

JAMAICA

IN THE COURT OF APPEAL

REFERENCE NO. M12/80 FROM THE GOVERNOR-GENERAL

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BEFORE: THE HON. MR. JUSTICE LEACROFT ROBINSON - PRESIDENT
THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE ROWE, J.A.

IN THE MATTER OF SECTION 24 OF THE DANGEROUS
DRUGS ACT

AND

IN THE MATTER OF application by Philip Bender
for the Revocation of an Order of Forfeiture
made in respect of Cessna Aircraft 414,
Registered N4699N Serial No. 0084.

Mr. Ernest Smith for Appellant Philip Bender

Mr. Henderson Downer and Mr. Soares for the Crown

April 17, 18, 21; May 19, 1980

.....and November 14, 1980.

KERR, J.A.:

Philip Bender, the applicant is an American Businessman residing at Canton, County of Wayne, Michigan. In January 1979, he purchased the plane, the subject of this application with the help of a loan of \$305,000.00 from the Ford Motor Company of Ohio, U.S.A. The plane was hired or leased to the Enterprise Aviation, a Company incorporated in the U.S.A. - and whose business was an Air-taxi Service. Wayne Stayton, the authorised pilot, was the president and sole shareholder of the Company.

On April 27, 1979 Stayton flew the plane to Jamaica and about 2:30 a.m. the following day he and two other men were seen loading ganja in the plane at Boscobel Airport in the parish of St. Mary. They were arrested and in the Resident Magistrate's Court held at Richmond, St. Mary they pleaded guilty to attempting to export ganja and were convicted and sentenced

for that offence. On application of the prosecution, the learned Resident Magistrate ordered that the Aircraft be forfeited pursuant to Section 24 (2) (b) of the Dangerous Drugs Act.

Bender's subsequent application to the Resident Magistrate under Section 24 (3) for a revocation of the order was refused on September 13, 1979.

The matter came before this Court on a reference from the Governor-General under Section 29 (1) (a) of the Judicature (Appellate) Jurisdiction Act and as provided therein was heard and determined as an appeal.

Section 24 of the Dangerous Drugs Act provides:-

" (1) If any constable has reasonable cause to suspect that any conveyance is being used or has been used for the commission of any offence against this Act, he may without a warrant search and, if such search reveals evidence that the conveyance is being used or has been used for the commission of any offence as aforesaid, seize and detain such conveyance.

(2) On the conviction of any person for an offence against this Act, the Court shall, upon the application of the prosecution, order the forfeiture of any conveyance used in the commission of the offence, and seized pursuant to this section, if the Court is satisfied that -

(a) such person owns the conveyance, or the owner thereof permitted it to be so used; or

(b) the circumstances are otherwise such that it is just so to order.

(3) If, upon the application of any person prejudiced by an order made by the Court under subsection (2), the Court is satisfied that it is just to revoke such order, the Court may, upon such terms and conditions (if any) as it deems meet, revoke that order.

(4) Any application to the Court under subsection (3) for the revocation of an order shall be made within three months of the date of the order:

Provided that where the applicant satisfies the Court that, in the special circumstances of the case, it was not reasonably practicable for him to make such application within the period of three months aforesaid, the time (whether expired or not) for making that application may be extended by the Court as it thinks just."

At the hearing of his application, Bender exhibited the lease

which contained the following terms:-

"PHILIP K. BENDER, JR. AGREES:

To provide for the use of Enterprise Aviation one (1), 1978 Cessna 414A Aircraft, N4699N, Serial # 0084.

To be financially responsible for all maintenance to said Aircraft.

To be financially responsible for Commercial Insurance on said Aircraft, in the amount legally required for far 135 operations.

To provide Enterprise Aviation with as much notice as possible and practical when the Aircraft will be required for the personal use of Mr. Philip K. Bender, Jr.

To compensate Enterprise Aviation for any fuel used in the Aircraft for the personal use of Mr. Philip K. Bender, Jr.

ENTERPRISE AVIATION AGREES:

To utilize the Aircraft provided by Philip K. Bender, Jr., only for legal and legitimate purposes; and to protect the interests of Mr. Philip K. Bender, Jr. in said Aircraft to the fullest extent possible at all times.

