

Notes

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 37/2001

**COR: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE WALKER, J.A.**

**McTAIR MAJOR
MIGUEL CARTWRIGHT
SHAVANE TURNQUEST V. R
DWIGHT GRANT
OCTAVIOUS SMITH**

**Ian Ramsay, Q.C. George Thomas and Deborah Martin
Instructed by Ernest A Smith & Co., for the appellants**

**Paula Llewellyn, Deputy Director of Prosecutions
And Ann-Marie Lawrence-Granger for the Crown**

November 14, 15, 19, and December 20, 2001

FORTE, P:

I have had the opportunity of reading in draft the reasoning of Walker, J.A. which is consistent with my own views. However, I make the following comments on the two issues which arose in the appeal.

1. Section 19(5) of the Exclusive Economic Zone Act, 1991 (the "Act") clearly makes no provision for the consent of the Director of Public Prosecutions to be in writing. It was agreed on both sides

that the case was prosecuted before the Learned Resident Magistrate by Crown Counsel in the Office of the Director of Public Prosecutions. When such an officer appears in a prosecution it cannot be denied that he does so on behalf of and as the representative of the Director of Public Prosecutions.

The facts do reveal that when the appellants were arrested for the offences, for which they eventually stood trial, there was no indication that the Director of Public Prosecutions had at that stage become involved. Nevertheless, this would have no effect on this issue, having regard to the provisions of the proviso to Section 19(5) which reads:

"(5) Provided that this subsection shall not prevent the arrest, or the issue or execution of a warrant for the arrest, of any person in respect of such an offence, or the remanding in custody or on bail of any person charged with such an offence."

In my judgment therefore, the presence of counsel from the office of the Director of Public Prosecutions at the commencement of the prosecution in the Resident Magistrate's Court and his direct involvement in the prosecution of the case was sufficient to satisfy the provisions of Section 19(5) of the Act.

2. This issue involved the interpretation of Section 19(1)(a) & (b) and in particular Section 19(2) of the Act.

The section seeks to give jurisdiction to the Courts in Jamaica, to try offences committed in the Economic Zone. These offences for which the appellants were convicted were all committed in the Zone.

Section 19(b) provides that offences committed in the Zone, if punishable on indictment had they been committed on land in Jamaica, are triable in Jamaica. Section 19(b) offers no difficulty in the instant appeal, but counsel for the appellant advances the argument that on a proper interpretation of Section 19(2), though offences against the Dangerous Drugs Act committed in the Zone, can be tried in Jamaica, such offences must be tried on indictment. Section 19(2) reads:

"(2) For the purposes of this section all offences under the Dangerous Drugs Act, whether or not they are only summary offences, shall be treated as if they are offences punishable on indictment."

In my judgment this contention of the appellants is fallacious. Subsection (2) does nothing more than deem "for the purposes of this section" an offence under the Dangerous Drugs Act whether summary or not, to be "an offence punishable on indictment." This it does, purely for the purpose of giving the Jamaican Courts, in particular the Resident Magistrate's Court, jurisdiction to try offences under the Dangerous Drugs Act even though they are committed in the Zone.

Jurisdiction having been bestowed, the offences that are summary will be tried summarily in accordance with the Dangerous Drugs Act.

For those reasons and for the reasons detailed in the judgment of Walker, J.A. I concurred in the dismissal of the appeals.

HARRISON, J.A:

I agree with the reasoning and conclusion of my learned brothers in this matter. I however, wish to add my comments.

Section 19(1) of the Exclusive Economic Zone Act is a jurisdictional provision extending the sovereignty of the coastal state thereby giving jurisdiction to its relevant courts to try offences committed within its exclusive economic zone. Previous to this Act the courts' jurisdiction extended to the width of its territorial sea, that is, twelve miles from the base line (see the Territorial Sea Act of 1971).

