Privy Council Appeal No. 56 of 1996

(1) Brian Bernal and
(2) Christopher Moore *Appellants*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 28th April 1997

Present at the hearing:-

Lord Browne-Wilkinson
Lord Slynn of Hadley
Lord Lloyd of Berwick
Lord Hoffmann
Sir Brian Neill

*[Delivered by **Sir Brian Neill**]*

On 29th March 1995 the two appellants, Brian Bernal and Christopher Moore, were convicted in the Kingston Resident Magistrates Court before His Honour Mr. N. Dukharan on informations relating to the possession of ganja, dealing in ganja and taking steps preparatory to the export of ganja. On the informations relating to the possession of ganja contrary to section 7C of The Dangerous Drugs Act both appellants were sentenced to a term of 12 months' imprisonment and a fine of $15,000 or 6 months' imprisonment in default. On the informations relating to dealing in ganja contrary to section 7B(a) of the Act both appellants were sentenced to a fine of $50,000 or 12 months' imprisonment in default. On the informations relating to taking steps preparatory to the export of ganja contrary to section 7A(1) of the Act both appellants were sentenced to a fine of $50,000 or 12 months' imprisonment in default. "Ganja" is defined in section 2 of the Act as including "all parts of the plant known as cannabis sativa from which the resin has not been extracted and includes any resin obtained from that plant, but does not include medicinal preparations from that plant".

[17]

On 26th January 1996 the appellants' appeals against conviction and sentence were dismissed by the Court of Appeal of Jamaica. Following the dismissal of their appeals the appellants have appealed to their Lordships' Board against both conviction and sentence with the leave of the Court of Appeal, who certified certain specified questions as involving points of law of exceptional public importance. In addition the appellants have sought leave to appeal in relation to certain other questions for which the Court of Appeal refused leave.

One of the certified questions relates to an application which was made to the Court of Appeal on behalf of the appellant, Brian Bernal, for leave to adduce further evidence. This application was refused by the majority decision of the Court of Appeal. Their Lordships will deal with the application to adduce further evidence at a later stage and after the evidence which was before the Resident Magistrate has been examined.

At the conclusion of the oral hearing before the Board on 19th February 1997 their Lordships agreed humbly to advise Her Majesty that the appeal by the appellant, Moore, should be dismissed for reasons to be given later. Judgment in the appeal of the appellant, Bernal, was reserved.

Both appellants have been on bail pending the determination of their appeals.

The facts.

The outline of the facts is taken in part from the record of the evidence given at the trial and in part from some of the findings of fact made by the Resident Magistrate. As, however, it is at least possible, for reasons which their Lordships will explain later, that there will be a new trial in the case of the appellant Bernal it is important to remember that any references to the evidence and the inferences drawn from the evidence are based on the material which was before the Resident Magistrate at the hearings in 1994 and 1995.

The appeals are concerned with events which took place in March and April 1994. At that time the appellant, Brian Bernal, was 20 years old. His younger brother Darren was 16 years old. They are the sons of a diplomat who at the relevant time was the Jamaican Ambassador in Washington.

In March 1994 Brian Bernal was a student at Howard University in the United States. He was planning to go on holiday with a group of friends to Florida during the University spring break. A few days before he was due to leave for Florida, however, the appellant, Moore, telephoned Darren Bernal from

Jamaica. There then followed one or more telephone conversations between Moore and Brian Bernal. As a result of these conversations, or possibly as a result of telephone conversations between Brian Bernal and his grandfather in Jamaica, Mr. Franklyn Bernal, Brian Bernal decided to cancel his visit to Florida and instead spend the spring break in Jamaica. According to Brian Bernal he was told by Moore, who had been a friend for some years, that he had obtained airline tickets for both the Bernal brothers at the discounted price of $149 each. There was a dispute at the trial as to the price at which the tickets were obtained. Moore said that he had obtained the tickets at the usual price of $517, but in his Findings of Facts the Resident Magistrate concluded that Moore had told Brian Bernal on the telephone that the price was $149 and that Brian Bernal had given Moore $300 by way of repayment for the tickets. The Resident Magistrate also concluded, however, that "Bernal ought to have known he could not get a ticket for that price ($149)"; which was a "ridiculously low" price.

The Bernal brothers flew to Jamaica on or about Friday, 25th March 1994. They were due to return on Tuesday, 5th April. On their arrival in Jamaica, the brothers went to stay with their grandfather, Franklyn Bernal, at his home in Kingston. During their stay Brian Bernal met Moore socially on a number of occasions and it was in the course of one of these meetings, according to both appellants, that Brian Bernal agreed to take tins of pineapple juice to Moore's sister in Washington. Brian Bernal said at the trial that he knew that Moore's two sisters in Washington had a booth every year in Jamfest, a trade fair held annually to mark Jamaica's Independence.

The tins of pineapple juice lie at the centre of this case. On Tuesday, 5th April, the day the Bernal brothers were due to fly back to Washington, Moore took Brian Bernal to Sampars, a self-service wholesale store in Kingston. Moore parked in the car park and went into the store leaving Brian Bernal in the car. In the store Moore bought four cases of Grace pineapple juice, each case containing 24 tins. Moore returned to the car with a trolley loaded with four cases and Brian Bernal helped Moore place the cases in the back of the car. Moore then drove to a gas station belonging to him or his family.