To compensate Mr. Philip K. Bender, Jr., one hundred forty dollars (\$140.00) for each hour of revenue producing use generated by Enterprise Aviation.

To implement the insurance coverage required for said aircraft, and to bill Philip K. Bender Jr., only for the actual cost of such insurance, if so directed by Philip K. Bender, Jr.

To restrict the use of the aircraft to only those pilots who have:

- (a) Any pilot holding an FAA commercial pilot certificate with FAA multi-engine and instrument ratings who has flown a minimum of 1,500 hours as pilot in command at least 500 hours of which shall have been in multi-engine aircraft and at least 50 hours of which shall have been in Cessna 400 series aircraft.
- (b) A check out in the aircraft from the chief pilot of Enterprise Aviation.

To provide Philip K. Bender, Jr., by the 15th of the following month, a tabulation of the hours flown by the aircraft during the month, and the type of such flights (i.e. rental, personal use by Philip K. Bender, Jr., ferry for service, etc.,)

To provide scheduling for all users of said aircraft.

To provide all required maintenance on said aircraft, at the current shop rate, if so directed by Philip K. Bender, Jr."

At the material time the aircraft was duly licensed and insured. The insurance coverage was limited to the United States and its territories and possessions, Canada, Mexico, the Bahamas Islands or while enroute between those places. Jamaica is not a country enroute between those places and is outside the confines of operation as contemplated by implication in the lease and expressly covered by the policy of insurance.

Before us as before the Resident Magistrate it was urged in effect that the applicant acted throughout with propriety and prudence and took all reasonable steps including supervision of the flight schedules to ensure that the aircraft was used for legitimate purposes and in keeping with the terms of the contract of hirage.

The Resident Magistrate notwithstanding he had reserved judgment refused the application in the following terse and unhelpful terms;

"The Court having considered the various documents filed, the evidence on oath and submissions of Counsel, Court is satisfied that this is not a fit and proper case in which it ought to grant this application, that is that it would not be just to revoke the order of the Learned Resident Magistrate and accordingly this application is hereby refused."

His omission to state his findings of facts has necessitated our careful consideration of the evidence tendered on behalf of the applicant.

At the hearing before the Resident Magistrate the applicant gave evidence on oath, tendered a number of affidavits, exhibited the insurance policies and other documents and was closely cross-examined by Counsel for the Prosecution.

The Prosecution filed no counter affidavits nor called any evidence. It was quite properly conceded then and before us that there was no evidence from which it could be inferred that Bender was a party to the

illicit venture or had any knowledge, actual or imputed, that the aircraft would be used for the conveying of dangerous drugs.

Affidavits of the applicant's good character and repute from (amongst other persons); the Presiding Judge of the 18th Judicial District Court, Westland, Michigan, The Mayor of the City of Westland, Wayne, and The Chief of Police of the same city were tendered.

From the evidence tendered on behalf of the applicant the following unchallenged or uncontroverted facts emerge:-

1. That over a year prior to this incident there existed as between the applicant and Stayton's Company a lease in respect of another plane on similar terms and that Stayton to the best of the applicant's knowledge lawfully and faithfully performed the contract in accordance with its terms.
2. He had investigated:-
 - (a) Stayton's Company and found it honoured its current financial obligations.
 - (b) Stayton himself, and:-
 - (i) ascertained that he was the holder of a valid pilot licence and that "no one who had been convicted of a felony was eligible for such a licence", and
 - (ii) he investigated his crime record and obtained a "proper document which clarified Stayton's previous employment, education background, pilot licence, all of which were excellent".
3. That the applicant insisted on being provided with flight schedules and on several occasions he carried out checks to ascertain if the plane went to its scheduled destination.

In support of the Resident Magistrate's refusal to revoke the order, Mr. Downer rested his submissions on four main grounds which he termed "Propositions".

Proposition 1:

That the evidence established that on the basis of the

lease Wayne Stayton or his Company was "owner" of the aircraft within the contemplation of Section 24 (2) (a) of the Dangerous Act. In support he referred to R. v. Jacent Edwards - R.M. Criminal Appeal No. 15/78.