The Exclusive Economic Zone was established by the Exclusive Economic Zone Act in 1991. Section 3 reads:

"3. – (1) There is established beyond and adjacent to the territorial sea of Jamaica a Zone to be known as the Exclusive Economic Zone.

(2) The Zone shall have as its inner limit the boundary line of the seaward limit of the territorial sea and, subject to subsection (3), as its outer limit a boundary line which is at every point a distance of two hundred nautical miles from the baselines from which the breadth of the territorial sea is measured."

It was therefore necessary for the legislature to delimit the jurisdiction of the courts of the coastal state, Jamaica, in general terms as it related to indictable offences, in section 19(1), and specifically as it related to offences under the Dangerous Drugs Act, in subsection (2). Section 19(2) reads:

"(2) For the purposes of this section all offences under the Dangerous Drugs Act, whether or not they are only summary offences, shall be treated as if they are offences punishable on indictment."

Subsection (2) must therefore be read as it appears by the use of the phrase ..."shall be treated ...", merely as a legal fiction, to regard such special statutory summary offences as subject to the jurisdictional power as extended to the courts in section 19(1) dealing with indictable offence. I do not agree with the submission of Mr. Ramsay, that subsection (2) obliges the Resident Magistrate to embark on committal proceedings in adjudicating on such offences under the Dangerous Drugs Act, with a view to committal for trial at the Circuit Court. In interpreting a statute it must be read in its entirety as a whole to determine its intent and purpose. The Exclusive Economic Zone Act, is principally a jurisdictional one. Section 19 in particular is referable specifically to the jurisdiction of the courts, and not to the procedure to be employed in respect of such summary offences. A

clear indication of the jurisdictional nature of section 19 is provided by the words and tenor of subsection (6) which reads:

" (6) Notwithstanding any provision to the contrary in any other enactment, proceedings against any person for an offence declared under subsection (1), to be punishable in Jamaica may be commenced before a Resident Magistrate having jurisdiction in the parish where that person is for the time being, and, for all incidental consequential purposes, the offence shall be deemed to have been committed within the boundaries of that parish."

The legislature could not have intended such a fundamental change in procedure making it obligatory on a court to so regard such summary offences, as Mr. Ramsay contends by the use of such a terse phrase as contained in subsection (2).

Mr. Ramsay also argued that no written consent of the Director of Public Prosecutions was given and therefore the trial was a nullity and the convictions and sentences must be quashed. Section 19(5) of the Exclusive Economic Zone Act reads:

" 19(5) No prosecutions for an offence punishable under subsection (1) shall be instituted except by or with the consent of the Director of Public Prosecutions.
Provided that this subsection shall not prevent the arrest, or the issue or execution of a warrant for the arrest, of any person in respect of such an offence, or the remaining in custody or on bail of any person charged with such an offence."

Mr. Ramsay seemed to concede that if the Director of Public Prosecutions himself appeared in person, the statutory requirement would thereby be satisfied in substitution for his fiat. However, any other functionary of his, such as a crown counsel, would not suffice without a written consent.

In the instant case the prosecution was conducted by Mr. Evan Brown, and it was accepted that he appeared as a crown counsel from the office of the Director of Public Prosecutions. Clearly the Resident Magistrate is obliged to take judicial notice of the provisions of the Criminal Justice (Administration) Act which in section 2(2) permits the preferment of an indictment "... by the direction or with the consent ... in that behalf by the Director of Public Prosecutions." The power of delegation by the Director of Public Prosecutions is confirmed by statute.

Some statutes specifically stipulate when the consent of the Director of Public Prosecutions is required prior to the prosecution of certain offences. An examination of these statutes will indicate that when the legislature intended that written consent was required, it specifically so stated:

(1) The Marriage Act, section 57 provides

"57. No prosecution shall be instituted against any person for any offence punishable on summary conviction under this Act without permission of the Director of Public Prosecutions."

(2) The Corruption Prevention Act, section 10 provides:

"10. A prosecution for an offence under this Part shall not be instituted except by or with the consent of the Director of Public Prosecutions."

