Judgment Book

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 100/85

BEFORE: THE HON. MR. JUSTICE KERR - PRESIDENT (AG.)
THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WHITE, J.A.

REGINA

VS.

FITZROY CRAIGIE
DWIGHT HYMAN
NIXTON WALLACE
STANHOPE NAIN
BRYAN SMALLING
WILLIAM WOOD
ROY BROWN
CARLTON JOHNSON
FRANK GRAY
GERALD CAMERON
LEROY DUNKLEY
RONALD STERLING

Mr. Ian Ramsay and Mr. George Thomas for Dunkley, Nain, Smalling and Johnson.

Mr. Roy Fairclough for Craigie, Hyman and Wallace.

Mr. Enos Grant and Mr. B.E. Frankson for Sterling, Brown and Wood.

Mr. Hugh Thompson for Gray and Cameron.

Mr. Glen Andrade, Q.C., Deputy Director of Public Prosecutions for the Crown.

November 11, 12, 13, 14, 15, 18, 19, 1985; and May 22, 1986

KERR, P. (AG.):

The appellants were jointly tried and convicted in the Resident Magistrate's Court for St. James before His Honour, Mr. D.J. Pitter for breaches of the Dangerous Drugs Act.

We dismissed the appeals and affirmed the convictions and sentences. We now set out herein the reasons for our decisions.

The Informations on which they were charged and convicted in the operative parts read:

"INFORMATION 4378/85

On the 6th January, 1985 Fitzroy Craigie, Dwight Hyman, Nixton Wallace, Stanhope Nain, Bryan Smalling, William Wood, Roy Brown, Carlton Johnson, Frank Gray, Gerald Cameron, Leroy Dunkley, Ronald Sterling, and Hugh Scott, unlawfully had ganja in their possession.

Contrary to Section 7(c) of the Dangerous Drugs Act.

INFORMATION 4379/85

On the 6th January, 1985 Fitzroy Craigie, Dwight Hyman, Nixton Wallace, Stanhope Nain, Bryan Smalling, William Wood, Roy Brown, Carlton Johnson, Frank Gray, Gerald Cameron Leroy Dunkley, Ronald Sterling and Hugh Scott, did attempt to export ganja from the Island of Jamaica.

Contrary to Section 6 of the Dangerous Drugs Act.

INFORMATION 4380/85

On the 6th day of January, 1985 Fitzroy Craigie, Dwight Hyman, Nixton Wallace, Stanhope Nain, Bryan Smalling, William Wood, Roy Brown, Carlton Johnson, Frank Gray, Gerald Cameron, Leroy Dunkley, Ronald Sterling and Hugh Scott did use conveyances namely canoes for carrying ganja.

Contrary to Section 22(1)(e) of the Dangerous Drugs Act.

INFORMATION 4381/85

On the 6th day of January 1985 Fitzroy Craigie, Dwight Hyman, Nixton Wallace, Stanhope Nain, Bryan Smalling, William Wood, Roy Brown, Carlton Johnson, Frank Gray, Gerald Cameron, Leroy Dunkley, Ronald Sterling and Hugh Scott, did deal in ganja.

Contrary to Section 7(b) of the Dangerous Drugs Act."

The defendant Hugh Scott was acquitted on all charges while on the charge of "dealing", only Leroy Dunkley and Ronald Sterling were convicted.

On Friday the 4th of January, 1985 in accordance with certain instructions received from Commander David Hall, a vessel in the possession of the Jamaica Defence Force apparently prepared for covert action, unnamed, fitted with a VHF radio operating on Channel 10 and with a marine radio, with Lieutenant Guy Harvey in charge and a crew of Jamaica Defence Force personnel and Acting Corporal of Police Howard Hamilton, set out from Kingston, its destination a point off the Montego Bay shore. According to Lieutenant Harvey, he arrived there at 11:00 p.m. and took up this position which was about quarter of a mile from the Montego Bay Free Port area.

There had been an earlier mission to the same place on Saturday, December 12, 1984. He then had a conversation with one "Papa John" using as instructed, the name "Albatross", about a shipment of ganja. This mission fell through because the shipment was not ready according to his contact "Papa John."

A second mission on December 27 was aborted because the ship "broke down" en route off Port Antonio.

On this the third mission, Harvey and his ship arrived at or near the same rendezvous as on the previous occasion. While there and using the same code name "Albatross" he received information on the radio operating, as advised, on Channel 10 from "Papa John". He recognized the voice as the same on the previous occasion. The caller informed him that the shipment was ready but would await the departure of cruise ships then in port. After the ships departed "Papa John" advised,"Please prepare to receive the first load - we are coming out now". About fifteen minutes later, a canoe with three men on board and laden with packages arrived along-side the ship and these were placed on board ship by the three men. Harvey said the appellant Craigie was one of the three men. He had known him before, having seen him on occasions at the Montego Bay Yatch

Club. He refused Craigie's request to come on board. Craigie asked him to move the ship nearer to the shore from which they were moving the packages. He agreed and piloted by Craigie in his canoe, Harvey moved his ship to a point in the sea about half of a mile off Reading. Harvey who was dressed in a T-shirt and shorts, pulled his cap over his face to avoid recognition by Craigie and he spoke in a simulated American accent. The canoe left, and he then communicated by his military radio with his superior officer. About forty-five minutes after, another canoe came and transferred its load to the ship. A third canoe then came along with three men and off-loaded its packages. At this stage, Harvey and his men disclosed their true identity and took the three men into custody. Of the three men, Craigie and another had made the first trip. Some hours later, three vessels - two canoes and an open hulk of a cabin cruiser, came along - the hulk being towed by a canoe. On Harvey's direction they came along-side. Seven men were in the larger vessel. The canoes and hulk had packages. The Jamaica Defence Force ship, the Manatee, then came upon the scene. The canoe towing the open hulk broke or slipped the two line and took off. The seven men in the larger vessel were taken into custody.

Acting Corporal Hamilton, who corroborated Harvey in every important particular, said he had kept out of sight during the loading operations but came forward and assisted in securing the boat and custody of the men. When the three men, Hyman, Wallace and Craigie, were detained on board, he had opened one package and showed the contents of vegetable matter resembling ganja to them and that the appellant Craigie then said, "Boss, beg you a chance and hold the other two men ... me a police, mi wife a breed and me pickney dem have to go a school, anything you want, name it and dem boys we tek care of you." The men,

the packages and the boats were taken to the pier at the Montego Bay Free Port.

Acting Corporal Lawrence of the Narcotics Division gave evidence that, while at the Montego Bay Free Port that night, he had been in radio communication with the "Albatross" and as a result of information received at about 2:30 a.m. he went to the shore at Reading and recovered thirteen packages. As a result of further communications between himself and the "Albatross" he went to the pier at Montego Bay Free Port and waited until the "Albatross" arrived with the canoes and open hulk.

There were three appellants, Craigie, Hyman and Wallace on board the ship and seven other appellants: Nain, Smalling, Wood, Brown, Johnson, Gray and Campbell in the open hulk. Hamilton in their presence made a report to him.

On the ship were sixty-nine packages, in the canoe "Eagle Craft", thirty-two packages, and on the big open hulk, fifty-seven packages. The packages when opened contained vegetable matter resembling ganja and he so advised the ten men. He labelled the packages taken from each place separately and arrested the ten men for possession, trafficking, attempt to export and conspiracy to export ganja.

The packages were sealed and stored in the Jamaica Defence Force Coast Guard vessel and the prisoners taken to the Montego Bay lockup. Later the packages were removed to the store-room of the Narcotics Division in Kingston where on the 21st of January Dr. Lee took samples of the packages from each place of collection - (Reading, the Albatross, the Eagle Craft and the open hulk). Captain Errol Bailey of the Jamaica Defence Force Coast Guard who was on board the Manatee Bay gave evidence of the packages being stored on the Manatee Bay and being taken to Kingston.

The case against the appellants Dunkley and Sterling (who were subsequently arrested on warrants) and their culpable involvement in the activities of the night of the 4th January, 1985 rested entirely on the evidence of Anthony Cammarato and Michael Moon, members of the U.S. Drug Enforcement Agency in Florida. It was the prosecution's case that the events of that night were in keeping with arrangements which had their genesis in Florida in April 1984.