In that case the appellant was convicted for possession of ganja and using a fishing vessel for conveying ganja. At the material time he was registered owner and master of the vessel - valued at \$50,000. The Small Business Loan Board, were the holders of a Bill of Sale for a loan of \$15,000 and of which \$12,372.50 was then outstanding. The order for forfeiture of the vessel was made on conviction pursuant to Section 24 (2) (a). The sole question considered by the Court of Appeal was whether or not the Resident Magistrate was correct in holding the appellant "owner" within the meaning of the sub-section having regard to the Bill of Sale held by the Small Business Loan Board. The Court in upholding the Resident Magistrate's decision observed:-

"The purpose of the act must be weighed against such proprietary rights as the holder of the Bill of Sale may have. The owner of a Vessel intent upon the illegal enterprise of conveying narcotics could escape the provisions of the Law by executing a Bill of Sale for a comparatively small loan against the value of the boat. In the instant case the equitable interest of the appellant in the Erin far exceeds that of the Small Business Loan Board, the ratio being approximately 3:1. Apart from Mr. Grossett giving evidence as to the outstanding balance on the loan the Board has shown no further interest in the case."

It is enough to say that the facts in the instant case are clearly distinguishable. Save for his interest under the lease Stayton had no vested proprietary interest in the plane and by the forfeiture he lost nothing but the user thereof. His taking the plane outside the authorised area of operation was a fundamental breach of contract. Regardless of what handle is applied to Stayton's interests, vis-a-vis Bender's it is so comparatively insignificant that Bender was certainly within the meaning

of "owner" in Section 24 (2) (a) so that although the order for forfeiture was not made under that sub-section the absence of any evidence of criminal culpability or complicity on the part of the applicant is an important factor in considering the merits of his application.

In any event, Bender is clearly a "person prejudiced by the Order of forfeiture" and therefore competent to make this application under the provisions of Section 24 (3) of the Act. It is therefore unnecessary for the determination of the substantive question "whether it would be just to revoke the Order of forfeiture" to indulge in any pedantic categorising of the respective interests of Bender and Stayton. In that regard cases such as "The Australian Insurance Company v. Jackson (1875) 33 L.T.R. 286 and Sir John Jackson Limited v. Owners of the Steamship Blanche et al (1908) A.C. p. 126 are unhelpful. These cases are, however, distinguishable in that in the former the forfeiture was not only mandatory but absolute in the sense that whether or not the owner as distinct from the master permitted the vessel to be used in contravention of the Kidnapping Act, 1872, was immaterial and did not arise for consideration. In the latter the purpose of the Act was entirely different: In that case it was held that "The charterer of a ship by demise who has control over her and navigates her by his own master and crew is "owner" of the ship within ss. 503 and 504 of the Merchant Shipping Act, 1894, and entitled to the limitation of liability to damages conferred upon "owner" by those sections."

Propositions 2,3 and 4 set out hereunder may conveniently

be considered together:-

- (2) In the circumstances of the case, Bender as registered owner was astute to protect himself by an indemnity clause and it would be just for the Court to infer that he would recover thereunder from Stayton or his Company from this type of loss.
- (3) It could never be just in the circumstances of this case to revoke the forfeiture order because Bender, the applicant, did not take appropriate steps to ensure that Stayton was able to honour the indemnity clause in the agreement.
- (4) On the evidence adduced it was open to the Magistrate to infer that Bender and Stayton are in agreement to obtain a revocation of the order and a revocation would benefit both Bender and the convicted Stayton who would be released from his liability under the indemnity clause.

Evidentially and in support, Mr. Downer adverted attention -
inter alia to:-

- (i) the affidavit of attorney Julius H. Giarmarco who was retained apparently in contemplation of civil action against Stayton and/or his Company;
- (ii) Bender's failure to investigate the financial standing of the Company;
- (iii) his failure to obtain a performance bond to cover an uninsurable eventuality as existed in the present case.

