IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 166/69

B E F O R E: The Hon. Mr. Justice Waddington, Presiding

The Hon. Mr. Justice Eccleston

The Hon. Mr. Justice Luckhoo

R. v. CRAIG KARRER; BON LINKINOGGOR; DARYL ESCRIBA

F.M.G. Phipps, Q.C., P.Atkinson and Dr. Edwards, for the appellants.

J.S. Kerr, Q.C., D.P.P. and L. Wolfe, for the Crown.

17th and 18th MARCH, 1970.

WADDINGTON, J.A.,

The appellants were convicted on three Informations, under the dangerous drugs law, by the Resident Magistrate for the parish of St. James, on the 15th of December, 1969. They were convicted on Information 7424 of 1969, which charged them jointly with exporting ganja from the island of Jamaica, contrary to Section 6 of Chapter 90. On that Information, they were convicted of attempting to export ganja, and Karrer and Linkinoggor were each fined $200 or 12 months imprisonment at hard labour, whilst Escriba was fined $100 or six months imprisonment at hard labour.

On Information No. 7425 of 1969, they were convicted of the offence of being unlawfully in possession of ganja, contrary to Section 7(c) of Chapter 90, and Karrer and Linkinoggor were both sentenced to 2½ years imprisonment at hard labour, whilst Escriba was sentenced to 18 months imprisonment at hard labour.

On Information No. 7559 of 1969, they were convicted for using a vehicle, to wit, an aeroplane, Cessana 206, lettered and numbered N - 2545X, for carrying ganja, contrary to section 22(1e) of Chapter 90. Karrer and Linkinoggor were each fined $200, or 12 months imprisonment at hard labour, whilst Escriba was fined $100 or six months imprisonment at hard labour.

The learned Resident Magistrate ordered that if the fines on the conviction for attempting to export ganja were not paid, then the sentences of imprisonment on that conviction were to run consecutively to the sentence imposed in respect of the Information for possession of ganja.

In respect of the conviction for possession of ganja, the

evidence in support of the case of the Crown was, briefly, that on the 14th of November, last year, an aircraft landed at Braco airstrip in the parish of Trelawny. The three appellants were the occupants of that aircraft. The appellants were seen and interviewed by an Inspector of Police, Felix McLeod at the police station at Falmouth. The pilot of the aircraft, who was the appellant, Karrer, informed Inspector McLeod that he was on his way to Kingston and had run out of fuel and was forced to land at Braco airstrip. As a result of what Karrer told McLeod, permission was granted for the three appellants to remain in the Island for three days.

A witness, Reginald Phillips, said that on the 16th of November, 1969, at about dusk, he was at the taxi stand in Montego Bay. A taxi drove up and the driver spoke to him, and as a result of what he was told he went in the car with him. The car was driven to the parade, where he saw three white men who came into the car, and they all drove to a place in Hanover. When they got there, it was late at night. The car stopped and the three white men got out and went up to a bank and whistled. A man came up and talked to them, and three crocus bags were produced, which Phillips said smelt of ganja. The bags were put, two in the front of the car and one on the back seat, and they all drove back to the airport at Montego Bay, where the car stopped beside an aeroplane with green and white stripes. The crocus bags were then placed in the aeroplane, the door of which was opened with a key by a man whom he described as being "slim and good looking." He saw three seats in the aeroplane and two bongo drums.

Evidence was given by Woodrow Anderson, a sergeant of Police, who said that on the 17th of November, 1969, at about 8 a.m., he was at the police station in Montego Bay, when he received a call, as a result of which he went to the Montego Bay Airport, where he saw Inspector McLeod. Both of them went to a certain point on the ramp and took up a position in ambush, at about 8.30 to 9 a.m. At about 12.40 p.m., he saw the defendant, Escriba, came along the ramp to a Cessana aircraft which was parked on the ramp. He had a bongo drum in his hand. He went up to the plane, looked inside and looked around and then sat down on the bongo drum underneath the plane. About four to five minutes later, the defendant Linkinoggor