According to Cammarato, on the 10th of that month he met the appellant Sterling at the house of one Ruth Carstarphen who introduced him and another under-cover agent as associates of hers. There was then discussion with Sterling about their providing an aircraft and pilot for transferring marijuana (ganja) from Jamaica; of Sterling undertaking to provide security cover and an air-strip in Montego Bay; of the packaging of the ganja; of payment of expenses incurred, and of Ruth Carstarphen handling the security in Florida. The arrangements fell through because no agreement concerning the expenses was reached. There was a second meeting at Carstarphen's house on November 7, 1984, between Cammarato, Sterling and Ruth Carstarphen concerning the transportation of ganja by ship. The amount of ganja would be about 10,000 lbs. In the course of discussions, Sterling invited Cammarato to visit Jamaica to meet his partners. Cammarato said he would need more commitment from Sterling before coming to Jamaica. Sterling then gave certain assurances: there would be no problem; he would provide security; and that a radio with arranged frequencies would be provided. Sterling also gave him a Jamaican telephone number - 953-2236 - by which he could be contacted. Cammarato came to Jamaica the following month, December 12. He first spoke with Commander Hall of the Jamaica Defence Force in Kingston and on the following day while at the

Seawind Hotel in Montego Bay he saw and spoke with Sterling. Cammarato said that between the last meeting in Florida and this meeting at the Seawind Hotel he had spoken with Sterling and one Scottie about seven to ten times and he had taped the conversations. At the talk with Sterling at Seawind Michael Moon was present. On the following day as arranged, at about 5:30 p.m. Sterling took them by car to Patterson Avenue in the Ironshore area, and there introduced them to the appellants Dunkley and Craigie. Of Craigie, Sterling said, "This is the waterman" and that Craigie would be the one bringing the ganja. Dunkley said that Craigie was the security man and a Marine Police Officer. To this Craigie admitted being a policeman for "about thirteen years." Cammarato then produced a map provided by Commander Hall and Craigie pointed out a channel in the sea off Montego Bay and a point two chains from the reef and a quarter of a mile from shore and placed an overlay on the map there. The map with overlay was tendered in evidence. In Dunkley's room time and manner of delivery were discussed, the code words, "Papa John" and "Albatross" decided upon. "Papa John" being Craigie's identification and "Albatross" Cammarato's vessel; the communication to be by radio on VHF Channel 10. In answer to Dunkley's enquiry as to price, Cammarato said that as it had already cost him over $40,000.00 for boat and crew he would give US$200.00 per lb. and that since he had a buyer he would give the money to Sterling the following week. Dunkley then promised to throw in an additional 1,000 to 2,000 lbs. Discussions concluded, Sterling took Cammarato and Moon to their hotel. Sterling again met them the following morning at the hotel and Cammarato told him that he had contacted his vessel and crew and based on the information relative to frequencies, everything would be set and there was no need for another visit to the residence. At a further meeting

at noon, the arrangements were again discussed and the delivery was to take place within a few days. Cammarato advised Sterling that they would be leaving Jamaica that day and so they did, by the afternoon flight from Montego Bay to Florida.

Moon's evidence corroborated Cammarato as to the discussions between Cammarato and Sterling at the Seawind Hotel and also the discussions and arrangements between Cammarato, Sterling, Dunkley and Craigie at Ironshore. He also gave evidence of conversations he had by telephone calls to the same number Sterling gave Cammarato and of speaking to "Leroy" and Dunkley whose voice he recognized. The conversations concerned the planned venture. Both Cammarato and Moon were closely cross-examined and at great length. They denied being in Jamaica in January 1985. As it was not argued that there were inconsistencies and conflicts in their evidence reference will only be made to such evidence elicited in cross-examination as is essential in dealing with the questions raised on appeal.

David Lee, the Government Analyst gave evidence to the effect that from samples which he took all the packages contained ganja.

No case submissions based upon critical examinations of the evidence for the prosecution were rejected and all the defendants were called on.

The case for the appellants Dunkley, Nain and Sterling rested on submissions made by their attorneys. Appellant Craigie gave evidence on oath. He said he was a Corporal of Police with over twelve years service and in January 1985 stationed at Montego Bay and at the time attached to the Marine Division there. At about 10:30 p.m. that night he was on board the police launch at Old Kerr Wharf, Montego Bay, when he saw the appellants Hyman and Wallace (known to him as Nicky

and Billy) in a fibre-glass canoe. They informed him that they had seen boats with men and packages along the beach. He asked them to wait at the wharf for him. He then left and made efforts to locate officers of the Marine Division including Inspector Beaumont but without success. He returned to the pier and persuaded Hyman and Wallace to assist him in investigating their report. He was wearing civilian clothes. His intention was to observe, make notes and report to his superiors. They took him in their canoe to the beach at Reading. There he saw three canoes and about twenty men. Some of the men looked like fishermen. Of the twenty men, three were white. The sea was rough and because of that the fishermen said they were not going out. He instructed Hyman and Wallace to find out what was happening and they went to where the men were while he remained in the canoe. Nicky reported that the men were having problems in getting the packages out to a boat and offered him a job to assist them. Craigie said he advised him to take the job as that will assist him in his investigations. Nicky spoke with the men and they loaded the packages in the canoe. On the instructions of a white man they put out for a point a mile off "Seawind" where he saw a ship. He observed that there was no name on the ship but the letters "FL" indicating a Florida registration. No light was on it. He went along-side and two of the crew threw out line by which they tied the canoe to the ship. The packages were transferred to the ship. His request to go on board was denied. After unloading his canoe he returned to the beach. There he saw a white man - who looked like the witness Moon but his features were different then - he had on a beard. His canoe was again loaded and with others in another canoe made the trip to the ship. After the other canoe was unloaded and left and while his canoe was along-side he heard a voice saying, "Don't move, and guns were pointed on them by men

on the boat. They were then taken aboard. In obscene language he told them he was a police officer investigating and Hyman and Wallace were asisting. All three were ordered to sit and be quiet. About half hour after other boats came along. Then the Coast Guard boat arrived and the other boats and men were detained. He denied using the words alleged by Corporal Hamilton and in particular that his wife was pregnant. He denied that there was any meeting at Dunkley's house with Cammarato in December. In cross-examination he denied knowing Sterling or Dunkley before. When he was seeking assistance he saw regular policemen but he did not say anything to them. He was not armed - he did not consider that he was on a dangerous operation. He went as an under-cover man that night - he had no identification on him - he did not alert the Coast Guard because he had nothing concrete to tell them.

After his observation of the boat, he had something concrete to report. He wanted to make sure the packages were on board. He did suspect the packages contained ganja. The loading at Reading was at 12:30 a.m. The trips took two and a half hours.

For what it was worth Dr. Kingsley Smith gave evidence that at the material time Craigie's wife was not pregnant.

Appellant Wallace in a statement from the dock spoke of Hyman and himself meeting Craigie at Kerr's Wharf; of agreeing to assist him in his investigations; of going to the beach at Reading and on Craigie's instructions agreeing to assist the men in conveying the packages to the boat; of making the trips to the ship; of being taken into custody with Craigie who told the men on the ship that he was a policeman carrying out investigations.

Hyman in his unsworn statement said, "I heard what Nixton Wallace has said and it is true."

Roy Brown in his unsworn statement said that he and others were fishing with a net off the beach at Bogue that night when a boat with three men (two white and one black) came up with two extra boats and offered them US$100.00 each to assist in conveying some packages. He agreed. At the beach, the men loaded the boats with the packages. They set out, but his boat was stuck on the reef for some time. When it was eventually freed they went out to the ship where they were held; he did not know what was in the packages.

Frank Gray in his unsworn statement merely agreed "with what Brown had to say."

Gerald Cameron in his unsworn statement said that he was at River Bay Beach with the appellants Smalling, Nain and Johnson when two men - a white and a black offered each $100.00 as he wanted a boat to go to the reef. They went into a canoe to the Reading area and when they got to the reef he saw men, boat and packages there. On going out from the reef they saw a big white ship and another ship. Their boat was towed with them to Montego Bay Free Port. Appellants Smalling and Johnson merely stated that Cameron's account was true.

The learned Resident Magistrate after hearing full submissions by defence attorneys in his "findings of facts" concisely set out his findings on the important issues. Such findings as were challenged on appeal or relevant to the questions raised will be referred to specifically.

Mr. Ramsay opened his attack on the convictions, on the joint trials of the appellants and the conduct of the prosecution under the following grounds of appeal which generally were applicable to all the appellants:

> "That the Court upon the application of the defence ought to have compelled the Crown to elect between the charges preferred against the accused; alternatively, that the informations are bad for duplicity; that the Crown ought to have opened to the facts of the case relied on as requested by Counsel for the defence and as indicated by the learned Resident Magistrate."

In support, Mr. Ramsay submitted that there was a latent duplicity in that on one view of the case for the prosecution it may be that certain appellants convicted of certain substantive offences could not be so convicted and if that is so, then it may be that different persons are being tried together for different offences. In that regard the basis for the conviction of Dunkley and Sterling would have to be different from the others. If they were merely in conspiracy to do certain things then in the joint information quite different offences by different persons might be included or several offences (albeit of the same type) are in one information.

Further, the failure to open had the conjoint effect of misleading the defence or leaving it unprepared for the type and nature of the forthcoming evidence. Counsel for the Crown ought to have adhered to the written practice directions of the Director of Public Prosecutions that in complex summary cases, such as this is, counsel should open to the facts.

Now as was stated in R. v. Greenfield (1973) 3 All E.R. p. 1050 - duplicity is a matter of form. On the face of these informations there is no duplicity nor do we understand Mr. Ramsay to be so urging. Apparently, the gravamen of his complaint was that the role allegedly played by certain defendants and in particular, Dunkley and Sterling cannot be deduced from the informations and that the refusal by senior prosecuting counsel to open to the facts prejudiced or impeded the presentation of the defence.