Re: (i) and (ii) Giarmarco in his affidavit said:-

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- (3) That after making a thorough investigation of Mr. Staton's finances as well as those of Enterprise Aviation, I concluded that neither Wayne Staton nor Enterprise Aviation had any identifiable assets. As a result, I recommended to Mr. Bender that he not commence legal proceedings because the cost of such proceedings would be in excess of the amount recoverable from Wayne Staton and/or Enterprise Aviation. Further, I advised Mr. Bender that if such proceedings were instituted, Wayne Staton and/or Enterprise Aviation would more than likely declare bankruptcy to avoid payment of any amounts owing to Mr. Bender.

Stayton's Company was not a trading company but one that provided a specialized service and therefore the primary considerations would be the skill and experience of its operatives and its reputation for reliability

and the meeting of such financial commitments that ought reasonably to be expected to be incurred by a company offering such services. From his previous dealings with the Company and from his enquiries concerning Stayton in my view Bender acted with reasonable prudence. It would be unrealistic to hold that unless a hirer has the means to indemnify the owner for loss of the vehicle the subject of the hirage, the owner acted imprudently.

As to the performance bond, it is enough to say that any bond which has in contemplation coverage of an illicit venture such as this would be tainted with illegality and unenforceable.

The important and vital consideration is not whether there may be some incidental benefit for the person who used the plane on the illicit venture should the order of forfeiture be revoked. This would invariably be the case in any revocation. The cardinal question is, is it "just to revoke the order" in relation to the applicant. In considering whether the applicant acted reasonably regard must be had to matters that ought reasonably to be in contemplation. No contract is made against the background of probable illegal action by one of the parties. If there is any presumption obtaining here, it must be the presumption of legality even in these days of waning respect for traditional virtues.

Notwithstanding the high esteem in which I hold my brother Rowe, J.A. I am constrained to observe that in his endeavour to justify the imposition of a condition that the plane be released on payment of a penalty of \$50,000 his reasoning seems forced and unhappy.

This is a penal statute and I am unaware of any principle of law civil or criminal that could make Bender even vicariously liable in the

particular circumstances of this case.

In my view the applicant did all that a reasonable prudent man in the circumstances would be expected to do and a revocation of the order of forfeiture was manifestly just. Accordingly, I concurred with the Honourable President in his decision revoking the order of forfeiture on condition that the costs and charges attendant on the detention and security of the Aircraft be paid by the applicant to the Jamaica Defence Force at the determined rate of \$65 per day from the 30th day of April, 1979 to the date of release of the Aircraft. Such date to be the date on which the payment is made (i.e. tendered).

This decision was delivered in Court on May 19, 1980.

THE PRESIDENT, J.A.:

The above written reasons for judgment of Kerr, J.A. admirably set out the reasoning which prompted the decision at which we arrived and there is nothing that I could usefully add thereto.

ROWE, J.A.:

In January 1979, Philip Bender who has described himself as an experienced and successful businessman obtained a loan of \$305,000 from Ford Motor Credit Company of Ohio, U.S.A., and with the proceeds thereof he purchased a Cessna 414 Aircraft for \$305,000. He had himself provided the deposit of \$1,500.00.

Immediately after the purchase, Bender leased the aircraft to Enterprise Aviation, a company which carried on an air taxi service in the U.S.A., on the following terms:-

To provide for the use of Enterprise Aviation one (1), 1978 Cessna 414 Aircraft, N4699N, Serial No. 0084.

To be financially responsible for all maintenance to said Aircraft.

To be financially responsible for commercial insurance on said aircraft, in the amount legally required for 135 operations.

To provide enterprise aviation with as much notice as possible and practical when the aircraft will be required for the personal use of Mr. Philip Bender, Jr.

To compensate Enterprise Aviation for any fuel used in the aircraft for the personal use of Mr. Philip Bender, Jr.

ENTERPRISE AVIATION AGREES:

To utilize the aircraft provided by Philip K. Bender, Jr., only for legal and legitimate purposes; and to protect the interests of Mr. Philip K. Bender, Jr. in said aircraft to the fullest extent possible at all times.

To compensate Mr. Philip K. Bender, Jr., one hundred forty dollars (\$140.00) for each hour of revenue producing use generated by enterprise aviation.