There was a dispute at the trial as to what happened at the gas station, but the Resident Magistrate found as a fact that Moore and Brian Bernal remained together while they were in the gas station where they had a conversation with Andrea Moore, another of Moore's sisters. On leaving the gas station Moore picked up two large cardboard boxes which Moore had asked an attendant at the garage to put near the car. Moore then drove

back to Mr. Franklyn Bernal's house where he and Brian Bernal unloaded the four cases and the two cardboard boxes and put them in the living room. It seems, however, that the cardboard boxes which had been picked up at the gas station were not used because it was not possible to fit two of the cases into one box. Accordingly, in order to reduce the number of items which had to be taken on the plane, each pair of cases was taped together with masking tape by Moore and Brian Bernal so as to form a total of two packages.

While Moore and Brian Bernal were bringing the cases into the house Mr. Franklyn Bernal came out of his work room at the back and saw what they were doing. Later he spoke to Brian Bernal alone and told him to "Make sure it is pineapple juice".

Shortly after this they all left for the airport. By then Darren Bernal had rejoined them. Darren travelled with Moore in his car and Brian Bernal travelled with his grandfather. On arrival at the airport, however, they found that they were too late and that the flight was closed. They made enquiries about other airlines and whether the brothers could fly without their luggage leaving it to be sent on later by their grandfather. But these efforts were unsuccessful and eventually bookings were obtained on an early flight on the following day, Wednesday, 6th April. The party then drove back to the grandfather's house where the luggage was unloaded and placed in the living room.

Early next morning, Wednesday, 6th April, Brian Bernal drove with Darren to the airport in their grandfather's car. It had been arranged that Mr. Franklyn Bernal would collect the car later using a spare key. On arrival at the airport the brothers took their luggage to the x-ray machine where they placed their suitcases, their hand luggage and the two packages consisting of the four taped-together cases on the conveyor belt. They were asked to put one of the packages through the machine again. Brian Bernal lent his penknife to the security guard so that he could open one of the packages and take out some of the tins. The security guard looked at the tins and shortly afterwards the police were sent for.

Two police officers arrived and in their presence two of the tins were opened with the aid of Brian Bernal's penknife. The tins were found to contain plastic packages of compressed ganja. The contents of the 96 tins were later analysed and were found to consist of parts of the plant cannabis sativa from which the resin had not been extracted. The total weight of the ganja was 43.2 kilograms.

At the airport police station Brian and Darren Bernal were arrested and charged with the offences on which they were subsequently tried. Moore, whose name had been given to the police by Brian Bernal, arrived at the police station later where he too was arrested and charged with the three offences.

The trial.

The trial took place on a number of dates between 5th September 1994 and 29th March 1995. On 7th September 1994 the Crown decided to offer no further evidence against Darren Bernal and he was discharged.

The case for the Crown at the trial was that the four cases containing the ganja had been carefully prepared in advance and that these cases had been substituted by the appellants for the cases of pineapple juice which Moore had bought at Sampars. It was suggested that the appellants had hoped to take advantage of Brian Bernal's status as a member of an Ambassador's family to lessen the risk of a search..

The case for Brian Bernal was that he had no knowledge that the cases contained anything other than pineapple juice and that any switch must have been made in his absence and without his knowledge. The case for Moore was on the same lines. In support of Bernal's case on the issue of credibility his counsel sought to introduce the evidence of a polygraph test conducted by Mr. Robert Bristintine, a polygraph examiner, but this evidence was rejected by the Resident Magistrate as being inadmissible.

The Resident Magistrate concluded (a) that the tins in the four cases bought by Moore at Sampars contained genuine Grace pineapple juice; and (b) that the tins which contained the ganja, though of similar appearance to Grace products and bearing Grace labels, had not been canned by Grace. He then formulated the question for his determination as being whether Moore made the switch or caused it to be made without Brian Bernal's knowledge and thereby tricked him into believing that he was taking genuine juice abroad, or whether there was a common design by both accused to substitute the tins containing ganja.

Having considered the evidence the Resident Magistrate stated his conclusion in these words:-

> "It is the finding of the court that when Bernal and Moore left the gas station, at some point before reaching Bernal's home a switch was made and the tins of ganja substituted for the pineapple juice. This was done with the knowledge

> of both accused. They both knew that the tins contained ganja. I find as a fact that the four boxes that were taken to Bernal's home were the boxes with the 96 tins of ganja. Both accused had knowledge of, possession, custody and control of it. I find as a fact that there was a common design by both accused to take ganja out of the island. They both knew that ganja was in those boxes when they taped them together.
>
> I also find that the same boxes taken to the airport the day before were the same boxes that were discovered to have ganja the next morning at the airport. I also took into account a lapse of over twelve hours while the boxes were in possession of Bernal overnight."

It will be seen that the Resident Magistrate concluded that both appellants took part in the switch and therefore had actual knowledge of the fact that the tins which were taken to the airport contained ganja.

The appeal to the Court of Appeal.

The appellants appealed to the Court of Appeal against both conviction and sentence. It will be convenient to deal later and separately with the question of sentence, which now arises only in the case of the appellant, Bernal.

The appellant Bernal's grounds of appeal were set out at length in the amended grounds dated 12th September 1995 and were supplemented by a written submission dated 6th October 1995 and a further undated written submission directed to the contention that the Resident Magistrate should have held that Bernal had no case to answer. The appellant Moore's grounds of appeal were set out, also at some length, in the grounds of appeal dated 12th April 1995 and in the supplemental grounds of appeal dated 27th October 1995.

