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> (a) there was no admission by accused that he knew ganja was contained in exhibits 4 and 5;
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> (b) the ganja was concealed underneath the tapes;
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> (c) the Crown presented no other evidence to link him with knowledge of the ganja apart from his admittedly having physical

> " custody of exhibits 4 and 5, the Court considered carefully the evidence of the accused as to his absence of knowledge. The Court considered the circumstances in which the accused arrived, remained and subsequently attempted to leave the island ...".

Having so stated she set out in her findings a detailed examination of the circumstances of the case and concluded that the accused had the requisite knowledge. Her approach is beyond reproach. We are satisfied that she employed and applied the correct standard of proof in coming to her conclusion that the accused had knowledge that he was physically in possession of ganja.

In any event Mr. Macaulay in making his submissions emphatically stated that he was not contending that there was not evidence upon which the Resident Magistrate could have properly found that the appellant had knowledge. He further conceded that her method of approach in resolving the issue could not be faulted. Finally he conceded that even if his argument was successful it could properly be argued that this was a fit case in which to apply the proviso to section 14 (1) of the Judicature (Appellate Jurisdiction) Act. Had we decided the point in favour of the appellant we would most surely have applied the proviso as indicated by Mr. Macaulay.

The third ground of appeal argued sought to impeach the conviction for dealing in ganja contrary to section 7D (a) of the Dangerous Drugs Act. It was urged that there was no evidence, led by the prosecution and indeed none at all, to support the charge of dealing. Miss Diana Harrison, Deputy Director of Public Prosecutions made short shrift of this argument by reference to section 22 (7) (e) of the Dangerous Drugs Act which states:

> "(7) A person, other than a person lawfully authorised, found in possession of more than -
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> ...
>
> (e) eight ounces of ganja

> "is deemed to have such drug for the purpose of selling or otherwise dealing therein, unless the contrary is proved by him."

The ganja which the appellant had amounted to 37 lbs 4 ozs. He offered no evidence to negative the deeming provisions of the section. Hence the verdict was inevitable.

R. v. Hooper and Another [1975] 2 N.Z.L.R. page 763 was cited and relied upon by counsel for the appellant, in support of his submission. Suffice it to say, we find that decision unhelpful as it was based upon the meaning of the phrase "otherwise deal" in the context of section 5 (1) (d) of the relevant statute.

Finally there was the complaint that the sentence of three (3) months imposed on the appellant for possession of ganja was manifestly excessive and had no rehabilitative element in it. We found absolutely no merit in this ground. The trafficking of drugs is big business. Because of the large sums of money involved in this business, heavy fines by themselves are no deterrent to traffickers or would be traffickers. The sting of the sentence is in its custodial aspect. The legislature, notwithstanding the large pecuniary penalty it has empowered the Resident Magistrate to impose, has gone further and empowered the magistrate to impose a term of imprisonment of up to two years in addition to the fine. A sentence of three months imprisonment in the face of this barefaced attempt to export ganja, is nothing but a mere slap on the wrist. The implications of exporting ganja on our local carrier cannot go unnoticed. For the custodial sentence to have the desired effect of eradicating this scourge, magistrates would be well advised to impose a custodial sentence in the upper half of the sentence of two (2) years permitted under the law. By no stretch of the imagination could the sentence imposed be considered manifestly excessive. In R.M.C.A. No. 100/85 **Fitzroy Craigie and Others,** unreported, dated May 1986, Craigie and others were fined $10,000 or 3 years hard labour and in addition thereto sentenced

to imprisonment at hard labour for 2 years for various offences against the Dangerous Drugs Act. On appeal against sentence Kerr, P. (Ag.) said:

> "In declining to interfere with the sentence we had to weigh against the considerations urged, the amount of ganja involved, the international scope of the illicit endeavour, and the prevalence of the offence ..."

We consider this approach to be a proper one and find it appropriate in the circumstances of this case.

It is for these reasons stated that we dismissed the appeal and confirmed the convictions and sentences of the Court below.