While there is no duty on the prosecution to open to the facts in a case triable in the summary jurisdictions, nevertheless we firmly advocate that the practice directions of the Director of Public Prosecutions to the effect that it is desirable that in complex cases the prosecution ought to open to the facts be followed. The advantages are self-evident; the Magistrate is thereby advised of the nature of the case for the prosecution and the evidence to be adduced in proof thereof, and with such prescience will be better able to appreciate the relevance and purpose of evidence sought to be tendered and better prepared to deal with objections as to admissibility. Further, defence counsel, against the background of their instructions will be able to identify the important issues in contention and avoid cross-examination that may be merely fishing or irrelevant. The instant case, involving issues of common design and questions of particeps criminis is one in which an opening to the facts should have been made. However, having regard to the method of presentation and the order in which the evidence unfolded and that the trial extended over nearly three months with eighteen days of hearing, there was ample opportunity tc appreciate the nature of the Crown's case. Indeed the sub-tained challenge to the credit and credibility of certain important witnesses and the full and astute presentation of the defence would belie any suggestion that there was any real prejudice or impediment to the presentation of the defence.

The second ground of complaint concerned the admissibility of certain evidence and the prejudicial effect of such evidence.

First: The evidence of radio conversation as given by:

(i) Corporal Lawrence and

(ii) Lieutenant Harvey from the Albatross with "Papa John".

Re (i) Corporal Lawrence:

Mr. Ramsay submitted that such evidence ought not be admitted as the witness could not identify the voice heard on his radio and the calls were not made by any of the appellants.

Now, Lawrence's evidence was to the effect that he had heard on a pre-arranged radio frequency a call at 2:30 a.m. from the "Albatross". That he knew that that was the code name for the ship in this undercover operation and that as a result of that information he went to the beach at Reading and recovered a number of packages containing ganja and that on receipt of further radio information he went to the Montego Bay Free Port where he took charge of the operations.

In our view the admission of this evidence is unobjectionable. Such evidence is merely explanatory of the witness' conduct.

Re (ii) Harvey:

Strong objections were taken to the admissibility of Harvey's evidence concerning his conversation as "Albatross" with "Papa John".

Before us it was submitted that neither Harvey nor Hamilton was able to identify the voice of "Papa John" - indeed, Harvey had said in evidence that he had "no idea who Papa John was". Accordingly it was argued that the learned Resident Magistrate erred in finding that "it was the accused Craigie who made the call identifying himself as 'Papa John'."

It was clear to us that the identification of "Craigie" as Papa John could not rest on the evidence of Harvey. However, in our view, the admission of Harvey's evidence and this finding of the Resident Magistrate rested on firm bases. When Harvey came to give his evidence, the learned Resident Magistrate had already heard from Cammarato of the "well laid plans" including code words, radio frequency, rendezvous and that Craigie would

be the "waterman" who would use the code word, "Papa John". The foundation had then been already laid. Then, after the conversation with the same voice, as on the previous mission, Craigie came along at the appointed time and place in the first canoe with the first shipment and gave advice to Harvey to move the ship nearer the loading strip. On such primary facts, the inference that Craigie was "Papa John" was reasonable and inescapable.

Secondly: It was submitted that the learned Resident Magistrate in spite of objections, expressly admitted evidence of an alleged conversation between the defendant Sterling and Cammarato in America as evidence against all the accused for the purpose of all charges, which, it clearly could not be, since it would be evidence against Sterling alone.

In support, Mr. Ramsay further urged that the meetings and discussions in the United States were so remote in time and place that the evidence ought not to have been even admitted against Sterling, and at the time these conversations were held, the status of the witness as an agent provocateur could not be determined.

There really is no merit in these submissions. The U.S. meetings were part of a series and clearly admissible against Sterling who was jointly charged with the others. Nowhere in his findings were we adverted to the Resident Magistrate making use of that evidence against the other defendants. The Resident Magistrate, as judge in his Court must be presumed to know the law and be aware of the elementary rule of evidence that in a criminal case, admissions are only evidence against the maker unless adopted by others by word or conduct. Indeed the fact that he dismissed all the other defendants except Sterling and Dunkley on the charge of "dealing in ganja" is clearly indicative of his not doing so.

Thirdly: That the learned Resident Magistrate allowed the tender of alleged tapes of conversations between the American agents and the appellants Sterling and Dunkley when:

(i) There was no production from proper custody before the Court, bearing in mind that the evidence was that the tapes had been placed in the custody of the Evidence Custodian at Fort Lauderdale, Florida, and he was not called as a witness.

(ii) That the tapes were admitted with unjudicial haste and long before there was complete testimony and adduction of facts by either side to justify such reception.

(iii) That the learned Resident Magistrate ignored or brushed aside or reconciled contradictions of fact relating to this provenance of the tapes and in particular to the vital question whether it was the "originals" that were produced in Court.

At the trial, Cammarato in evidence said, that after the recordings, he would make copies of the tapes, then initial and place them in a plastic bag and give it to the "Evidence Custodian". He labelled the original tapes. If further copies were required, he would reopen the sealed plastic bag, make copies and reseal the bag. When he received them from the Evidence Custodian, they were not disturbed in anyway. He then produced a sealed envelope with three tapes in it. The seals were placed by him. He broke the seals in Court, and tendered as originals, the three tapes which were then tendered and marked as exhibits.

Objections were then made:

(1) That the defence was entitled to a transcript of such recordings so that objections could be prepared in the usual way as is usual in the case where admissions are being tendered against a defendant and none was given to them.

(2) That evidence of tapes was only admissible on:

(a) proper identification of the recorded voices;

(b) if the evidence met the requirements of relevance and admissibility; and

(c) there was evidence of proper provenance of the exhibits.

(3) That there should be a 'voir dire' to test the admissibility of the evidence contained in the tapes.

Counsel for the Crown in reply submitted, inter alia that:

(1) There was evidence of originality, authenticity, and relevance and proper provenance.

(2) That as Resident Magistrate sitting as judge and jury there was no necessity for a 'voir dire'.

The Court then ruled that the "tapes be admitted in evidence". Then followed specific identification and admission of three original tapes and copies of the originals. Counsel for the Crown then applied for the tapes to be played. Defence counsel objected strongly to the playing of the tapes. The learned Resident Magistrate prudently ruled "tapes to be heard by defence counsel before the playing of the original tapes". This was on the 3rd of June. On the following day the Court pronounced that tapes should be played together at the conclusion. On the 11th of June and 1st of July the tapes were played by Cammarato after Moon had given evidence. Both Cammarato and Moon were subject to further cross-examination.

So, although notionally the tapes were in evidence from the 3rd of June, in reality, the evidence contained therein was not before the Court until the playing of the tapes, and by then the defence attorneys were aware of the contents of the tapes and were in a position to challenge their genuineness, originality and relevance and this they did by incisive and extensive cross-examination of Cammarato and Moon. That the tapes were admitted as exhibits at the time, rather than marked for identity, was a

mere formal technicality. In point of fact, the evidence contained therein was only admitted when the tapes were played and by then there was proper foundation for admissibility of such evidence.

On the question of originality and provenance, there was before the Resident Magistrate sufficient credible evidence that the tapes were original, were kept in reasonably safe custody and were not tampered with.

As was said - R. v. Robson (1972) 2 All E.R. at p. 701:

> "In the first stage, when the question is solely that of admissibility - i.e. is the evidence competent to be considered by the jury at all? the judge, it seems to me, would be usurping their functions if he purported to deal with not merely the primary issue of admissibility but with what is the ultimate issue of cogency. My own view is that in considering that limited question the judge is required to do no more than to satisfy himself that a prima facie case of originality has been made out by evidence which defines and describes the provenance and history of the recordings up to the moment of production in court."

On the question of voir dire, as the Resident Magistrate was judge of the law and tribunal of fact, a preliminary test of admissibility by way of a voir dire was impractical and unnecessary. In any event, in the circumstances of this case, there was no basis for holding a "trial within a trial".

Another area of complaint was against the witnesses Cammarato and Moon - their status, integrity, credit and credibility and the proper approach to their evidence. As to status, the following grounds were argued by Mr. Ramsay:

> "5 That the 'evidence' of Cameratta and Moon was that they were special agents of the Drug Enforcement Administration, a foreign agency located in the United States of America; that they came to Jamaica and pursued activities criminal in themselves, under a doctrine of 'hot pursuit' as these activities began in

"the United States of America. That in Jamaica they received authority to act as they did from the Drug Enforcement Administration attache, one Peter Davis, attached to the United States Embassy in Kingston and to whom they reported exclusively; that to their specific knowledge they were never authorized by any member of the Jamaican Government to do what they did; nor had they authority from the local Police, nor were they deputed Special Constables in relation to the Jamaican Constabulary; nor did they even speak to any member of the Jamaican Police Force until April, 1985, well after the incidents in issue; further they expressly stated that they received no authority to act in Jamaica from one Commander Hall of the Coast Guard to whom , they spoke after meeting with their attache:

THAT on the basis of the above it is submitted:

(a) A duty was cast upon the Crown to show the lawful presence of these men in the Island, for example whether any Government to Government agreements existed between the United States of America and Jamaica which permitted the above kind of conduct within the sovereign state of Jamaica by aliens.