The hearing of the appeal extended over 28 days between 25th September and 17th November 1995. The judges delivered their judgments on 26th January 1996. The principal judgments were given by Forte J.A. (with whom, in dismissing the appeal against conviction, Wolfe J.A. agreed) and Downer J.A. Both judgments dealt in detail with the submissions that the Resident Magistrate should have ruled at the end of the Crown's case that there was no case to answer. In considering these submissions both Forte J.A. and Downer J.A. looked with great care at the authorities, including *R. v. Livingston* (1952) 6 J.L.R. 95 and *Director of Public Prosecutions v. Brooks* [1974] A.C. 862; (1974) 12 J.L.R. 1374, in which the nature of the mens rea required to support a charge of possession of a prohibited substance was analysed. Their Lordships

will refer to these authorities again when considering the first of the certified questions.

The Court of Appeal also considered, in relation to the charges of dealing in ganja and taking steps preparatory to the export of ganja, the statutory presumptions contained respectively in section 22(7)(e) of the Dangerous Drugs Act and in section 7A(2) of the Dangerous Drugs Act. In view, however, of the reduced number of issues which were argued before their Lordships' Board it is unnecessary to make further reference to these statutory presumptions.

The Court of Appeal dealt comprehensively with the other matters raised in the grounds of appeal and concluded (*inter alia*):-

(1) That the Resident Magistrate had not erred in his consideration of the evidence of good character tendered on behalf of the appellants.

(2) That the Resident Magistrate had been correct in deciding that the polygraph evidence which counsel wished to call on behalf of the appellant, Bernal, was not admissible for the purpose of supporting Bernal's credibility.

(3) That the Resident Magistrate had been entitled to decide on the totality of the evidence that the appellants had <u>actual</u> knowledge that the tins contained ganja.

On this third matter Forte J.A. (when dealing with the case against Bernal) expressed himself as follows:-

> "... the only inference that a tribunal of fact could draw, was as the learned Resident Magistrate found, that during their journey between Sampars and Phadrian Avenue [the grandfather's house] the ganja was substituted for the pineapple juice and that since they were together at all times during that period, no 'switching' could have occurred without the knowledge of both appellants."

Later he added (when dealing with the case against Moore) that the contention that the switch could have been made during a period between the return from the airport on 5th April and the arrival at the airport at about 6.00 a.m. on the following morning fell within the realm of "fanciful possibilities".

Downer J.A. stated his conclusion in these terms:-

> "To conclude, the inference drawn by the Resident Magistrate that there was a switch of the pineapple juice to

compressed ganja in cartons was correct. For it was inferred that the switch took place between the Moore's gas station and grandfather Bernal's home and was based on correct finding that pineapple juice was bought at Sampars. Ganja was taken to Phadrian Avenue and detected at the American Airlines baggage area in the cartons which were taken by Bernal and Moore to Phadrian Avenue. This presumption of fact was based on the presumption of continuance. There were no co-existing circumstances to weaken the inference of guilt of both appellants based on the doctrine of common design. The verdicts were joint and several in respect of each appellant. To affirm the verdicts, it is necessary to indicate the knowledge proved in respect of the three informations.

At the conclusion of the Crown's case for the possession charge, the knowledge had to be inferred from the conduct of the appellants. In Bernal's case, failure to examine despite a warning. In Moore's case, the presumption of continuance together with his going to Inspector Rhone with his planned excuse of the invoice from Sampars and aiding and abetting Bernal by transporting the cartons. At the end of the case, the inference was actual knowledge and it was rightly inferred that they both participated in switching Grace pineapple juice to compressed ganja. ... At the conclusion of the case, the joint excuse of the Sampars invoice, the switch to compressed ganja, in which both participated and the evidence of Bernal's diplomatic privileges made a finding of guilt on these informations irresistible."

Downer J.A. too dismissed quite shortly the possibility of a switch having been made overnight. He said:-

"... it was submitted on behalf of Moore that between the time the cartons were returned to Phadrian Avenue on the afternoon of the 5th April and the early morning of the following day, Brian Bernal had sole control over the cartons and the switch could have taken place then. Such a suggestion could be described as fanciful."

It is to be noted, however, that when giving judgment on the hearing of the application for leave to adduce further evidence Downer J.A. made it plain that he would if necessary have upheld the conviction of Bernal on the basis of constructive knowledge. Having referred to some of the authorities which he had cited in his main judgment, he said:-

"The effect of these passages which were cited in the main judgment is that even if the switch took place at Sampars ..., this court would still have found that Bernal had the

requisite knowledge to be guilty of possession in contravention of section 7 of the Dangerous Drugs Act. He was found at the airport with 96 tins of compressed ganja and failed to act on his suspicion and the warnings of his grandfather. Had he heeded those warnings he would have examined the contents of the tins."

The appeal to their Lordships' Board against conviction.

At this stage their Lordships are considering the matter on the basis of the material before the Resident Magistrate and without consideration of the application to adduce further evidence.

The first two questions certified by the Court of Appeal were formulated in these terms:-

"1. What is required to establish knowledge in a case depending on proof of possession of a prohibited substance where the evidence establishes the prohibited substance was sealed within a container.

2.(a) Whether the learned Resident Magistrate erred in law in holding that to permit an expert to give opinion evidence of polygraph tests which he administered on the appellant, Brian Bernal, would encroach on the learned Resident Magistrate's judicial function.

(b) Whether evidence of the findings of a polygraph examination by a competent expert are admissible where such evidence is sought to be adduced by a Defendant in support of his defence, in particular to rebut an allegation of guilty knowledge."

On the hearing of the instant appeals to their Lordships' Board counsel were permitted to argue the appeals on wider grounds than those covered by these certified questions. In particular it was argued on behalf of both appellants that in reaching his conclusion that the appellants had been parties to a joint enterprise the Resident Magistrate had failed to consider adequately the periods when they were not together and when a switch of the cases might have been made by one appellant in the absence of the other. Before addressing these arguments, however, their Lordships will first examine the two certified questions and the submission that the Resident Magistrate erred in his approach to the evidence of good character.