- (3) The Exchange Control Act (now repealed) had provided in Part II of the Fifth Schedule, paragraph 2(1):

"2. (1) No prosecution for an offence punishable under this Part of this Schedule shall be instituted, except by or with the consent of the Director of Public Prosecutions."

- (4) The Perjury Act, section 14 provides,

"14. Except in cases coming within the provisions of section 12, no information for perjury or for an offence against section 11 shall be laid without the consent in writing of the Director of Public Prosecutions." (Emphasis added)

It is patent from this examination that it is only the Perjury Act, in the entire statutory framework, which specifically requires that the consent of the Director of Public Prosecutions be in writing and that this must be in existence before any

" ... information for perjury or for any offence against section 11 shall be laid ..."

By contrast, the proviso to subsection (5) of section 19 of the Exclusive Economic Zone Act, expressly contemplates the initiation of proceedings prior to the intervention of the Director of Public Prosecutions. The proviso reads:

"Provided that this subsection shall not prevent the arrest, or the issue or execution of a warrant for the arrest, of any person in respect of such an offence, or the remanding in custody or on bail of any person charged with such an offence."

In ***R v Bull*** (1994) 99 Cr. App. R. 193, the Court of Appeal in England, in dismissing the appeal, held that proceedings under the Firearms Act 1968, were not “instituted” by the consent of the Director of Public Prosecutions until the appellant had to meet the charges in committal proceedings in court. The Court considered ***Price v Humphries*** [1958] 2 Q.B. 353 in which the Divisional Court held that the “consent of the Minister ...” required under the National Insurance Act 1946 were “instituted” by the issue of a summons and ***Brentwood Justices ex parte Jones*** [1979] R.T.R. 155, in which the Divisional Court held that proceeds were “commenced” when the suspect was arrested and formally charged at the police station. The Court of Appeal, in ***R v Bull*** (supra) followed however ***R v Elliott*** (1985) 81 Cr. App. R. 115 which held that the “proceedings” under the Administration of Justice Act 1982 for the issuing of the consent of the Attorney General meant the time when a person went to court to answer the charge and ***R v Whale & Lockton*** [1991] Crim. L.R. 692, in which it was held that the consent of the Attorney General which was required for the institution of proceedings under the Explosive Substances Act 1833, was valid if issued at the time the appellant came to court to answer the charges at the arraignment, “the stage at which the case proceeded beyond the formalities of charging the offender and the ensuing remands.”

Each statute therefore has to be specifically examined in order to determine when proceedings are held to be “instituted” for the purpose of the

consent of the Director of Public Prosecutions or other authority to the respective prosecution.

In *R v Brendon Blair* (1989) 26 J.L.R. 9, this Court held that the consent of the Director of Public Prosecutions for the institution of prosecution under the then Prevention of Corruption Act was validly obtained in that it was in fact in court when the order for indictment was made. In this regard the powers of the Director of Public Prosecutions as described in the Constitution of Jamaica is not without some significance. Section 94 (3) reads:

"(3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do;

- a. to institute and undertake criminal proceedings against any person before any court other than a court-martial in respect of any offence against the law of Jamaica;
- b. to take over and continue any such criminal proceedings that may have been instituted by any other person or authority ..."

Although it is desirable that when such consent is required to be obtained, it ought to be in writing for the removal of doubt, unless the particular statute so requires, it may be given orally or by the actual appearance of the Director of Public Prosecutions or his delegate.

In the instant case, the presence of crown counsel from the office of the Director of Public Prosecutions who conducted the prosecution, satisfied the statutory provisions of section 19(5) of the

Exclusive Economic Zone Act requiring the consent of the Director of Public Prosecutions for the institution of proceedings. Such consent was not required to be in writing, as argued by Mr Ramsay of counsel. To so hold would amount to reading into the statutory provisions words that were expressly excluded.