(b) Having regard to their testimony as to their 'authorization' to act by an attache to the United States Embassy in Jamaica, it was further the duty of the Crown to establish whether they came within the ambit of Diplomatic Immunity or not; as on the one hand, if they did, then it would require express waiver for them to invoke the criminal jurisdiction either against or for themselves; if not, then they were mere private unauthorized aliens of unfounded pretensions in law, whose actions would make them 'particeps criminis' in the ordinary sense of the word."

And Mr. Fairclough following on thus:

"(c) That having regard to their admitted lack of an/or proof of authority from the Government and/or the Police authorities to act within Jamaica, the cases clearly show that the alleged agents would fall outside the ambit of 'agents provocateurs' and into the category of accomplices requiring corroboration within the meaning of that term in this area of law."

The learned Resident Magistrate expressly found that Cammarato and Moon were agents provocateur and not accomplices.

We accept as correct the statement that a person who participates in an offence simply for the purpose of obtaining evidence is not an accomplice for the purpose of the rule requiring corroboration - R. v. Buckley, 2 Cr. App. R. 53.

What we are being asked to say that although as members of the Drug Enforcement Agency in the U.S.A., Cammarato and Moon qua police spies, may be agent provocateur in the U.S.A., when they came to Jamaica they were beyond their jurisdictions, and in the absence of positive proof that they were authorized to pursue their investigative activities here by the Jamaican Police, they were to be treated as particeps criminis.

The grounds and arguments in support are interestingly novel but unsupported by authority and good sense. An agent provocateur is not like a chameleon, changing colour with the place where he may be at a particular time. According to the evidence, throughout, the intent of Cammarato and Moon was to obtain evidence of drug exportation from Jamaica to the United States of America by Sterling and other Jamaicans. In any event, there was ample evidence to infer that the joint police and defence force operation on the night of the 4th January was based on information supplied by Cammarato and, in addition, there was the express statement of Cammarato that he communicated with Cammander Fall, a member of our Security Forces, who provided him the map that was used in arranging the rendezvous.

There really is no merit in these submissions on the status of the witnesses Cammarato and Moon.

On the question of integrity, it was submitted that in any event, these agents on a proper assessment of their evidence instigated, encouraged, incited, fomented, participated,

and forced on others, a crime they would not have otherwise committed; that in the light of certain Commonwealth authorities there was a discretion in the Court to be exercised in favour of the exclusion of such evidence and that in the instant case the learned Resident Magistrate "equivocated, side-stepped and failed to apply this principle."

Mr. Grant, in far reaching research, unearthed cases from the U.S.A. and Commonwealth jurisdictions illustrating the approach to evidence from "trappers" in those jurisdictions. He submitted that the decision in the House of Lords case of R. v. Sang (1979) 3 All E.R. 1222, which denied the existence of any such general discretion as that for which he was contending, ought not to be followed as it went further than cases of binding authority such as Herman King v. R. (1968) 2 All E. R. 610 and R. v. Arnough (post).

In deference to Mr. Grant's industry and enthusiasm, we considered certain cases cited in support of the different approach to the evidence of agent provocateurs in the countries touched by his odyssey.

In the U.S.A. submits Mr. Grant, entrapment was a total defence as illustrated by the case of Sherman v. U.S.A. 356 US 369. In delivering the opinion of the Court Warren C.J. referred to the earlier case of Sorrells v. U.S. 287 US 435 and quoted with approval the following headnotes:

> "Headnote 1: This Court firmly recognized the defence of entrapment in the federal courts. The intervening years have in no way detracted from the principles underlying that decision. The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer.

"Headnote 2: However 'a different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute'. 287 US, at 442. Then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations.

However, the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the creative activity' of law-enforcement officials.....

Headnote 3: To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. The principles by which the courts are to make this determination were outlined in Sorrells. On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence."

Apart from the fact that there is no precedent that the defence of entrapment was recognized in our system, the application of the defence as in the U.S.A. jurisdiction is not free from difficulties and imbalance. First, it draws a distinction between the trapper being a policeman or officer of Government and a private citizen when, as far as the defendant was concerned, the distinction would generally be unknown to him at the material time.

Secondly, the defence is available to the head of a drug trafficking syndicate who is charged for the first time but unavailable to the small pusher 'who has a predisposition'.

Thirdly, from the decisions, the question seems to be treated as one of law for the judge and not of fact for the jury. The effect is to rule the witness incompetent and his evidence inadmissible.

Not even in Canada, (Mr. Grant's next port of call) where U.S. influence is strong, has "entrapment" been accepted as a defence.

There, in R. v. Shipley (1970) 2 O.R. at p. 411:

> "The accused was charged with trafficking in narcotics and at the trial moved to stay the proceedings on the ground that he was induced by an undercover officer to commit the offence. Evidence was given by the undercover officer at the preliminary hearing to the effect that he had not developed a relationship with the accused for the purpose of catching him in the act of trafficking. His primary interest was in finding out who the accused's suppliers were going to be as he felt that the accused was not a supplier himself. Held, the proceedings should be stayed. The accused would not have indulged in the offence without the inducements held out by the officer and it would be unfair to this accused and an abuse of the process of the Court to allow the prosecution to continue."

In making the order, County Court Judge McAndrew founded his jurisdiction on a similar order in R. v. Osborn (1969) 1 O.R. 152 and (1969) 4 C.C.C. 185:

> "In that case the accused was acquitted on a charge of having possession of cheques intended to be used to commit forgery. Subsequent to that the accused was indicted on a charge of conspiring with other person or persons to commit an indictable offence of uttering the same seven forged cheques. Counsel for the accused urged the trial Judge to exercise his discretion to stay the indictment on the ground that the proceedings were oppressive and an abuse of the process of the Court."

The circumstances in the Osborn case are manifestly different from those in Shipley. In the former, the prosecution was vexatious, bordering on persecution. It is unlikely that the Court in the Osborn case, had in contemplation, the circumstances in R. v. Shipley (supra). A stay of proceedings is not a final determination of the case. It seems to us that the principle expressed in the maxim "interest rei publicae ut sit finis litium" is more applicable to criminal cases, than any other type of litigation. It is not only in the interest of the State but also of the person charged, that there should be a final determination. While the jurisdiction of the Court to prevent the Crown from presenting its case is debateable, we would not, in any event, advocate such a course, especially in relation to serious criminal offences.

From Canada, we were taken to Northern Ireland and the case of R. v. Murphy (1965) N.I. (which was considered in R. v. Sang (post)). And from Ireland to the antipodes: R. v. Capner (1974) 1 N.Z.L.R. 411 the headnote of which reads:

> "This was an attempt to persuade the Court of Appeal to lay down a positive rule of law excluding evidence unfairly obtained by a police officer or the evidence of a police officer who has instigated the commission of an offence by an accused."

In delivering the judgment of the Court of Appeal, McCarthy P. said at p. 414:

> "Let us say quite plainly that in this country a trial Judge does have that overriding discretion. It has been recognised in a long series of rulings extending over a number of areasof the law of evidence. It may well be that there is some doubt in England as to the extent to which the discretion applies in circumstances where the evidence has been obtained by a police officer who acted unfairly or instigated the offence. It is apparent that some in that country take the view that probative evidence cannot be excluded for such reasons, though they are important on penalty. For example, see R. v. Mealey [The Times, 30 July 1974].

> "However, in this country we have not hesitated to develop the use of this discretion, and we think that that it is a desirable attitude. To deny the discretion would be to take away something which acts very much in the interests of accused persons."

And later, quoting with approval from the unreported case, R. v. O'Shannessy, 8th October 1973, the following at p. 414:

> "This Court has been most anxious not to restrict this discretion reposing in the trial Judge. Indeed the well known residual discretion to exclude evidence on this and on other grounds has always received support and encouragement here. We have thought it preferable to deal with questions touching the acceptance or rejection of such evidence on the basis of discretion rather than to lay down rigid delineations of areas of admission or exclusion."

Mr. Grant then referred to the Australian case - Bunning v. Cross (1978) 19 A.L.R. 641. In the judgment in that case, the High Court of Australia stated the proposition as summarised in the headnote thus at p. 642:

> "The statement in R. v. Ireland (1970) 126 C.L.R. 321 at 335; [1970] ALR 727 at 735, affirmed in Merchant v. R. (1971) 126 CLR 414; [1971] ALR 736, represents the law in Australia, that is to say: 'Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion'."

Our attention was also drawn to the Ghanaian case of Ahenkora v. The Republic (1968) at p. 625, a decision of the High Court where in dismissing the appeal it was held:

> "It was unlawful for a police officer to trap a person, provoke a crime or commit an offence in order that an offence by another might be detected. But it was not unlawful for the police to feign participation in a crime in order to observe and obtain evidence. The evidence here did not establish that the

> "senior officer trapped the appellant or committed an offence in order to detect an offence. What the officer did amounted to feigning participation in the crime in order to observe and obtain evidence."