Their Lordships have already recorded that the first certified question was formulated as follows:-

"What is required to establish knowledge in a case depending on proof of possession of a prohibited substance where the

> evidence establishes the prohibited substance was sealed within a container."

In his judgment in the Court of Appeal Downer J.A. made reference to the principles expounded in the House of Lords in *R. v. Warner* [1969] 2 A.C. 256 and in *Director of Public Prosecutions v. Brooks* [1974] A.C. 862; (1974) 12 J.L.R. 1374, as well as to the judgment of the Court of Appeal of Jamaica in *R. v. Livingston* (1952) 6 J.L.R. 95. All these cases concerned the unlawful possession of prohibited substances which were contained in sacks or boxes.

Their Lordships are satisfied that the answer to the certified question is to be found in the judgment of the Board in *Brooks*. In that case the prohibited substance consisted of a quantity of ganja which was contained in 19 sacks in the back of a van in which the accused had been sitting. When police officers approached the van the accused and the men with him ran away. It was argued on the accused's behalf that there was no evidence that he had any knowledge of the contents of the sacks. The judgment of the Board was delivered by Lord Diplock who explained at page 867B that the technical doctrines of the civil law about possession were irrelevant in this field of criminal law. A little later he continued:-

> "Upon the evidence, including his own statement to the police, the nineteen sacks of ganja were clearly in the physical custody of the respondent and under his physical control. The only remaining issue was whether the inference should be drawn that the respondent knew that his load consisted of ganja. Upon all the evidence and in particular the fact that he and the other occupants of the van attempted to run away as soon as they saw the uniformed police approaching, the magistrate was, in their Lordships' view, fully entitled to draw the inference that the defendant knew what he was carrying in the van."

The *actus reus* required to constitute an offence under section 7C of the Dangerous Drugs Act is that the dangerous drugs should be physically in the custody or under the control of the accused. The mens rea which is required is knowledge by the accused that that which he has in his custody or under his control is the dangerous drug. Proof of this knowledge will depend on the circumstances of the case and on the evidence and any inferences which can be drawn from the evidence. The court which has to determine the issue of knowledge will have to look at all the evidence and, always remembering the burden of proof which rests on the Crown, decide what inference or inferences should be drawn. There will be great variations in the circumstances of different cases. It will be for the tribunal of fact to investigate these circumstances to decide whether or not the accused had

knowledge (a) that he had the sack (or as the case may be) and its contents in his possession or control, and (b) that the contents consisted of the prohibited substance.

The second certified question was directed to the Resident Magistrate's decision that the evidence about the polygraph test was inadmissible.

At the trial counsel for Brian Bernal sought to call Mr. Robert Bristintine, a polygraph examiner, as a witness to give evidence about the results of a polygraph test. The evidence was directed, it seems, to the issue of Bernal's knowledge of the presence of ganja in the tins and was intended to support the credibility of his denials.

Mr. Bristintine gave evidence on a *voir dire* and explained the nature of a polygraph test which is designed to detect stress caused by anxiety. The test involved the attachment to the body of instruments to take measurements of changes in the subject's blood pressure and heart rate and in his rate of respiration and, by means of galvanic span response plates placed on the fingers, of changes in any electrical discharge. The polygraph examiner puts questions to the subject and the measurements recorded on the instruments are then analysed. Mr. Bristintine stated that a polygraph test could not be conducted in open court.

Notes of the evidence of Mr. Bristintine are included in the Record of Proceedings which their Lordships have had the opportunity of reading. The Resident Magistrate decided that although Mr. Bristintine was a competent witness in the field of polygraphy the result of the test was not admissible. In his Findings of Facts the Resident Magistrate said:-

> "The court was of the view that this was not a recognised area of law and to admit into evidence the result of a polygraph test done on an accused, would be to infringe upon the right of the court to determine certain critical issues, namely guilt or innocence."

In the Court of Appeal, in the course of their judgments upholding the Resident Magistrate, Forte J.A. and Downer J.A. referred to three cases in the Commonwealth in which the court had considered the occasions when an expert may state his opinion as to what is really the ultimate issue which the court itself has to decide. These cases were *Blackie v. Police* [1966] N.Z.L.R. 910, *R. v. McKay* [1967] N.Z.L.R. 130 and *R. v. Beland and Phillips* (1987) 43 D.L.R. (4th) 641. In all three cases the evidence was ruled to be inadmissible. The headnote in the report of *Beland and Phillips* provides a useful summary of the position taken by the majority of the Supreme Court of Canada:-

"The admission of such evidence in the circumstances of this case offends several of the rules of evidence. First, to admit evidence of the polygraph examination to bolster the credibility of the accused as a witness offends the well-established rule against adducing evidence solely for the purpose of bolstering a witness's credibility. As well, the admission of polygraph evidence would offend the rule against admission of past consistent out-of-court statements. Polygraph evidence which the accused proposed to tender would be entirely self-serving and shed no light on the real issues that were before the court. Since the evidence did not fall within any of the well recognised exceptions to the operation of the rule against prior consistent statements such as to rebut an allegation of recent fabrication the evidence should be rejected. Otherwise the trial process would be opened up to time consuming and confusing consideration of the collateral issues and be deflected from the fundamental issue of guilt or innocence. The evidence which the polygraph examiner would give would also offend the rule relating to character evidence since the operator would be called as a witness for the purpose of bolstering the credibility of the accused and in effect to show him to be of good character by inviting the inference that he did not lie during the test. It was not evidence of general reputation but of a specific incident. Finally, the evidence would not be receivable as expert evidence. The function of an expert is to provide the jury or the trier of fact with an expert's opinion as to the significance of, or the inference which may be drawn from, proved facts in a field in which the expert witness possesses special knowledge and experience going beyond that of the trier of fact. Where, however, the question is one which falls within the knowledge and experience of the trier of fact there is no need for expert evidence and his opinion will not be received. In this case the sole issue upon which the polygraph evidence was tendered was the credibility of the accused, an issue well within the experience of judge and juries and one on which no expert evidence is required."