I also agree that the appeals should be dismissed.

Walker, J.A.:

On May 4, 2001 in the Resident Magistrate's Court for the parish of Saint Mary the appellants, some of them foreign nationals, were convicted on informations which charged them with various breaches of the Dangerous Drugs Act including possession of a large quantity – 26 bales – of ganja. The appellants had been apprehended in consequence of a joint operation between the Jamaican Coast Guard and the United States Coast Guard. Previously the appellants had been observed during the course of a chase at sea to jettison the bales of ganja from a motor boat on which they were aboard in waters falling within the Exclusive Economic Zone of Jamaica ("the Zone") as defined by the Exclusive Economic Zone Act, 1991 (the "Act").

Before us the appellants' case was argued on two grounds which were framed as follows:

- "(1) That if the learned Resident Magistrate has jurisdiction to hear and determine the cases

then the Prosecution had failed to establish and show that the Director of Public Prosecutions had given his written consent for the prosecution of the cases as is the mandatory requirement of the Economic Zone Act.

- (2) Alternatively, the Resident Magistrate failed to follow the statutory provision laid down for dealing with indictable offences whereby the trial herein was a nullity."

To take the first complaint, it was common ground that where the question of jurisdiction was concerned the proceedings before the Resident Magistrate were governed in part by the Act which, so far as is relevant, provides as follows:

" 19. - (1) An act -

- (a) committed in the Zone by a person, whether he is or is not a citizen of Jamaica; and
- (b) being of such a description as would, if committed on land in Jamaica, be punishable on indictment, is an offence punishable on indictment in Jamaica in like manner, notwithstanding that it may have been committed on board, or by means of, a vessel the nationality or registration of which is not Jamaican, and the person who is reasonably suspected of having committed such offence may be arrested and may be tried or otherwise dealt with in reference to any charge against him in connection with that offence.

(2) For the purposes of this section all offences under the Dangerous Drugs Act, whether or not they are only summary offences, shall be treated as if they are offences punishable on indictment.

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(5) No prosecution for an offence punishable under subsection (1) shall be instituted except by or with the consent of the Director of Public Prosecutions:

Provided that this subsection shall not prevent the arrest, or the issue of execution of a warrant for the arrest, of any person in respect of such an offence, or the remanding in custody or on bail of any person charged with such an offence."

For the appellants it was argued that the consent required by section 19(5) was written consent and that consent in any other form would be insufficient to satisfy the requirement of the law. To support this argument Mr. Ramsay Q.C., prayed in aid cases such as **John Thomas Bates** (1911) 6 Cr. App. R 153; **R. v. Warn** (1968) 1 All ER 339; **R. v. Angel** (1968) 2 All ER 607 and **Adrian William Bull** (1994) 99 Cr. App. R 193. These cases, all of English origin, were concerned with instances in which the consent of the Director of Public Prosecutions, or in the case of **Bates** the consent of the Attorney General, was a legal pre-requisite for the institution of a prosecution for a criminal offence. These cases show that a consent in writing was

customarily given although the relevant statutes did not specifically require that it should be so given. That, as I understand it, was Mr. Ramsay's strong point. But, inasmuch as such consent is a statutory requirement, it seems to me that, ultimately, one must look to see what precisely the particular statute enacts. In our jurisdiction there is at least one statute which mandates the consent of the Director of Public Prosecutions in writing as a pre-requisite for the institution of criminal proceedings. That statute is the Perjury Act: (s.14). However, the Act with which we are here concerned requires simply the consent of the Director of Public Prosecutions. I am, therefore, inclined to the view that in the Jamaican context, unless specifically enacted by express words in the statute, a statutory requirement for the consent of the Director of Public Prosecutions as a pre-requisite for the institution of criminal proceedings is fulfilled if the consent is given in writing or otherwise. In the instant case it is common ground that the case against the appellants was prosecuted ab initio by Mr. Evan Brown in his capacity of Crown Counsel in the Department of the Director of Public Prosecutions. As such, he was the personal representative of the Director. There was no evidence of a formal consent in writing of the Director of Public Prosecutions, himself. But Mr. Ramsay argued strenuously that even in these circumstances such consent was necessary as a matter of law. I disagree. Is it