The principle was similarly stated in the Nigerian case of George Diamantides v. Chief Inspector of Mines (1950) 13 W.A.C.A. 94.

The common factual basis for the application of the principle in all these Commonwealth jurisdictions to which our attention was adverted, was that the agent provocateur as policemen or other public law enforcement officers instigated or incited the commission of the offence for which the defendant was charged.

In the instant case, the evidence falls far short of providing any such basis. From the beginning, Sterling was the promoter of the venture and the plans were laid out by himself and his associates. The witnesses Cammarato and Moon were as described in the Ahenkora case, "feigning participation in the crime in order to observe and obtain evidence." In that regard, the learned Resident Magistrate puts it this way:

> "In so far as Cammarato and Moon are concerned I find that their modus operandi is the recognised way in which spies or agent provocateurs operate in order to detect offences which it is otherwise impossible or difficult to detect."

Notwithstanding our approval of this finding, we feel constrained to deal with the wider question whether or not a judge or magistrate has a discretion to exclude the evidence of an agent provocateur.

In R. v. Sang, (1979) 2 All E.R. at p. 1222, the facts were summarised in the headnote:

> "The appellant was charged with conspiring with others to utter forged United States banknotes. On his arraignment he pleaded not guilty to the charge. Before the case for the Crown was opened, counsel for the

> "appellant applied to the court to hold a trial within a trial in order that it might consider whether the involvement of the appellant in the offence charged arose out of the activities of an agent provocateur. He said that he hoped at such trial to establish, by cross-examination of a police officer and by evidence-in-chief from an alleged police informer, that the appellant had been induced to commit the offence by an informer acting on the instructions of the police and that but for such persuasion the appellant would not have committed the offence. Counsel then hoped to persuade the judge to rule, in the exercise of his discretion, that the Crown should not be allowed to lead any evidence of the commission of the offence thus incited, and to direct that a verdict of not guilty be returned. Without hearing the evidence, the judge ruled that he had no discretion to exclude the evidence. The appellant retracted his plea of not guilty, pleaded guilty and was sentenced to a term of imprisonment. His appeal against the judge's ruling was dismissed by the Court of Appeal."

On appeal to the House of Lords, the Court certified for consideration the following broad question at p. 1225:

> "Does a trial judge have a discretion to refuse to allow evidence, being evidence other than evidence of admission, to be given in any circumstances in which such evidence is relevant and of more than minimal probative value?

Before dealing with this question, Lord Diplock gave his opinion on the narrower point of law on which the appeal turned, namely whether or not the defence of entrapment is known to English Law thus at p. 1226:

> "Before turning to that wider question however, I will deal with the narrower point of law on which this appeal actually turns. I can do so briefly. The decisions in R. v. McEvilly, R. v. Lee [1973] 60 Cr. App. R. 150 and R. v. Mealey, R. v. Sheridan [1974] 60 Cr. App R. 59 that there is no defence of 'entrapment' known to English law are clearly right. Many crimes are committed by one person at the instigation of others. From earliest times at common law those who counsel and procure the commission of the offence by the person by whom the actus reus itself is done have been guilty themselves of an offence, and since the abolition by the Criminal Law Act 1967 Section 1(1) of the distinction between felonies and misdemeanours can be tried, indicted and punished as principal offenders. The fact that the counsellor and procurer is a policeman or a police informer, although it may be of relevance

> "in mitigation of penalty for the offence, cannot affect the guilt of the principal offender; both the physical element (actus reus) and the mental element (mens rea) of the offence with which he is charged are present in his case.
>
> My Lords, this being the substantive law on the matter, the suggestion that it can be evaded by the procedural device of preventing the prosecution from adducing evidence of the commission of the offence, does not bear examination."

He then considered the following cases in which there were dicta suggestive of a discretion - Brannan v. Peek (1947) 2 All E.R. 572, Browning v. J.W.H. Watson (Rochester) Ltd. (1953) 2 All E.R. 775, and Sneddon v. Stevenson (1967) 2 All E.R. 1277, and after commenting on the anomalous position of the Magistrates having heard evidence which convinced them of the guilt of the accused, would then be called upon to prevent the prosecution from relying on that evidence continued at p. 1227:

> "Where the accused is charged on indictment and there is a practical distinction between the trial and a trial within a trial, the position, as it seems to me, would be even more anomalous if the judge were to have a discretion to prevent the prosecution from adducing evidence before the jury to prove the commission of the offence by the accused. If he exercised the discretion in favour of the accused he would then have to direct the jury to acquit. How does this differ from recognising entrapment as a defence, but a defence for which the necessary factual foundation is to be found not by the jury but by the judge and even where the factual foundation is so found the defence is available only at the judge's discretion.
>
> My Lords, this submission goes far beyond a claim to a judicial discretion to exclude evidence that has been obtained unfairly or by trickery; nor in any of the English cases on agents provocateurs that have come before appellate Courts has it been suggested that it exists. What it really involves is a claim to a judicial discretion to acquit an accused of any offences in connection with which the conduct of the police incurs the disapproval of the judge. The conduct of the police where it has involved the use of an agent provocateur may well be a matter to be taken into consideration in mitigation of sentence; but under the English system of criminal justice it does not give rise to any

> "discretion on the part of the judge himself to acquit the accused or to direct the jury to do so, notwithstanding that he is guilty of the offence. Nevertheless the existence of such a discretion to exclude the evidence of an agent provocateur does appear to have been acknowledged by the Courts-Martial Appeal Court of Northern Ireland in R. v. Murphy [1965] N.I. 138. That was before the rejection of 'entrapment' as a defence by the Court of Appeal in England; and Lord McDermott C.J. in delivering the judgment of the court relied on the dicta as to the existence of a wide discretion which appeared in cases that did not involve an agent provocateur. In the result he held that the court-martial had been right in exercising its discretion in such a way as to admit the evidence.
>
> I understand your Lordships to be agreed that whatever be the ambit of the judicial discretion to exclude admissible evidence it does not extend to excluding evidence of a crime because the crime was instigated by an agent provocateur. In sofar as R. v. Murphy suggests the contrary it should no longer be regarded as good law."

Some six years before the decision in Sang, in R. v. Arnough (1973) 12 J.L.R. 1170 this Court had to consider whether the evidence of an agent provocateur should have been excluded by the Resident Magistrate. The arguments on behalf of the appellant were in pith and substance similar to those raised by Mr. Grant before us in the instant case. The facts in Arnough were summarised thus, at p. 1170:

> "A law enforcement officer, J.F. called at the home of one S.B. where he met the appellant. The appellant told J.F. that he had hashish for sale. Later the same day J.F. returned to S.B.'s home with two empty suitcases. After they were packed with hashish J.F. asked the appellant for some 'grass' (ganja). The appellant left and returned with a paper bag with ganja which was placed in one of the suitcases. He asked J.F. how and when he wanted the suitcases delivered. J.F. told him that they should be delivered at the parking lot at the Mahoe Bay Club at 9 p.m. The appellant was seen to drive a car into the parking lot and parked it shortly after 9 p.m. He got out of the car, opened the trunk and removed a suitcase which was later discovered to contain a paper bag with ganja."

In delivering the judgment of the Court, Smith J.A. concisely set out the arguments of the appellant's counsel at p. 1172:

> "It was submitted that Fortier instigated, incited, encouraged and procured the commission of the offences for which the appellant was convicted and that his evidence should, therefore, have been excluded on the ground of public policy. It was said that 'no one, whether law enforcement officer or otherwise, can be allowed to procure and commit a crime in order to purport to solve the said crime to which he is particeps criminis'. This submission was based on the well known and oft cited passage in Brannan v. Peek (supra) where Lord Goddard, C.J., said that 'it is wholly wrong for a police officer or any other person to be sent to commit an offence in order that an offence by another person may be detected.' Alternatively it was submitted that if the evidence was strictly admissible under the rule in Kuruma v. R. [1955] 1 All E.R. 236 then it ought not to have been admitted as it was obtained by means in the category of 'trick, deception or fraud' under the principles in Callis v. Gunn [1963] 3 All E.R. 677 and R. v. Payne [1953] 1 All E.R. 848. In the further alternative, it was submitted that Fortier's evidence was that of an accomplice and ought to have been corroborated.
>
> It was contended that if, as Lord Goddard said in Brannan v. Peek (supra), it is wholly wrong for a police officer to commit an offence in order to detect an offence by another then it must have as a result either the inadmissibility of the evidence or its exclusion by the court. Though this can, perhaps, be said to be a logical deduction from Lord Goddard's statement, the fact is that the court in Brannan v. Peek (supra) did not hold that the evidence in that case was either inadmissible or should have been excluded. No case has been cited to us, and we know of none, in which the evidence of a police spy or an agent provocateur has been held to be inadmissible or has been excluded applying the statement in Brannan v Peek (supra)."