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and the defendant Karrer came along. They also went up to the plane where Escriba was; both men looked inside the plane and looked around, and Karrer then took from his right-hand trousers pocket something that resembled a key, with which he opened the door of the plane. Escriba then entered the plane through that door, went inside and took his seat. Linkinoggor then entered the plane and took his seat at the righthand side of plane, and finally, Karrer entered the plane and took his seat at the left side. Karrer closed the door, and at that moment Sergeant Woodrow Anderson and Inspector McLeod came up, and McLeod asked the men what they had in the bags in the plane. Karrer replied, in the presence of the other accused who could hear, that he did not know what was in them. The three bags were taken from the plane. Anderson said they were on the floor of the plane. Two had been placed lengthwise and one across, in the plane, and before the door was opened, the bags could be seen in the plane. Anderson opened one of the bags and noticed in it, vegetable matter resembling ganja. He said to all the accused: "This is ganja", and all three accused said: "I don't know who put it there."

Samples from these bags were subsequently taken to the Government Chemist for analysis, and there is no dispute that the bags contained ganja.

Evidence was also given by Inspector Felix McLeod in support of Sergeant Anderson's evidence as to what happened on the ramp, and there was also evidence by Aubrey Yee-Sang, an Air-Traffic Controller at Montego Bay Airport, to the effect that at about 10.00 A.M. on the 17th of November, the accused Karrer had submitted to him a flight plan showing the destination of the plane as West Palm Beach, Florida, United States of America.

The appellants all made unsworn statements. Linkinoggor said that he was a business man, a building contractor, and a Captain of Infantry United States Army Reserve. On November 14, he flew to Jamaica in a private aeroplane, piloted by Karrer, with one other passenger. He said they arrived in the afternoon, and were granted permission to stay for three days. He checked in at the Summit Hotel, and he did some sight-seeing and shopping for next few days. On November 17, they planned to depart from Montego Bay International Airport. Upon arrival at the aeroplane, the police arrived and searched the aeroplane and removed

the three bags of material from the aeroplane. He had never seen these bags before and did not know what they contained. They were placed under arrest and taken to the Montego Bay Police Station. He said he did not know Reginald Phillips; he had never spoken to him and he had never seen him before he saw him in the Courtroom.

The appellant Karrer said that he lived at Coco Beach, Florida. He was a restaurant owner, and had a commercial licence to fly an aeroplane. On Friday, November 14, he flew two passengers to Jamaica. The passengers were the other two accused. On approaching Jamaica, they had a fuel problem and landed at Braco. The Customs gave them three days to stay in Jamaica. They came to Montego Bay and checked in at the Summit Hotel. They went sightseeing. They were supposed to leave on the 17th. At about 1.00 p.m. they went out to the plane to depart, and as they were walking towards the plane, and were approximately fifteen feet in front of the plane, they were stopped by the police. In fact, he said, he was nearly run over. On the police stopping them, Inspector McLeod instructed him to open the back door of the plane. As he started to open it, he remarked to the Inspector that he had locked all the doors and this one was open, and he did not understand how it got opened. He pointed this out to the Inspector. He was then instructed to open the other doors. He said that the police removed three bags from the plane. He told them that he had never seen those bags before, and did not know what they contained, or how they ever got there. They were then arrested and taken to the Montego Bay jail. He said he had a plane of his own which had developed radio troubles and he had flown another man's plane to Jamaica.

The appellant Daryl Escriba said he lived at 27-39 South Atlantic Coco Beach, Florida. He knew nothing of the charge. He knew nothing about the bags and nothing of their contents.

Arising out of the appeal, an affidavit was filed by Ian McDonald Ramsay, a Barrister-at-Law, who described himself in the affidavit as being "Counsel for the defendant/appellants, upon their appeal in the Court of Appeal." It is not necessary to refer to the contents of the affidavit, except to say that it was referred to the learned Resident Magistrate for his comments, and in replying, the learned Resident Magistrate said this:-

" 1. With respect to paragraph 5 of the affidavit of Ian McDonald Ramsay, I would observe that I gave an oral judgment, and

" have no verbatim report of what I did say.