To implement the insurance coverage required for said aircraft, and to bill Philip K. Bender Jr., only for the actual cost of such insurance, if so directed by Philip K. Bender, Jr.,

To restrict the use of the aircraft to only those pilots who have:

- (a) Any pilot holding an FAA commercial pilot certificate with FAA multi-engine and instrument ratings who has flown a minimum of 1,500 hours as pilot in command at least 500 hours of which shall have been in multi-engine aircraft and at least 50 hours of which shall have been in Cessna 400 series aircraft.

(b) A check out in the aircraft from the chief pilot of Enterprise Aviation.

To provide Philip K. Bender, Jr., by the 15th of the following month, a tabulation of the hours flown by the aircraft during the month, and the type of such flights (i.e. rental, personal use by Philip K. Bender, Jr., ferry for service, etc.,)

To provide scheduling for all users of said aircraft.

To provide all required maintenance on said aircraft, at the current shop rate, if so directed by Philip K. Bender, Jr.

The aircraft was duly insured and was covered for occurrences that took place during the policy period while the aircraft was in the United States and its territories and possessions, Canada, Mexico, the Bahama Islands, or while enroute between those places.

On April 27, 1979 Wayne Stayton, the President and sole shareholder of Enterprise Aviation, flew the Cessna aircraft to Jamaica and on the following day at 2.30 a.m. Stayton and 2 other men were seen at the Boscobel Airport with 591.40 lbs of ganja loaded in the plane. These three men were arrested and each pleaded guilty to attempting to export ganja and were convicted and sentenced. On the application of the Clerk of the Courts, the learned Resident Magistrate ordered that the Cessna Aircraft be forfeited under the provisions of section 24 (2) (b) of the Dangerous Drugs act.

Section 24 (2) of that Act provides:-

"24 (2) On the conviction of any person for an offence against this Act, the Court shall, upon the application of the prosecution, order the forfeiture of any conveyance, used in the commission of the offence, and seized pursuant to this section, if the Court is satisfied that:

(a) Such person owns the conveyance, or the owner thereof permitted it to be so used; or

(b) the circumstances are otherwise such that it is just so to order."

Bender, the beneficial owner of the aircraft wished to have the order for forfeiture revoked on the grounds that he was a person prejudiced by that order, His application to the learned Resident Magistrate for St. Mary was determined on September 13, 1979 when in a very terse judgment, the application was refused in the following terms:-

"The Court having considered the various documents filed the evidence on oath and submissions of Counsel, the court is satisfied that this is not a fit and proper case in which it ought to grant this application, that is, that it would not be just to revoke the order of the learned Resident Magistrate and accordingly this application is hereby refused."

In this unhelpful reserved judgment the learned Resident Magistrate did not expose his thought processes.

The instant application comes before the court on a reference from the Governor General under the provisions of section 29 (1) (a) of the Judicature (Appellate Jurisdiction) Act. Bender is undoubtedly prejudiced in that if the order for forfeiture is allowed to stand he will lose his aircraft and will be unable to recover anything under the insurance policy. Neither will he be able to recover anything from Enterprise Aviation or its President/Shareholder as both are wholly impecunious. One Mr. Giamarco, the attorney in the United States for Bender, has sworn that from his investigations on behalf of Bender, neither Wayne Stayton nor Enterprise Aviation has any identifiable assets. This Attorney has acted on behalf of Bender in all matters relating to the Cessna Aircraft.

Mr. Smith argued before us that Bender did everything he conceivably could to ensure that Enterprise Aviation used the aircraft for lawful purpose only. This was the second aircraft that Bender had leased to

Enterprise Aviation and indeed the two had had a business relationship lasting for a year before the lease of January 1979 was entered into. Bender swore that when he checked on Enterprise Aviation he learnt that the company paid its debts regularly. He had no knowledge and had no cause to believe that Stayton was involved in the smuggling of drugs and he did not know and had no cause to believe that Stayton would fly his Aircraft to Jamaica. Bender was cast in the role of an honest, innocent man, who having been duped by Stayton, now faces the risk of bankruptcy if the aircraft is not recovered. He produced testimonials from high officials in Westland, Michigan including the Mayor, the Presiding Judge of the 18th Judicial District, and the State Representative of the 37th District.