The comments made by Lord Parker in Sneddon v. Stevenson (supra) on the dicta in Brannan v. Peek (supra) was quoted with evident approval. Smith J.A. then considered the facts and pertinent dicta in R. v. Murphy (supra) and continued at pp. 1173-4:

> "The Courts-Martial Appeal Court in its decision in R. v. Murphy (supra) was simply restating the principles stated in Kuruma v. R. (supra) and followed in many cases since (see e.g. King v. R. (supra)). It is the effective answer to the first submission made on behalf of the appellant. The most that can can be said of the evidence of a police spy or of a police officer who incites or encourages the commission of an offence in order to obtain evidence of its commission is that the evidence is illegally or improperly obtained. The authorities establish that this does not render the evidence inadmissible."

The judgment then went on to deal with the alternative suggestion that there was massive trick and deception and on this concluded thus at p. 1174:

> "The only trick, deception or false representation we were able to detect (since none was specifically identified during the argument) was that Fortier represented himself as a foreigner who was interested in, and willing to buy, hashish and ganja. We do not think that this is the sort of trick or false representation which was intended to be referred to in the cases relied on. This is the recognised way in which spies or agents provocateurs operate in order to detect offences which it is otherwise impossible or difficult to detect."

In our view the recognition of a general discretion in a Judge or Magistrate to exclude the evidence of an agent provocateur would implicitly confer a jurisdiction to obliquely declare an agent provocateur an incompetent witness; a power which a Court does not possess in relation to an accomplice who, the prosecution having elected not to treat as co-defendant by either having the case against him withdrawn or determined by verdict and sentence, is presented as a witness for the prosecution. In the case of accomplice witness, the Judge can do no more than advert to the dangers of relying on uncorroborated testimony.

In R. v. Karrer & Others (1970) 11 J.L.R. at p. 509, this Court noted the incidence of drug offences in the Montego Bay area and we cannot ignore the increasing incidence of drug

trafficking in this jurisdiction since that time. The traffic in narcotics is just one type of illegal venture that demands silence and secrecy between participants. Therefore investigation and detection in such criminal enterprises would be well nigh impossible without agent provocateurs. Accordingly, we are firmly of the view that precedent and the practicalities are against the recognition of any discretion in a Judge or Magistrate to exclude the evidence of an agent provocateur.

As to the credit of the witnesses Cammarato and Moon the following ground was argued:

> "That the Learned Resident Magistrate paid scant attention to one of the fundamentals of our Court procedure as a condition precedent to the reception of evidence - namely the meaning and value of an Oath.
>
> That the witness Cameratta admitted, inter alia, to being a trained liar, and a person trained to give evidence and to appear sincere. Further that no one could tell in such a situation when he was lying: that though he did say, he would lie at any time in the interest and expedience of his job, he said he would not lie under Oath; and then proceded to admit that for the purposes of what he considered just and in the interest of his job, he would lie before God and against his Roman Catholic Faith.
>
> That the witness Moon also admitted to being one of this new species of professional liars and evidence-givers and that he would also lie in order to carry out his job - and that giving evidence in Court was part of that job.
>
> That it is submitted, in the light of the foregoing, the evidence, if it could not be struck from the record, should have been entirely excluded from consideration. As it clearly shows that the significance of an Oath and the respect for truth based thereon had become no longer an objective obligation, but a matter for subjective interpretation for minds such as these in the interests of their concept of a 'higher morality'."

In support of this ground we were adverted to certain statements made by these witnesses in cross-examination. Both witnesses admitted that they were capable of falsehoods, an ability possessed by all mankind, and

that as undercover agents they were trained to deceive. However, the question for the learned Resident Magistrate was whether they lied in the evidence they gave. He saw and heard them. No doubt he was impressed by their graphic description of the meeting at Dunkley's home at Ironshore, the details of the plan to export ganja and of the expedition of January 4 which was obviously in keeping with the pre-arranged plan. Further, as his notes reveal he considered the evidence disclosed by the tapes and the identification of the occasions and the voices recorded on those tapes as given by the witnesses. Accordingly, the Resident Magistrate's acceptance of Cammarato and Moon as witnesses of truth was fundamentally reasonable.

Dr. David Lee, the Government Analyst was another witness whose credit was extensively attacked. Dr. Lee, a Ph.D. in Chemistry (University of the West Indies) and who had been an Analyst for four years at the Scientific Research Council gave evidence to the effect that on January 21, 1985 he attended at the Narcotics Division at Spanish Town Road, and there a number of packages were presented to him by Corporal Lawrence. There he marked and weighed the packages, and caused samples to be taken in his presence. Refreshing his memory from notes made at the time by his assistant, a Mr. Coates, he said there were one hundred and ninety-one packages, of total weight 4,286 kilograms or 9,448 lbs. 8 ozs., the average weight of each package being roughly 50 lbs. From tests, which he supervised, he came to the conclusion that the plant matter in each sample was the plant cannabis sativa from which the resin has not been extracted. The envelopes containing the samples were tendered in evidence as also the certificate of his findings. In the course of lengthy cross-examination he admitted that although he was present at the taking of the samples he did not "supervise it in an over-the-shoulder way". His initial of the particulars

indicated he had satisfied himself that the procedure for the sampling process had been followed and completed and the description corresponded with the exhibits. He admitted that other staff under his supervision assisted.

As regards the testing of the exhibits he said that a member of staff would take out each sample and do the requisite examination and satisfy himself or herself as to the identity of the samples. If he was present he would be in the area of the laboratory or in his office which was adjacent. He was asked the specific question: "Did you satisfy yourself in this case in relation to the one hundred and ninety-one samples as to the result of the test?" Answer: "I was satisfied as to the results. I supervised the tests - I would have seen the sample taken out and examined under a microscope and chemical test done. I then instructed all samples be so tested." He did not consider it necessary to be present every moment in the working of qualified staff.

Notwithstanding his answers, counsel for the crown made an application that Dr. Lee personally examine and test the samples without delegating duty to anyone. Objections by defence counsel were taken to the application. The adjournment of the 3rd of July, 1985 was taken and on the 8th of July the Court ruled that Dr. Lee be recalled. He then gave evidence of taking the one hundred and ninety-one envelopes with the samples which he received from the Court and personally performing the tests. He came to the same conclusion as in his examination-in-chief, namely that the vegetable matter in each envelope was ganja.

The Court's ruling was challenged on appeal under the following grounds:

> "That the evidence of Dr. Lee, the Government Analyst, failed to prove the nature of the substance exhibited, after examination, cross-examination and re-examination. Whereupon the Learned Resident Magistrate upon the application

"of the Crown (strongly resisted) ordered that the Exhibits be given back to and taken out of the Court's custody by the said Analyst to re-investigate by way of tests and for the said Analyst to be re-called to give evidence on the identical point in a second attempt to prove for the first time an essential and elementary ingredient of the Crown's case."

It was submitted:

(i) That in so doing in effect the appellants were deprived of their rights to submit at a later stage that the crown had failed to make out a case against them.

(ii) That the Resident Magistrate appointed himself investigator and prosecutor.

(iii) That the Resident Magistrate exceeded his statutory powers conferred on him in the Special Statutory Summary Jurisdiction in which the offences were triable. That the power to make such an order conferred by Section 278 of the Judicature (Resident Magistrates) Act, in relation to indictable offences was not applicable to summary trials.

Mr. Ramsay argued that the prosecution was given an opportunity to "scout about for evidence to strengthen their case" - Royal v. Prescott (1966) 2 All E.R. 369.

Now Section 278 of the Judicature (Resident Magistrates) Act merely conferred general powers of amendment and adjournment in indictable matters. These powers were neither in conflict nor prejudicial to the general powers of adjournment and amendment conferred by Sections 169 and 190 of the same Act.

In Royal v. Prescott-Clarke et al (supra) the defendants were charged on informations for breaches of the motorways Traffic Regulations 1959. Although the defence had intimated that he would require proof of certain relevant regulations and notices, no such evidence was given by the prosecution. At the conclusion of the case the justices accepted a submission by counsel for the defence that the prosecution had failed to prove the notices. In the course of counsel's submission the prosecution applied for an adjournment to enable the regulation and notices to be proved.

On appeal against the refusal of the application and dismissal of the informations, it was held that:

> "It was a matter for the justices' discretion, as in other cases where the circumstances were not peculiar and special, whether or not to grant the application; but as the adjournment applied for was to establish by production of further evidence something which was only a formal requirement which had to be satisfied, the discretion had been wrongly exercised."

In R. v. Kenneth Codner (1955) 6 J.L.R. 339 the appellant was charged with cultivating ganja and having ganja in his possession. When the cases came on for trial Mr. Kirby, the Government Chemist, who was called to give evidence that the plants were ganja apparently not having personally made the analysis admitted in cross-examination that he did not of his own knowledge know whether or not the resin had been extracted from the stalks. The trial was then adjourned to enable the Deputy Government Chemist, Mr. Walsh, who made the tests to be called. At the adjourned hearing Walsh stated that the plants were cannabis sativa and that the law defined ganja as including cannabis sativa from which the resin has not been extracted. He was cross-examined as to the nature of the test he made. When the Clerk of Courts closed his case, the solicitor for the appellant submitted that there was no evidence that the stalks were ganja as the evidence did not satisfy the definition in the law. The Clerk then applied for and obtained leave to recall Mr. Walsh. The application was granted and Walsh supplied the missing essential factor, namely, that his tests disclosed resin in the stalks and that he had to extract the resin to make the tests.