Their Lordships do not find it necessary to express any final conclusion as to whether or not there may be exceptional cases where the evidence of an expert may be admissible to testify as to the results of a polygraph test. The arguments against the admission of such evidence are very formidable. It is sufficient, however, for their Lordships to deal with the facts of the present case. On the evidence before the Resident Magistrate their Lordships are satisfied that the Resident Magistrate was not in error. The evidence before him did not suggest that polygraph tests were infallible and he was fully entitled to conclude that in

the circumstances to admit the evidence would encroach on his judicial function.

The next criticism of the Resident Magistrate was in relation to his approach to the evidence of good character. Brian Bernal called two witnesses to give evidence as to his positive good character and as to the absence of any propensity to commit these offences. Moore called a witness who gave evidence to a similar effect and who spoke as to Moore's truthfulness, integrity and sense of responsibility.

In dealing with this evidence in his Findings of Facts the Resident Magistrate said:-

> "Character evidence was given for both accused. The court took that into consideration. However exemplary one's life and conduct may be it is not possible to give evidence about the state of mind of another person and what his intentions are."

It was argued both before the Court of Appeal and before their Lordships that the Resident Magistrate was in error in failing to take the evidence of good character into consideration both in relation to the individual appellant's credibility and to his propensity to commit the crimes charged. Reference was made to the speech of Lord Steyn in *Reg. v. Aziz* [1996] A.C. 41 where at page 51D he cited with approval the judgment of Lord Taylor of Gosforth C.J. in *Reg. v. Vye* [1993] 1 W.L.R. 471. In a case tried with a jury it is now obligatory, it was said, for the judge to give a direction to the jury as to the relevance of an accused person's good character. Such a direction should make clear that good character has to be taken into account both when assessing the credibility of the accused and also when assessing the likelihood of his having committed the offence charged. In a case tried by a judge alone his findings should set out with sufficient detail the process by which he reached any relevant conclusion, and, in the case of character evidence, his method of valuing that evidence.

In the present case, however, as Forte J.A. pointed out in the Court of Appeal, the crucial issue before the Resident Magistrate was the state of mind of the appellants and their knowledge of the presence of the ganja. It is also to be observed that in *Reg. v. Aziz (supra)* Lord Steyn recognised that a residual discretion exists. He said at page 53C:-

> "I would therefore hold that a trial judge has a residual discretion to decline to give any character directions in the case of a defendant without previous convictions if the judge considers it an insult to common sense to give

> directions in accordance with *Vye*. I am reinforced in thinking that this is the right conclusion by the fact that after *Vye* the Court of Appeal in two separate cases ruled that such a residual discretion exists *Reg. v. H.* [1994] Crim. L.R. 205 and *Reg. v. Zoppola-Barraza* [1994] Crim.L.R. 833."

Their Lordships have considered this criticism of the Resident Magistrate. It is true that the Resident Magistrate might have expressed himself more fully, but, having read the transcript, their Lordships are satisfied that the Resident Magistrate took the character evidence into account and that on the facts of this case he was justified in concluding that the evidence did not assist him on the central issue of the appellants' state of mind and their intentions.

It is now time to come to the issues to which a substantial part of the hearing before their Lordships was directed.

It will be convenient to deal first with the case of the appellant Bernal. It was argued on behalf of Bernal that the finding of guilt by the Resident Magistrate was defective because he did not examine, or make relevant findings about, the period which elapsed between Moore getting out of the car at Sampars and his return with the trolley with four cases some 15 or 20 minutes later. Counsel drew attention to the provision in section 291 of the Judicature (Resident Magistrates) Act which requires the Magistrate to "record or to cause to be recorded in the notes of evidence, a statement in summary form of his findings of fact on which the verdict of guilty is founded". The Resident Magistrate's failure fully to comply with section 291 had led to his failure to deal adequately with this crucial period during which it was common ground that Bernal and Moore were not in each other's company. Although it was accepted that the cases of tins on the shelf in the store contained genuine pineapple juice there was clearly an opportunity to switch the cases in the interval between the moment when they were taken from the shelves and the time the trolley emerged from the store and into the car park.

This criticism of the Resident Magistrate has to be looked at, however, in the context of the trial and in the light of the issues which were explored at the trial. It is true that in his closing submissions counsel for Bernal referred to the fact that Bernal had not been in Moore's presence when the latter bought the pineapple juice, but the possibility that a switch took place before the cases were put in the car was never suggested in terms. At the trial the "gap" which was examined in detail was an alleged "gap" at the gas station. Thus Bernal said in the course of his evidence that while he was talking to Andrea Moore in the office at the gas station Moore went outside for a time.

In the Court of Appeal counsel for Bernal placed much greater emphasis on the period at Sampars and there were several references to this period in the grounds of appeal. The submission was summarily rejected, however, by the Court of Appeal. Downer J.A. rejected it in these terms:-

> "The suggestion on behalf of Bernal that the switch could have taken place before the cartons were put in the car is best described by Lord Keith of Avonholm in *Ramlochan v. The Queen* [1956] A.C. 475 at p. 490 as 'too incredible to be worthy of serious consideration'."