2. I clearly stated and I should be understood as finding (inter alia) -

(a) that the evidence of Phillips was corroborated.

(b) that Phillips' evidence on the identification of the accused Linkinoggor was untrustworthy.

(c) that the said Phillips did not purport to identify the other two accused.

(d) that I drew the inference from other facts which I found that:

(i) the 3 men who arrived at Braco in the aircraft tendered in evidence (Ex. 2)

(ii) who went to Hanover and obtained 3 bags of Ganja,

(iii) who were found in the said plane, (Ex. 2) with the said 3 bags of Ganja; were the same men viz the 3 accused persons. "

Mr. Phipps, Counsel appearing in this appeal for the appellants, Linkinoggor and Karrer, argued one ground of appeal against conviction, and that is, that the appellants ought not to have been convicted of more than one offence, for what was really one transaction, that the appellant's possession of the ganja was merely incidental to the offence of exporting or attempting to export ganja.

Learned counsel submitted that on the facts of this case, there was one incident of what is called a compound crime, and it was submitted that in compound crimes the lesser offence must not take precedence. It was submitted that on the evidence in the case what the offenders were doing was attempting to export ganja, and in the circumstances, the evidence of possession of ganja could only be incidental to the exporting. The possession was evidence in the transaction which amounts to the actus reus of the charge of attempting to export, and in those circumstances the Court ought not to have punished the appellants more than once.

Learned counsel cited several cases in support of this submission. He cited the cases of R. v. Francis Kenny, 21 Cr. App. R. 78, where there were convictions for the offence of pavillion-breaking and larceny, and also for malicious damage, arising out of the same act; R. v. Charles Alexander and Lloyd Daniels (1966) Gl. L.R. 264, convictions for smoking ganja

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and also for possession of a chillum pipe for smoking; Portous v. Mohammed, 5 W.I.R. 219, alternative offences of dangerous driving and careless driving; R. vs. Brickligge, 7 W.I.R., 45, convictions for smoking ganja and possession of ganja; R. v. Lewis, 9 W.I.R. 333, convictions for carnal knowledge and rape, in respect of the same act of sexual intercourse; R. v. Smith, 8 W.I.R. 138, convictions for attempted office-breaking and also possession of the house-breaking implements, which were being used in the attempt.

In our view, the instant case can be distinguished from the cases cited by Mr. Phipps. In each of the cases cited, the accused committed one act which in itself comprised two offences. In Kenny's case, one act of pavilion breaking which also resulted in malicious damage. In Portous and Mohammed, one act of driving which resulted in alternate charges of dangerous and careless driving. That case is not really relevant on this point, because the charges were laid in the alternative. In Lewis' case, one act of sexual intercourse, resulting in convictions for carnal knowledge and rape. In Smith's case, one act of attempting to break into an office, which resulted in convictions for attempted office breaking and possession of the house-breaking implements which were being used.

The ganja cases of R. v. Alexander and Daniels and R. v.Brickligge, as indicated during the course of the arguments must be considered separately and in doing so it must be borne in mind that the minimum mandatory sentence for possession of ganja is 18 months imprisonment, a sentence apparently designed to prevent trafficking in the drug. The sentence for smoking ganja is less severe, and may consist of a fine. In cases of smoking, the quantity of ganja involved is usually minimal, and the smoker is not usually a trafficker in the drug. In these circumstances, an Appellate Court might not be too astute in affirming a conviction for possession on evidence which merely supported a charge of smoking, even though technically, the accused may be said to be in possession of the ganja being smoked, or the pipe in which it is being smoked. In any event, however, in both of the cases cited, the one act of smoking comprised also the possession of the ganja being smoked in the one case, and in the other case, the pipe in which the ganja was being smoked.

In the instant case, the appellants were found in possession of a large quantity of ganja - three large full crocus bags. That was one act - one act of being in possession of ganja. It is true that they obtained

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the possession of this ganja for the purpose of exporting it, but at the moment when they were found in possession, the offence of being in possession of ganja was complete. In other words, they had to obtain possession of the ganja before any possibility of exporting it could arise. After obtaining possession of the ganja, some further act was necessary in order to constitute the offence of exporting.