On appeal, it was argued that the learned Resident Magistrate was wrong in giving permission to re-open the case to prove material facts after the prosecution's case was closed. In giving

the judgment of the Court, MacGregor J, after considering a number of English Authorities, concluded:

> "In the present case, we are satisfied that the learned Resident Magistrate was entitled to give leave for the case to be re-opened to supply the evidence which had been omitted and we cannot say, and in fact it has not been argued that he failed to exercise it judicially."

In the instant case, the witness was still open to re-examination when the application was made. Counsel for the prosecution despite Lee's evidence as to supervision was desirous of the tests being personally made by him. The tests could not then be done as facilities were apparently not there in Court and as the samples were now in cutodia legis, a formal order for their release to enable the witness to make the tests was essential. Dr. Lee was further cross-examined by the defence after he gave evidence concerning the tests which he had personally performed. Counsel for the defence in categorising the grant of the application of the prosecution as providing an opportunity "to scout" around for further evidence was putting the matter too highly. In the exercise of his discretion and in pursuit of truth and justice, the learned Resident Magistrate granted the application of the prosecution. In the circumstances, we are unable to say that the discretion was not judicially exercised and having regard to the nature and conduct of the defence we are of the view that no unfairness or prejudice was occasioned thereby.

As to the probative value of Dr. Lee's evidence, it was submitted that his evidence still fell short of the proof required by the Dangerous Drugs Act, in that (i) he denied expertise in the area of taxonomy of plants, and (ii) in the area of his expertise he failed to make the one necessary test, i.e. for the chemical compound (T.H.C.) indicative of the plant cannabis sativa.

Now in his evidence concerning the tests personally carried out by him Dr. Lee said:

> "Portions of each envelope, the contents thereof were examined under microscope for presence of certain characteristic features of certain plant, that is cannabis sativa. As a result of examination and tests I came to the conclusion that each and every envelope contained parts of the plant cannabis sativa and that the resin was not extracted therefrom. I concluded that the vegetable matter contained in each envelope was ganja."

In cross-examination he said he was not a qualified botanist. Under the microscope he looked for certain types of hair giving a wasting appearance to parts of the plant. He also looked for seeds which have a mottled appearance. He was not a taxonomist. He did not know the difference between cannabis sativa and cannabis indica. He did the standard test for the purpose of detecting the resin. T.H.C. is one of the ingredients in the resin. Having detected certain characteristics microscopically, he went on to do the chemical test. He had been carrying out tests in respect to the cannabis sativa for eight years - about three hundred and fifty to four hundred such tests per year.

Now ganja is not in Jamaica a rare exotic plant. Dr. Lee has had many years experience in testing for ganja. It is therefore enough to say that there was sufficient credible evidence to establish beyond reasonable doubt that the one hundred and ninety-one packages contained ganja.

Further, it was suggested that Dr. Lee was discredited in relation to his evidence that on the 21st of January, 1985, he was present at the Narcotics Office on Spanish Town Road when samples were being taken. The defence called Mr. Robin Smith, Attorney-at-Law, who gave evidence to the effect that at 10:30 a.m. that day when according to the crown Dr. Lee received the samples, he, Dr. Lee was in fact at the Supreme Court Building.

Finally, that the Resident Magistrate erred in finding that the samples personally tested by Dr. Lee were the said samples taken at the Narcotics Office.

The learned Resident Magistrate as he was entitled to do, accepted the evidence of the prosecution witnesses Lee and Corporal Lawrence, that Lee attended at the Narcotics Office on the 21st of January 1985, and took samples or supervised the taking of samples from each of the one hundred and ninety-one packages and weighed the packages.

Of Robin Smith's evidence he had this to say:

> "The evidence of Robin Smith is viewed with suspicion as at no time was it suggested to Dr. Lee that at the time he said he took the samples he was at the Supreme Court. In any event, the times given by both the witnesses Smith and Dr. Lee are approximations."

These findings of fact were based on the acceptance of oral testimony and there seems no good reason for interference by this Court.

On behalf of Sterling and Dunkley, it was submitted that the learned Resident Magistrate fell into error by convicting Dunkley and Sterling on the basis of constructive possession, and the other ten accused on the basis of actual possession of the same articles; further, that no doctrine of constructive possession in relation to ganja exists in Jamaica since the Privy Council's decision in D.P.P. v. Wishart Brooks (1974) 12 J.L.R. 1374. In any event, argued Mr. Ramsay, the doctrine of constructive possession as laid down and illustrated in R. v. Cavendish (1961) 2 All E.R. 856, was not applicable to the facts and circumstances of the instant case. Further, since Sterling and Dunkley could not be guilty of possession, equally they could not be guilty of any other charge which would involve possession as an essential ingredient. In that regard the ingredients of attempting to export and dealing in ganja were not made out

against Sterling and Dunkley. Mr. Ramsay sought support and comfort for his submissions in dicta from R. v. Collins et al 9 Cox 497; and Haughton v. Smith (1973) 3 All E.R. 1120. Mr. Ramsay argued that having acquitted the ten appellants on the charge of dealing there was no basis upon which Sterling and Dunkley could be convicted. If there is no link between the ten and the appellants in relation to the dealing, it would be contradictory to hold there was a link in relation to the other charges. If the Resident Magistrate's finding of dealing was on the basis of the discussion at the alleged meeting at Ironshore on the 13th of December, 1984, that is not the date charged in the Information, and it therefore follows, argued Mr. Ramsay, that Dunkley and Sterling have been charged with others whose offences occurred in January 1985 - and that as dealing includes delivery then the persons who engaged in delivery must be guilty of dealing, unless there is no common design between that person and the dealer. We interpret this last submission to mean in effect that the convictions of Sterling and Dunkley of dealing in ganja were inconsistent in the circumstances with the acquittal of the others.

In reply, Mr. Andrade submitted that the legal basis for the joint charges depended upon the role of Sterling and Dunkley. Their role was to provide ganja for export. In order to carry out their objective and in keeping with arrangements made with Cammarato, it was necessary to procure the others to obtain the ganja and this they did. That was the inescapable inference to be drawn from the totality of the evidence. If that is so, Sterling and Dunkley fell squarely within Section 6 of the Justices of the Peace Jurisdiction Act. They were counsellors and procurers and were jointly charged with the principal offenders. Mr. Andrade submitted that in the alternative, Dunkley and Sterling were in constructive possession, as the ganja came to be where it was by

arrangement - R. v. Cavendish (supra). Further, with respect to the charge of attempting to export, the evidence fell squarely within the 3rd category defined in R. v. Donnelly (1970) N.Z.L.R. 990-1.

In reply Mr. Ramsay submitted that in relation to attempt the crime was incapable of commission in the circumstances and accordingly none of the accused should have been charged therewith. He relied on R. v. Donnelly (1970) N.Z.L.R. 980, and Haughton v. Smith (1970) 3 All E.R. 1109.

Now in D.P.P. v. Brooks (supra) the appellant was charged with possession of ganja. A van of which the defendant was the driver, was seen by police officers parked with its engine running near an air-strip. On the approach of the police who were in uniform the appellant ran. He was caught. In the body of the van were nineteen sacks containing a large quantity of ganja. When asked by a police officer why he ran he said that a man named Reid had employed him to drive the van. Reid had taken the van and returned it to him laden and asked him to drive it to the air-strip. On appeal this Court [Luckhoo, Smith and Graham-Perkins JJ.A.] based upon an erroneous interpretation of the earlier case of R. v. Livingston (1952) 6 J.L.R. 95 at p. 1374, held that Brooks was not ".....shown to have anything more than mere custody or charge of the van and its contents and that this was not enough to constitute 'possession' " - in that he was in charge of the van in the capacity as servant of Reid. On further appeal, Lord Diplock giving the opinion of the Board and reversing the Court of Appeal said at p. 1376:

> "In the ordinary use of the word 'possession' one has in one's possession whatever is to one's own knowledge physically in one's custody or under one's physical control."

And later at p. 1377:

> "The only actus reus required to constitute an offence under Section 7(c) is that the dangerous drug should be physically in the custody or under the control of the accused."

These statements must be interpreted against the background of the questions raised on appeal. The doctrine of constructive possession was never in contemplation. In our view these statements are not incompatible with the doctrine of constructive possession as laid down in R. v. Cavendish (supra).

However, although Mr. Andrade argued as an alternative the doctrine of constructive possession, his support for the convictions rested primarily on the provisions of Section 6 of the Justices of the Peace Jurisdiction Act which reads:

> "Every person who shall aid, abet, counsel or procure the commission of the offence which is or hereafter shall be punishable on summary conviction, shall be liable to be proceeded against and convicted for the same, either together with the principal offender or before or after his conviction, and shall be liable, on conviction, to the same forfeiture and punishment as such principal offender is or shall be liable and may be proceeded against and convicted either in the parish where such principal offender may be convicted or that in which such offence of aiding, abetting, counselling or procuring may have been committed.