Their Lordships would reject the criticism that the Resident Magistrate failed to pay due regard to the Judicature (Resident Magistrates) Act. Section 291 does not require a Resident Magistrate to set out every possibility in his findings of fact and then give his reasons for rejecting some possibilities and accepting others. His task is to find the facts and to provide an intelligible narrative to connect those facts together.

Their Lordships are satisfied that on the evidence before the Resident Magistrate and in the light of the issues which were debated before him he cannot be criticised for not dealing specifically with the possibility of a switch before the cases ever reached the car. Accordingly for the foregoing reasons their Lordships would reject the appellant Bernal's appeal in so far as it is based on the material before the Resident Magistrate. The application relating to further evidence will be considered later.

The reasons for advising Her Majesty that the appeal by Moore should be dismissed can be stated very shortly.

The principal submissions advanced on behalf of Moore were:-

(1) That the Resident Magistrate had erred in his approach to the evidence of good character.

(2) That the Resident Magistrate had taken a one-sided attitude to the case and had never seriously examined the possibility that Bernal alone might be guilty. The only alternatives posed by the Resident Magistrate for his determination were that Moore had made or caused the switch in the absence of Bernal or that there was a common design by both accused.

(3) That there was an interval of about 12 hours between the time when the appellants returned to the grandfather's house on 5th April and the discovery of the ganja at the airport on 6th April. The switch could have been made during this period.

Their Lordships have already stated their reasons for rejecting the criticism about the Findings of Facts in relation to the evidence of good character. These reasons do not require repetition.

The second and third submissions can be dealt with shortly. In their Lordships' judgment the suggestion that an overnight switch could have been made by Brian Bernal acting alone was rightly described by Downer J.A. as "fanciful". The evidence established that the preparation of the substitute tins would have taken a considerable time and could not have been arranged by Bernal at short notice. Furthermore, the grandfather testified that the cases were in his house overnight and in the same place in the morning as they had been on the night before. It is to be remembered that the cases had been taped together with masking tape to form two packages. Any interference with the taping would have damaged the cardboard and could have been detected.

The application of leave to adduce fresh evidence.

The oral hearings in the Court of Appeal concluded on 17th November 1995. Judgment was due to be delivered on 15th December 1995 but the time for delivery was extended until 26th January 1996.

At the sitting of the Court of Appeal on 26th January 1996 Mr. Phipps Q.C. for the appellant Bernal sought to address the court in support of a motion for leave to adduce fresh evidence. The notice of motion, which was dated 25th January 1996, referred to an affidavit by Mr. Richard Small, who had acted as counsel for Bernal both at the trial and before the Court of Appeal at the earlier hearings, and to an affidavit by Mr. Dwight Moore, a brother of the appellant Moore. Dwight Moore in his affidavit stated that shortly after the arrest of the appellant his brother Christopher told him that Bernal did not know that he was carrying ganja and that the tins containing the ganja had been collected by Christopher Moore at Sampars as part of a pre-arranged plan to lead Bernal to believe that the purchase was a normal purchase of pineapple juice. Both Dwight Moore in the later paragraphs of his affidavit and Mr. Small in his affidavit set out their account of the circumstances in which information about this conversation was brought to the attention of Bernal's legal advisers.

In view of the conclusion which their Lordships have reached about this application they do not propose to make any detailed comment about this evidence. It is sufficient to say that if the evidence of Dwight Moore as to his conversation with his brother is true and can be put before the Court of Appeal as admissible evidence it may be of crucial importance to any final decision about Bernal's guilt or innocence. It is necessary, however, to

examine the circumstances in which the application to adduce fresh evidence was struck out.

In the notice of motion reliance was placed on section 28(b) of the Judicature (Appellate Jurisdiction) Act. Section 28, so far as is material, is in these terms:-

> "For the purposes of Part IV and Part V, the Court may, if they think it necessary or expedient in the interest of justice -
>
> ...
>
> (b) if they think fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any Judge of the Court or before any officer of the Court or justice or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court;
>
> ...
>
> and exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Court on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentence of the Court:
>
> Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial."

Part V of the Act relates to the appellate criminal jurisdiction of the Court of Appeal in appeals from Resident Magistrates in criminal proceedings.

It will be seen that the discretion given to the Court of Appeal by section 28(b) to order a witness who would have been a compellable witness at the trial to attend is very wide. The test is whether the court thinks it is necessary or expedient in the interest of justice.

Their Lordships have been provided with a copy of the transcript of the argument before the Court of Appeal when Mr. Phipps rose to address the court in support of his motion to adduce fresh evidence. Mr. Phipps drew the court's attention to the provisions of section 28. At an early stage of the argument, however, Forte J.A., who was presiding, invited Mr. Ramsay,

who was appearing for the appellant Moore, and Mr. Andrade Q.C., the Director of Public Prosecutions, to state their attitude to the application.

Mr. Andrade made clear that he objected to the application primarily on the ground that the evidence had been in existence for some time and reasonable steps should have been taken earlier to bring the matter to the attention of the court. As the argument developed, however, it became unclear whether the court were concerned with (a) the question whether the evidence should have been put before the court at an earlier stage, or (b) the question whether they had jurisdiction to entertain such an application at a time when judgment was about to be delivered. At page 17 of the transcript Mr. Phipps sought the court's help on this point. The following exchanges took place:-

"Mr. Phipps: I wish to understand whether I am dealing with the point as to the jurisdiction of the Court at this late stage or the question of the availability of the evidence. Or both.