The gravamen of Mr. Smith's submissions is that Parliament having realized that there will be a number of circumstances where persons who are wholly innocent will have their vehicles confiscated due to the criminal activities of others, has empowered the Court to lift the forfeitures when it is not just that the owners should suffer the loss. He instanced Drive Yourself Car Hire Firms whose vehicles hired for legitimate purposes might sometimes be used to commit breaches of the Dangerous Drugs Act. It could not be just, said he, to forfeit in all such cases.

It is not in my view necessary to deal with Mr. Downer's propositions in which he urged the court to say that Aviation Enterprise was owner pro tempore of the aircraft and as a consequence the learned Resident Magistrate could have ordered its forfeiture under section 24 (2) (a) of the Dangerous Drugs Act. Mr. Smith was not contending that the original forfeiture was without jurisdiction and Mr. Downer conceded that whether the

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forfeiture was under the first or second limb of the section, Bender would be a person aggrieved and entitled to petition for revocation under section 24 (3) of that Act.

I find some merit in Mr. Downer's argument that Bender was astute to protect himself by an indemnity clause in his lease agreement with Aviation Enterprise and if that company was in a position to meet its obligations, it would not be just to revoke the forfeiture order. Here is a case in which the Aircraft was leased for an indefinite period to Aviation Enterprise and of course Bender must have contemplated that circumstances could arise which would place some responsibility upon the company if they were in breach of the Lease Agreement. He need not have had in contemplation anything of the enormity of a forfeiture of the aircraft by a foreign State but he was well aware that if Enterprise Aviation embezzled the aircraft within the meaning of the Insurance Policy, he would not be covered by Insurance. Mr. Downer suggested that since Enterprise Aviation had no identifiable assets then the prudent thing for an experienced and successful businessman to do, was to demand and obtain a performance bond. This Bender did not do.

If Stayton or Aviation Enterprise was in a position to indemnify Bender in whole or in part for his wrongful use of the Aircraft, then Bender would have to look to his indemnity and could not move the court in Jamaica to lift the forfeiture so that Stayton could receive an unjust benefit to a corresponding degree.

At all times Bender must have known that Aviation Enterprise was a mere facade for Stayton, a mere front, a mere trade name. If the

applicant could show that as a prudent businessman he had leased his Aircraft to Enterprise Aviation, a financially sound organization, which due to circumstances over which he Bender had no control, had fallen into dire financial straits, bankruptcy or some such similar plight, then his prayer would have a basis in fact. Any person in Bender's present position would have an unanswerable case, if all he had to show was that he leased his Aircraft to an independent person whom he believed on reasonable grounds to be honest. If that were the law, Jamaica's airspace and landing grounds could be covered with aircraft transporting ganja and not one would be liable to forfeiture or if such an order was made it would promptly lifted on an application so to do.

In my view the intention of the legislature is clear and manifest that trafficking in dangerous drugs should be discouraged and one method of accomplishing that intent is to confiscate the conveyance regardless of its intrinsic value.

I conclude from the fact that Bender acted with gross imprudence in Leasing his Aircraft to a company without assets, that his main interest was in obtaining periodic payment with which to meet his obligations and ultimately for his own profit. Having entered into a reckless arrangement, it would not be just to enable him to benefit to the hilt from the profits of that arrangement and to be ~~immune~~ from the result of obvious risks, notwithstanding his imprudence. Equally it would not be just to penalize him to the fullest extent as it has not been shown that he participated actively or passively in Stayton's illegal adventure. The forfeiture should be revoked but on two conditions. Firstly as the Aircraft

is now the property of the Government of Jamaica and the intendment of the Dangerous Drugs Act is that the country should be protected from drug traffickers, a sum approximating one-sixth of the value of the Aircraft should be paid by the applicant and this is quantified as \$50,000 J. Secondly, the applicant should pay all the costs and charges consequent upon the detention and security of the Aircraft at the determined rate of \$65.00 per day from the date of detention until the date of its release which date shall be the date when the two conditions herein are fulfilled.