In our view these provisions are sufficiently wide to embrace persons, who, in relation to felonies, being absent when the crime was perpetrated, would be accessories before the fact as well as those present aiding or encouraging by word and deed and would be principals in the second degree. The provisions, in our view, were clearly aimed at extending to summary offences the procedure, practice and punishment of such secondary parties as is the case in indictable misdemeanours - see the comparative provisions of Section 41 of the Criminal Justice Administration Act.

We accept the following useful definition of "procure" in Section 8 of the Accessories and Abettors Act (England) which is ipsissima verba with Section 41 of the Jamaican Criminal Justice Administration Act as applicable to "procure" in Section 6 of the Justices of the Peace Jurisdiction Act (supra):

> "To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking appropriate steps to produce that happening. We think that there are plenty of instances in which a person may be said to procure the commission of a crime by another even though there is no sort of conspiracy between the two, even though there is no attempt at agreement or discussion as to the form which the offence should take" - A.G.'s Reference (No. 1 of 1975) (1975) 2 All E.R. 684 per cur. at p. 686.

In the instant case, there was ample evidence to support the finding that the expedition on the night of January 4, 1985 by the ten other appellants, including the "link man" Craigie, was an endeavour to carry out the plan as designed by appellants Sterling and Dunkley at Ironshore on December 13, 1984, and the rational conclusion that both Sterling and Dunkley were guilty as accessories within the contemplation of Section 6 of the Justices of the Peace Jurisdiction Act.

With reference to the alternative argument based upon constructive possession, as there was no evidence that the boats were owned or in the possession of Sterling or Dunkley or that the ganja was ever on premises belonging to them, the doctrine of constructive possession in our view would be inapplicable to make Sterling and Dunkley principal possessors.

With reference to Mr. Ramsay's submission that the conviction of Sterling and Dunkley was inconsistent with the acquittal of the others, it is enough to say that "the dealing" in the instant case was the selling of ganja, and that on the evidence it was open to the Resident Magistrate to find that the ten defendants were not a party to the "deal" between Sterling

and Dunkley with Cammarato. We see no inconsistency in the verdicts and there was evidence from which the Resident Magistrate could infer that Sterling and Dunkley were dealing in ganja and that the attempted export was one instance of such dealing.

With respect to Mr. Ramsay's submission that no offence for attempting to export ganja could be made out because of the impossibility of completion, an examination of the decided cases reveal a distinction between those cases in which there is impossibility of performance because, ab initio, some essential element was non-existent and those cases where the attempt was frustrated by some supervening event. R. v. Collins (1864) 9 Cox 497 is illustrative of the former class. The case was reserved for the opinion of the Court on the question whether "supposing a person put his hand into the pocket of another for the purpose of larceny, there being nothing in the pocket, that is an attempt at larceny?" In giving the judgment of the Court, Cockburn, C.J. said at p. 499:

> "But, assuming that there is nothing in the pocket of the prosecutrix, the charge of attempting to commit larceny cannot be sustained. .... we think that an attempt to commit a felony can only be made out when, if no interruption had taken place, the attempt could have been carried out successfully, and the felony completed of the attempt to commit which the party is charged."

In the House of Lords case - Haughton v. Smith (supra) at p. 1109:

> "A quantity of goods was stolen from a firm in Liverpool. Some days later a van travelling south was stopped by the police; it contained the stolen goods. It transpired that the van was proceeding to a rendezvous with the accused in Hertfordshire where the accused was to make arrangements for the disposal of the goods in the London area. In order to trap the accused the van was allowed to proceed on its journey with two policemen concealed inside and a disguised policeman beside the driver. At the rendezvous the van was met by the accused and at least one other person and the accused thereupon began to play a prominent role in assisting in the disposal

> "of the van and its load. Finally, the trap was sprung and the accused and others were arrested. The prosecutor was of the opinion that, once the police had taken charge of the van, the goods had been restored to lawful custody, within s. 24 of the Theft Act 1968, and were, therefore, no longer stolen goods. Accordingly, the accused was not charged with handling 'stolen goods', contrary to s. 22 of the 1968 Act, but with attempting to handle stolen goods.
>
> HELD:
>
> A person could only be convicted of an attempt to commit an offence in circumstances where the steps taken by him in order to commit the offence, if successfully accomplished, would have resulted in the commission of that offence. A person who carried out certain acts in the erroneous belief that those acts constituted an offence could not be convicted of an attempt to commit that offence because he had taken no steps towards the commission of an offence. In order to constitute an offence under s. 22 of the 1968 Act the goods had to be stolen goods at the time of the handling; it was irrelevant that the accused believed them to be stolen goods. It followed that, since the goods which the accused had handled were not stolen goods, he could not be convicted of attempting to commit the offence of handling stolen goods."

For the offence of receiving stolen goods (or its modern English counterpart "handling stolen goods") to be committed, at the time of the receipt of handling the goods must be "stolen goods". The moment they came into the possession of the police, they were no longer "stolen goods" - R. v. Schmidt L.R. 1 C.C.R. 15. Accordingly, in Haughton v. Smith (supra) at the time of receipt an essential element in the commission of the crime was non-existent. There was therefore, ab initio, the impossibility of committing the offence.

In his judgment in Haughton v. Smith, Lord Hailsham quoted at p. 1115 with evident approval the following six fold classification of Turner, J. in R. v. Donnelly (1970) N.Z.L.R. 980:

> "He who sets out to commit a crime may in the event fall short of the complete commission of that crime for any one of a number of reasons. First, he may, of course,

> "simply change his mind before committing any act sufficiently overt to amount to an attempt. Second, he may change his mind, but too late to deny that he had got so far as an attempt. Third, he may be prevented by some outside agency from doing some act necessary to complete commission of the crime - as when a police officer interrupts him while he is endeavouring to force the window open, but before he has broken into the premises. Fourth, he may suffer no such outside interference, but may fail to complete the commission of the crime through ineptitude, inefficiency or insufficient means. The jemmy which he has brought with him may not be strong enough to force the window open. Fifth, he may find that what he is proposing to do is after all impossible - not because of insufficiency of means, but because it is for some reason physically not possible, whatever means he adopted. He who walks into a room intending to steal, say a specific diamond ring, and finds that the ring is no longer there but has been removed by the owner to the bank, is thus prevented from committing the crime which he intended, and which, but for the supervening physical impossibility imposed by events he would have committed. Sixth, he may without interruption efficiently do every act which he set out to do, but may be saved from criminal liability by the fact that what he has done, contrary to his own belief at the time, does not after all amount in law to a crime."
>
> [Emphasis supplied]

Mr. Andrade in reply submitted that the instant case fell within the third category. Of that category Lord Hailsham had this to say at p. 1115:

> "(3) The third case is more difficult because as a matter of fact and degree, it will depend to some extent on the stage at which the interruption takes place, and the precise offence the attempt to commit which is the subject of the charge. In general, however, a criminal attempt is committed, assuming that the proximity test is passed."

In the instant case, we are of the opinion that it is immaterial whether the police intercepted the boats laden with ganja on the way to the expected illicit drug-running ship, or the police, on the basis of information they had, substituted their own disguised vessel. It is an interruption within the contemplation of the "third category." On the evidence, the steps taken by the appellants in the canoes were sufficiently proximate to the completed offence to constitute an attempt to export ganja.

Finally, there was an appeal against sentence in respect of Sterling, Dunkley and Craigie. It was submitted that the custodial sentences in respect of these appellants were manifestly excessive. In that regard we were asked to consider (i) that they had no previous convictions, (ii) that Craigie was dismissed of the offence of dealing in ganja and (iii) that as advocated in the Sang case and as was done in R. v. Arnough (supra) (p. 1175) the custodial sentences should be reduced as there was a possibility that the appellants were encouraged to commit offences which they otherwise might not have committed.

The Resident Magistrate imposed the following sentences:

"Sterling:

Possession	-	2 years H.L.
Trafficking	-	1 year H.L.
Attempting to export	-	2 years H.L. in addition fined 10,000.00 or 3 years H.L.
Dealing	-	2 years H.L. in addition fined 10,000 or 3 years H.L. - Consecutive to Possession and Trafficking.

Dunkley:

Possession	-	2 years H.L.) concurrent
Trafficking	-	1 year H.L.)
Attempting to export	-	2 years H.L. in addition fined 10,000 or 3 years.
Dealing	-	2 years H.L. in addition fined 10,000 or 3 years H.L. - Consecutive to Possession and Trafficking.

Craigie:

Possession	-	2 years H.L.
Trafficking	-	1 year H.L. - Concurrent
Attempting	-	2 years H.L. in addition fined 10,000 or 3 years H.L.

"Dwight Hyman, Nixton Wallace, Stanhope Nain, Bryan Smalling, William Wood, Roy Brown, Carlton Johnson, Frank Gray and Gerald Cameron, on charges of Possession, Trafficking and Attempting to Export, each fined $1,000 or 12 months H.L. on each charge."

In declining to interfere with the sentences we had to weigh against the considerations urged, the amount of ganja involved, the international scope of the illicit endeavour, and the prevalence of the offence, and in respect of Craigie, that he was in charge of the operations on the night of January 4.

For these reasons, we affirmed the convictions and sentences.