Mr. Phipps submitted that the possession of the ganja was the lesser offence and was merely incidental to the attempt to export it. The Court does not share that view. In our view, the possession of the ganja was undoubtedly the substantial offence without which it would have been impossible to commit the other offences. This ground of appeal therefore fails.

There was another ground of appeal taken by Mr. Phipps, ground 3 relating to the Information for using a vehicle for carrying ganja.

Mr. Phipps submitted that there was no evidence that the vehicle which was used on the 17th of November, namely, the aircraft, had actually been used for carrying the ganja. He conceded quite readily, however, in answer to a question by my brother Mr. Justice Luckhoo, that the Court could on the evidence, have convicted for attempting to carry, and that this Court could amend the conviction accordingly.

I pass now to submissions made by Mr. Atkinson on behalf of the appellant Escriba. Mr. Atkinson argued the following ground of appeal: "That no evidence was adduced by the Crown at the trial to show (a) that the appellant Escriba exercised exclusive or any joint control over the alleged ganja, or (b) that the appellant had any knowledge whatsoever of the presence of the alleged crocus bags that were found on theplane, or (c) that the appellant had guilty knowledge of the contents of the said bag."

Mr. Atkinson submitted that before the appellant Escriba could have been found guilty of either exporting ganja or using an aeroplane to convey the ganja, it was incumbent upon theprosecution to prove that he had knowledge of the contents of those bags, and further, as regards using an aeroplane to transport ganja, that he had control over the user of the aircraft. He submitted that the Crown had completely failed to prove any actual control over the bags, and that the question must then be asked whether, if from finding the accused merely sitting in a plane with

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other persons where the bags in question were found, it could be inferred that the appellant Escriba had any effective control over those bags. He submitted that from those circumstances, and without more, it could not be inferred that he was in possession or control of the bags.

Mr. Atkinson cited several cases in support of his submissions which the Court does not find it necessary to review. The Court is of the view that on the totallity of the evidence in this case, the fact that this plane had landed at Braco airstrip with these three appellants aboard; the fact that the destination of the plane was given as being Kingston, but instead, it wentto Montego Bay; the fact that three white men were seen together at this spot in Hanover at night, and obtained three bags of ganja which were then transported to Montego Bay airport and placed on this very plane: the fact that these three accused were seen on the morning of the 17th of November to enter that plane, after a flight plan was obtained to fly the plane to the United States of America, the learned Resident Magistrate was fully justified in drawing the inference that this was a joint enterprise by the three appellants to come to Jamaica to purchase ganja and to endeavour to take it out of the country. It is our view that on the evidence,that inference was inescapable. In the circumstances, this ground of appeal also fails, and, it follows, the appeals against convictions must be dismissed.

I pass now to the ground of appeal relied on by all the appellants with regard to sentence, namely, that the sentences were manifestly excessive. It was urged that these appellants had no previous convictions, and that in the circumstances sentences of two-and-a-half years imprisonment were manifestly excessive. The Court has to take into account the fact, which I think is generally known, that this country has been afflicted in recent months with a spate of offences of this nature, particularly in the Montego Bay area. No doubt, the learned Resident Magistrate took that fact into consideration. These were serious offences, and it is necessary, in order to deter the commission of offences of this nature that the sentences imposed should be sufficiently severe. It is the view of this Court that in the circumstances of this case, a sentence of two-and-a-half years imprisonment could not be said to be manifestly excessive, and the Court is not minded to interfere with the sentences.

With regard to the order for consecutive sentences of imprisonment if fines are not paid, we do not think that that order infringes any principle of sentencing. In our view, as I have said before, these were all substantive offences, and we see no reason to interfere with theorder. In the result therefore, the appeals are all dismissed and the sentences affirmed.

G. E. Waddington J.A.

[illegible] J.A.

J. A. Luckhoo J.A.