President: Whether the court at this late stage can hear the application.

Mr. Phipps: There is no Statute or rule which excludes it and the matter is in the interest of justice. Thank your Lordships.

President: Gentlemen at the Bar, by a majority, the Court is of the opinion that it is too late in the day to entertain any such application."

The court then decided by a majority to strike out the notice of motion. Forte J.A. dissented.

The Court of Appeal gave their reasons for this decision in writing. Before turning to the judgments, however, it will be convenient first to set out the third certified question formulated for the opinion of their Lordships. The question was stated in these terms:-

"(a) Whether or not the Court of Appeal has authority to hear an application to adduce fresh evidence at any time before the delivery of judgment.

(b) Whether or not on the facts in the instant case it was in the interest of justice for the application to adduce further evidence to have been heard."

In his judgment giving his reasons for striking out the notice of motion Downer J.A. (with whom Wolfe J.A. agreed) set out the certified question and then continued:-

> "In the light of this certification it is necessary to state the reasons why it was not necessary or expedient in the interest of justice to think it fit to order the deponent Dwight Moore to be examined by this Court. If the motion was properly struck out, then the test was that it would have made no difference to the decision of the court which was then about to be delivered. To emphasize, it would have made no difference even if the affidavit evidence of the deponent Moore were true in every aspect. It was open therefore, either for the respondent Moore or the Crown to take objection on a preliminary point of law which is what they did as Mr. Phipps Q.C. was called on first to show on behalf of the applicant Bernal why he should be heard on the merits."

Downer J.A. next referred to the notice of motion and considered the effect of the affidavit evidence. He also gave some consideration to the time when the evidence was available.

Later in his judgment Downer J.A. gave his reasons for his conclusion that the evidence would have made no difference. He said:-

> "... even if the switch took place at Sampars as Dwight Moore alleges, this court would still have found that Bernal had the requisite knowledge to be guilty of possession in contravention of section 7 of the Dangerous Drugs Act. He was found at the airport with 96 tins of compressed ganja and failed to act on his suspicion and the warnings of his grandfather. Had he heeded those warnings he would have examined the contents of the tins. To reiterate his conviction was either joint or several. Had he been tried separately he would have been convicted either on the evidence which was adduced in court or on the evidence sought to be adduced in the affidavits supporting this motion."

At the end of his judgment Downer J.A. stated in addition that in his opinion the institution of the proceedings for leave to adduce fresh evidence was an abuse of process. It seems that he accepted the argument by the Director of Public Prosecutions that "Mr. Small refused to resort to the court for assistance".

It is plain from the transcript of the argument before the Court of Appeal on 26th January 1996 that Mr. Phipps did not have an opportunity to develop any argument he might have

wished to put forward either as to the effect of the evidence if admitted or as to the reasons why the evidence had not been brought to the attention of the court at an earlier stage. In this context it is relevant to refer to the dissenting judgment of Forte J.A. In the course of his judgment Forte J.A. referred to what took place on 26th January 1996. He said:-

> "Mr. Andrade Q.C., Director of Public Prosecutions, objected to the hearing of the application on the basis that on the face of the affidavits filed in support of the motion, no fresh evidence was indicated, as the evidence sought to be introduced was available to the appellants at a time which would not bring it within the legal definition of 'fresh evidence'.
>
> At the end of these submissions, none of which addressed the merits of the application, we ruled by majority that the Court ought not to hear the motion. Having so ruled, the judgment of the Court was delivered, dismissing the appeals against convictions and sentence."

Forte J.A. then referred to section 28(b) and to some paragraphs in the affidavit of Dwight Moore and continued:-

> "In those circumstances, the Court not being functus officio I was of the view that counsel for the appellant Bernal ought to have been allowed to advance arguments in support of the motion in an effort to establish that the conditions required to allow fresh evidence to be adduced had been fulfilled. Consequently I did not agree with the majority that the motion should not be heard. As a result of the views of the majority the motion was struck out without opportunity being given to counsel to advance arguments in support thereof."

Their Lordships are satisfied that this application should not have been dismissed in the summary manner in which it was dismissed. The application was dismissed before Mr. Phipps had had a proper opportunity to advance his arguments in support of the application. It may be that the delay in not issuing the notice of motion until 25th January 1996 could have been satisfactorily explained. It may be that Mr. Phipps would have been able to demonstrate the importance of the fresh evidence in a case in which the Resident Magistrate had based his conclusions on a finding of <u>actual</u> knowledge.

Their Lordships are satisfied that the interest of justice requires that this part of Bernal's appeal should be allowed and that the application for leave to adduce fresh evidence should be remitted to the Court of Appeal of Jamaica to be heard by a differently

constituted court. The question whether leave should be given will be for that court to determine after hearing argument on all the relevant aspects of the application including delay and the effect and admissibility of the fresh evidence. Their Lordships will humbly advise Her Majesty accordingly.

Appeal by Bernal on sentence.

The fourth main question certified by the Court of Appeal was formulated as follows:-

> "Whether on the true construction of section 3 of the Criminal Justice Reform Act, the majority decision was correct in affirming as appropriate the Resident Magistrate's discretion to impose a custodial sentence on the Appellant Bernal."