conceivable that the Director of Public Prosecutions could conduct, through his authorized agent, a criminal prosecution to which he was not consenting? I think not. In my opinion it was patently clear that the Director of Public Prosecutions gave his consent to the institution of the proceedings against the appellants and, accordingly, complied with the provisions of section 19(5) of the Act. This ground of appeal, therefore, fails.

With respect to the second ground of appeal, the argument was that on a true construction of the provisions of section 19(2) of the Act the appellants should have been tried on indictment and not summarily on Informations as they were. In my judgment section 19 (2) does not admit of such an interpretation as is contended for by Mr. Ramsay. If authority were needed to demonstrate the fallacy of Mr. Ramsay's argument such authority is to be found at the highest level in the decision of the Privy Council in **Pianka and Others v.R.** (1977) 15 JLR 175. In that case a motor boat registered in the United States of America was intercepted in the territorial waters of Jamaica while carrying a large load of ganja. Two American citizens who were on board at the time were tried summarily and convicted by the Resident Magistrate for St. Mary for various breaches of the Dangerous Drugs Act. They appealed and this Court dismissed their appeal against conviction. On a further appeal to the Privy Council it was held inter

alia (Lord Simon of Glaisdale and Lord Russell of Killowen dissenting) that the courts of Jamaica and specifically the resident magistrates courts have jurisdiction to try summary and special statutory offences committed by a foreigner on a foreign ship within the territorial sea. Their Lordships' Board so held having traced the history of the relevant Jamaican legislation and construed section 4(1) of the Jamaican Territorial Sea Act of 1971 against such a background. Section 4(1) enacts as follows:

"An act -

(a) committed by a person, whether he is or is not a citizen of Jamaica, on or in the territorial sea; and

(b) being of such a description as would, if committed on land within a parish in Jamaica, be punishable on indictment according to the law of Jamaica for the time being in force, is an offence punishable on indictment in like manner, notwithstanding that it may have been committed on board or by means of a vessel the nationality of which is not Jamaican; and the person who is reasonably suspected of having committed such offence may, subject to the provisions of subsection (5), be arrested, and may be tried and otherwise dealt with in reference to any charge against him in connection with that offence, accordingly."

Be it noted that the Act of 1971 contains no provisions comparable to the provisions of section 19(2) of the Act of 1991. Section 19(2) makes specific provision for the trial of offences under the Dangerous Drugs Act committed within the Zone. The provisions of section 19(2)

are enacted expressly for the purposes of section 19 which in turn provides for the treatment of indictable offences committed in the Zone. In that process section 19(2) confers upon the Resident Magistrate jurisdiction to deal with offences under the Dangerous Drugs Act committed within the Zone whether or not such offences are only summary offences. So drafted the Act of 1991 may be seen as an improvement on the Act of 1971, the obvious intent of the legislature being to provide specifically in the latter Act for the trial in the usual manner, i.e. summarily, of offences under the Dangerous Drugs Act committed within the Zone. In this way such an exercise in the construction of statutes as their Lordships were obliged to undertake in deciding **Pianka** (supra) now becomes unnecessary.

Accordingly, this ground of appeal must also fail, and with it the appellants' entire appeal.

ORDER

FORTE, P:

19th November, 2001

Appeals dismissed. Convictions and sentences affirmed. Appellants not appearing, recognizances escheated, and warrants of Distringas and Capias to issue for four (4) appellants viz:

- 1) McTair Major
 - 2) Miguel Cartwright
 - 3) Dwight Grant
 - 4) Octavious Smith
- and two sureties (1) Steadman Guy and (2) Keith Mendez.