JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL No: 101/86

BEFORE: The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

REGINA

vs.

HOPETON MORGAN

Mr. Hugh Small, Q.C. and Mr. H. Delroy Murray for Appellant

Mr. Garth McBean for Crown

17th October & 27th November, 1986

CARBERRY J.A.

The appellant was tried on the 25th and 30th July, 1986, in the Resident Magistrate's Court for the parish of St. Elizabeth held at Black River, before His Hon. Mr. R.A. Stewart, and convicted on two counts, the first, for having ganja in his possession on the 9th May, 1986, and the second for taking steps preparatory to exporting ganja from the island contrary to section 13 (5) of the Dangerous Drugs Act.

On the first count he was fined $1,000.00 or six months, and in addition was sentenced to two years imprisonment with hard labour. On the second count he was fined $10,000.00 or six months, and in addition was sentenced to two years imprisonment with hard labour. The appeal is against both these convictions.

The evidence was to the effect that on Friday the 9th May, 1986, at about 2.00 p.m. a police party of four, travelling in an unmarked police car, went to the holding of the appellant's father, at Lovely Point district, in St. Elizabeth. There were three buildings on the holding: at the front a dwelling house occupied by the father, behind it a second dwelling house, and at the back a store room. The police party parked their car some distance away, crept round the back of the buildings, and approaching from the rear they surprised a group of persons gathered at the entrance to the store room and busily engaged, it turned out, in packaging ganja into paper parcels which were wrapped on the outside with plastic tape.

On seeing the approach of the police party (the evidence does not disclose whether they were in uniform or plain clothes) the persons gathered at the store room ran away: amongst them was the appellant who was a taxi driver, and whose taxi was parked in front of the premises.

The appellant knew and was known to the leader of the raiding party, Det. Corporal Asa Campbell, who recognized him amongst the group. The police gave chase but did not then catch any of the fugitives. Walking however in a track in the direction in which they had run, Campbell met the appellant returning to the scene. He challenged the appellant as being one of those who had run away, and the appellant replied "If me did know say ah you, me wouldn't run sah."

Taken back to the scene of the packaging Campbell opened one of the parcels, pointed out to the appellant that they contained ganja, and arrested and charged him for possession of ganja and taking steps to export ganja. Cautioned, the appellant replied: "We no can talk bout dat sah."

There were some 35 paper parcels, and they had on numbers and weights written on to the outside of the packages. They were square in shape and had been bound by plastic tape. There was also present some knitted plastic bags, and it appears that some of these had been packed with the smaller square packages, and some were in process of having the smaller packages put into them, presumably for easier handling.

In general the evidence given by the police went unchallenged. It was elicited in cross-examination that the appellant operated his taxi in the Mandeville area and was said to live at Goshen some distance away. The thrust of the appellant's case, both before the court below and on appeal, was that there was no real evidence of his involvement to support either charge.

It was suggested that the appellant was entitled to be at the scene, he might well have been visiting his father and the family home. There was however no evidence that his father was there, and the father had not been charged in respect of the ganja. The appellant elected to give no evidence in support of the suggestion that he was only a casual bystander, but was content to rely on his no case to answer submission and the submission that his replies to the police were equivocal, and should not be construed against him.

The Resident Magistrate however construed the remark "we no can talk 'bout dat sah" as being equivalent to an offer to "do a deal", i.e. to buy off the police or bribe them not to prosecute, and that in all the circumstances there was sufficient evidence to draw the inference that the appellant had some measure of control and possession whether exclusive or joint.

We have carefully considered all the evidence and argument offered on this point. There was clearly knowledge on the part of the appellant as to what was going on, and it was clearly guilty knowledge. While knowledge alone is not sufficient to ground a charge of possession, in all the circumstances of this case there was sufficient evidence to support the conviction on count 1, re the possession of ganja.

There was however a great deal more to be said in respect of the second count. Section 13 (5) in part V of the Dangerous Drugs Act reads thus:

> "Every person who exports, causes to be exported, or takes any steps preparatory to exporting, any dangerous drug from the island except under and in accordance with the provisions of this Act shall be guilty of an offence against this Act."