Section 3 of the Criminal Justice (Reform) Act provides, so far as is material, as follows:-

> "(1) Subject to the provisions of subsection (2), where a person who has attained the age of seventeen years but is under the age of twenty-three is convicted in any court for any offence, the court, instead of sentencing such person to imprisonment, shall deal with him in any other manner prescribed by law.
>
> (2) The provisions of subsection (1) shall not apply where -
>
> (a) the court is of the opinion that no other method of dealing with the offender is appropriate; or
>
> (b) a sentence of imprisonment for such an offence is fixed by law; or
>
> ...
>
> (3) Where a court is of opinion that no other method of dealing with an offender mentioned in subsection (1) is appropriate, and passes a sentence of imprisonment on the offender, the court shall state the reason for so doing; and for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall take into account the nature of the offence and shall obtain and consider information relating to the character, home surroundings and physical and mental condition of the offender."

Before passing sentence the Resident Magistrate heard submissions from counsel for Bernal who pointed out that his career was in jeopardy and that he had an exemplary character with no previous convictions. Counsel also drew attention to Bernal's age.

When passing sentence the Resident Magistrate expressed himself as follows:-

> "Court has taken into account the ages of both accused. Bernal is 22 years old and Moore over 23 years.
>
> In relation to Bernal who is under 23 the court will not avail him the provisions of the Criminal Justice Reform Act. The dealing and exporting in drugs is quite serious in the society. This was a brazen attempt by both accused and the court will show no mercy on persons who export or attempt to export drugs out of the island. The court also notes that it is persons in this age group and under who are used to take drugs out of the island.
>
> The court's view is that a period of incarceration is necessary and that this will act as a deterrent to others."

The Resident Magistrate then passed the sentences to which their Lordships have already referred. Perhaps rather surprisingly the sentence of imprisonment was imposed on the first information rather than on the second or third informations which might well have been regarded as more serious offences. Their Lordships, however, are not concerned with that aspect of the matter.

The argument before the Court of Appeal and before their Lordships' Board was confined to the submission that the Resident Magistrate had failed to have regard to the mandatory provisions of section 3(3).

In the Court of Appeal Forte J.A. was of the view that the Resident Magistrate ought to have requested a social inquiry report so as to determine whether or not a community service order or a probation order could have been made in the circumstances. By a majority, however, the Court of Appeal upheld the sentence imposed by the Resident Magistrate. The reasons of the majority are to be found most clearly in the judgment of Wolfe J.A. who said that he was satisfied that the Resident Magistrate had given due consideration to the provisions of section 3. A little later, having set out the terms of section 3(3) Wolfe J.A. continued:-

> "During the course of the trial character evidence was adduced by the defence on behalf of the appellant Bernal. Mr. William Saunders, who studied at Howard University, Washington, D.C. with Bernal, testified as to his good character. Dr. Ronald Irvine, a Medical Practitioner of renown and a Parliamentarian for over twenty one (21) years, a former Minister without portfolio in the government, who has known the appellant since birth also testified as to his character.

> By way of the testimony of these two witnesses the Learned Resident Magistrate had before him evidence as to the character and home surroundings of the appellant, who is a son of the Jamaican Ambassador to the United States of America. The evidence also disclosed that he was involved in sporting activities and was Vice President of the Students' Assembly and Association and was receiving good grades in his school work. In my view there was an abundance of evidence before the Magistrate which he could properly consider whether any other method of dealing with the appellant was appropriate.
>
> Having stated 'the court will - not avail him the provisions of the Criminal Justice Reform Act' is a clear indication that the sentence was focussed on the requirements of the Act."

The policy enshrined in section 3 is the avoidance of imprisonment in the case of young persons except where no other method of dealing with them is appropriate and the importance of ensuring that before any sentence of imprisonment is imposed on such persons the court has full information as to the character, home surroundings and physical and mental condition of the offender. Furthermore, the words "shall obtain and consider" indicate that steps are to be taken by the court to obtain this information after verdict and before any sentence is passed. Their Lordships would therefore agree that the approach suggested by Forte J.A. is, certainly in the vast majority of cases, the correct approach.

It is not the practice of their Lordships' Board, however, to interfere with matters of sentence except where there is a danger of some serious injustice. Furthermore, it is apparent that the majority of the Court of Appeal were satisfied that in the light of the evidence the Resident Magistrate had sufficient information as to each of the matters specified in section 3(3) to entitle him to impose a sentence of imprisonment on Bernal.

In these circumstances their Lordships see no sufficient ground of interfering with the majority decision of the Court of Appeal. They will accordingly humbly advise Her Majesty that the appeal by Bernal in relation to the sentence of twelve months' imprisonment on the first information ought to be dismissed.

For the foregoing reasons their Lordships are of the opinion that the certified questions formulated by the Court of Appeal ought to be answered as follows:-

1. It is necessary for the tribunal of fact to be satisfied that the accused knew:
   (a) that he had the container; and
   (b) that the prohibited substance was in the container.

   The evidence to establish this knowledge will depend on the circumstances of the case and the inferences which can properly be drawn from the facts proved.

2. On the facts of this case the Resident Magistrate did not err in law. It is unnecessary to decide whether or not there may be exceptional cases where the findings of a polygraph examination may be admissible.

3. The Court of Appeal has jurisdiction to hear an application to adduce fresh evidence at any time before the delivery of judgment and indeed at any time before the order of the Court is drawn up. On the facts of this case it was in the interest of justice for the application to adduce fresh evidence to have been heard.

4. On the facts of this case the majority of the Court of Appeal was entitled to hold that the Resident Magistrate had sufficient information to enable him to pass a sentence of imprisonment on Brian Bernal in accordance with section 3 of the Criminal Justice Reform Act.

As to costs, their Lordships direct that the appellant Moore must pay the respondent's costs before their Lordships' Board. There will be no order as to costs in relation to Brian Bernal.