Assuming that ganja or cannabis sativa is a dangerous drug falling within section 13 (5), was there sufficient evidence in this case to justify the conviction for "taking steps preparatory to exporting"?

There must after all be some limit as to how far back the offence reaches, or every person, no matter how small the quantity, might be said by the very possession of ganja to be "taking steps preparatory to exporting it."

The Resident Magistrate, in his Reasons for Judgment appreciated this point and addressed it in the following words:

> "On the question of taking steps to export, there was no direct evidence of this. However, drawing on my experience I was able to say that where ganja is being transported for local use this is not the method of packaging. The method used in this case was similar to those used in Portland and St. James where persons attempt to go on board the cruise ships or air crafts. I have worked in Portland and St. James."

Apart from a certain unintentional ambiguity as to the "experience" involved, we take it that in effect the Magistrate was praying in aid the doctrine of Judicial Notice, and saying that from his experience in the courts, whether as a judge or advocate or clerk is not clear, he had drawn the inferences set out above.

With respect, this seems to us to have been wrong and to involve an unwarranted extension of that doctrine.

In Cross on Evidence, 6th Edition (1985) Chapter II 'Matters not requiring proof and judicial findings as evidence', the author commences his approach thus:

> "The general rule is that all of the facts in issue or relevant to the issue in a given case must be proved by evidence - testimony, hearsay statements, documents and things. .....
>
> There are a number of exceptions to this general rule. In some cases the judge, or trier of fact, is entitled to find a fact of his own motion, he may take judicial notice of it. In others a party may make a formal admission of relevant matter. ....."

He continues:

> "When a court takes judicial notice of a fact, as it may in civil and criminal cases alike, it declares that it will find that the fact exists, or direct a jury to do so, although the existence of the fact has not been established by evidence. ....."

The author having cited Lord Summer in Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service (1923) A.C. 191 at 212, divides the topic into "Facts judicially noticed without inquiry," and "Facts judicially noticed after inquiry" and of the former he writes:

> "It would be pointless to endeavour to make a list of cases in which the courts have taken judicial notice of facts without inquiry. The justification for their acting in this way is that the fact in question is too notorious to be the subject of serious dispute."

In a later section Professor Cross discusses the question of "Personal Knowledge" and observes that "The general rule is that neither a judge nor a juror may act on his personal knowledge of facts." He observes that this rule has reference to particular facts, and further on "that the basic essential is that the fact judicially noticed should be of a class that is so generally known as to give rise to the presumption that all persons are aware of it."

Phipson on Evidence (1982) 13th Edition is to like effect. At para. 2-06 it states:

> "Courts will take judicial notice of the various matters enumerated below, these being so notorious or clearly established or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary....."

at para. 2-08:

> "Judge or jury as witnesses: Although, however, judges and juries may, in arriving at decisions, use their general information and that knowledge of the common affairs of life which men of ordinary intelligence possess, they may not, as might juries formerly, act on their own private knowledge or belief regarding the facts of the particular case....."

It is also useful to refer to this topic in Halsbury, 4th Edition (1976) Vol 17: Evidence. At para. 108 the following appears:

> "Notorious Facts: The court takes judicial notice of matters with which men of ordinary intelligence are acquainted, whether in human affairs, including the way in which business is carried on, or human nature, or in relation to natural phenomena.
>
> He (the judge) may also act upon his general knowledge of local affairs, but he may not import into a case his private knowledge of particular facts, even if those facts have been proved in previous proceedings."

The passages cited above from some of the leading text books on the law of evidence indicate some of the factors involved that are relevant to this case. A fair reading of the texts and the cases referred to show that in fact "Judicial Notice" spans the whole range of judicial and quasi judicial tribunals. In many cases statute law may provide for notice to be taken of matters referred to therein. In other cases it is expected that the judge or trier of fact will use his general knowledge of local factors: See for example Peart v. Bolckow, Vaughar & Co. Ltd. (1925) 1 K.B. 399, County Court Judge hearing a claim under the Workmen's Compensation Act, expected to use his knowledge of local standard of living etc. Nevertheless the Courts have sought to preserve the position that personal knowledge is not to be substituted for actual evidence. It can be used to "interpret" evidence, but not as a substitute for evidence: See for example Wetherall v. Harrison (1976) 1 Q.B. 773; (1976) 1 All E.R. 241, see the remarks of Lord Widgery C.J. at page 778 (A-B). As O'Connor J., pointed out, in the same case at page 779, if the trier of fact uses his personal knowledge as evidence, it offends a number of other basic rules: it is not evidence given in the presence of the parties and is not open to cross-examination; further the party affected may have no opportunity of meeting such "evidence" by calling witnesses of his own.

Arguing the appeal on count 2, Mr. Small for the appellant cited a number of cases in support of his submission that the limits of judicial notice had been exceeded by the Resident Magistrate in the passage cited above from his Reasons for Judgment. Only a few need be mentioned here.

In Holland v. Jones (1917) 23 C.L.R. 149 Isaacs J. sets out a valuable guide:

> "The only guiding principle - apart from statute - as to judicial notice which emerges from the various recorded cases, appears to be that wherever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it, the Court "notices" it, either simpliciter if it is at once satisfied of the fact without more, or after such information or investigation as it considers reliable and necessary in order to eliminate any reasonable doubt.
>
> The basic essential is that the fact is to be of a class that is so generally known as to give rise to the presumption that all persons are aware of it. This excludes from the operation of judicial notice what are not "general" but "particular" facts.
>
> As to "particular" facts, even the Judge's own personal knowledge is not to be imported into the case. ....."

There are a good many cases illustrating the rule that judges may not act on their own private or personal knowledge of facts: see for example Palmer v. Crone (1927) 1 K.B. 804.

They may not do so even where the personal knowledge is in fact based on evidence given before them in a previous case: See Lazard v. Miland Bank (1933) A.C. 289 at 298; Owen v. Nicholl (1948) 1 All E.R. 707; and Roper v. Taylor's Central Garages (Exeter) Ltd. (1951) 2 T.L.R. 284 where the fact on which the justices purported to rely had been given in evidence in a case that they had heard earlier in the same day.

Our own Court of Appeal has shown the same sort of approach to judicial notice indicated in the passage cited from Holland v. Jones above, see R. v. Neville Purrier & Tyrone Bailey (1976) 14 J.L.R. 97.

In the event then we are of the view that the Resident Magistrate was not justified in extending judicial notice to the extent which he did in the passage cited from his judgment, nor in importing into the case his "personal experience" in Portland and St. James.

Though the Resident Magistrate had observed that "on the question of taking steps to export, there was no direct evidence of this" Crown Counsel sought to argue that the evidence was in fact sufficient to support the conviction on this score, and referred us to the recent case, in this Court, of R. v. Nincivic R.M. Criminal Appeal 107/1985 delivered on the 8th May, 1986.

In that case, as here, there was a police raid on premises in which Nincivic was sleeping. On the premises the police found parcels of ganja and also parcels of hashish, all wrapped in paper and plastic. In that case, as in this Nincivic attempted to bribe the police, or to enquire if an "out of court" settlement could not be reached. That was not all however, because there Nincivic admitted to the police that he was a courier plying his trade between Jamaica and America (He was an American citizen), and his passport showed several recent trips between the two destinations.

Nincivic's case is therefore readily distinguishable and it was possible on that evidence to draw the inference that he had taken steps "preparatory to exporting" the ganja with which he was found.

In the case now before us there was no such evidence and we are not able to say on the evidence before ~~us that this~~ was not destined for the local market but was designed for export. It is possible to conceive of situations in which such an inference could be drawn, for example if the packaged ganja had been found at an airstrip or air port. But it would not be helpful to

multiply by example circumstances of this sort in which the inference could be drawn.

In the result the conviction and sentence on count 1, in respect of the possession of ganja, is confirmed, but the conviction on count 2 is set aside.