

J A M A I C A

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL NO. 15/78

BEFORE: THE HON. MR. JUSTICE ZACCA, J.A. - PRESIDING.
THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE ROBOTHAM, J.A.

R. v. JACENT EDWARDS

Mr. R.N. Henriques for the Appellant.

Mr. M. Ducille for the Crown.

April 26, 1978

Delivered:

KERR, J.A.

On April 25, 1977, the appellant was convicted in the Resident Magistrate's Court for parish of St. Thomas for (i) Possession of ganja and (ii) using the Fishing Vessel Erin for the conveyance of ganja - and was sentenced respectively to (a) 9 months imprisonment with hard labour and in addition and consecutively a fine of \$1,000 or 6 months imprisonment with hard labour and (b) 9 months imprisonment with hard labour and an Order that the Fishing Vessel be forfeited pursuant to Section 24(2) of the Dangerous Drugs Act. It is against these sentences that verbal notice of appeal was given.

At the hearing Mr. Henriques indicated that he was ~~limiting~~ his arguments on appeal to the Order for forfeiture as having regard to all the circumstances it could not reasonably be said that the personal sentences were manifestly excessive. It is unnecessary for the purpose of this appeal to give a full summary of the facts leading to conviction. It is enough to say that on February 1, 1977, at about 4:30 a.m., the H.M.J.S. Fort Charles under the command of Major Peter Brody stopped and searched the Fishing Vessel, Erin under the captaincy of the appellant off the coast of St. Thomas within

the territorial waters of Jamaica and found in that ship 7.85 tons of ganja. At the close of the case for the Crown the appellant entered a plea of guilty in relation to the charges on which he was sentenced.

The application by Counsel for the Prosecution for forfeiture of the boat was opposed and evidence tendered on behalf of the defence by the appellant and Simeon Grossett.

The appellant's evidence was to the effect that he lived at Yallahs, St. Thomas, and the Fishing Vessel was registered in his name. That he purchased the engine through the Small Business Loan Board and he executed in the Board's favour a Bill of Sale - (Exhibit 5). The boat was used in conveying fishermen and their equipment to and from the Cays - he had no other means of livelihood - he had never before conveyed ganja in his boat but he was in arrears in his instalments to the Board and he tried to make some money that way to pay up. In cross-examination he said the boat was valued at about \$50,000 - his loan was originally \$15,000. Simeon Grossett of the Small Business Loan Board gave evidence that the amount outstanding on the Bill of Sale was \$12,372.50.

The following grounds formed the basis and outlines for the arguments of appellant's Attorney:-

- "Grounds: - (2) The Order of forfeiture is contrary to Law, the evidence and weight of evidence.
- (3) The Learned Resident Magistrate in making the Order for the forfeiture of the Motor Vessel "Erin" failed to appreciate the full effect of the Bill of Sale in favour of Small Business Loan Board which was tendered in evidence but merely adopted the submission of the Prosecutor that the only effect of the Bill of Sale is to give notice to anyone who may desire to have dealings with the accused with respect to the Motor Vessel "Erin", and the submission is contrary to the Law in relation to Bills of Sale.

Ground: - (4) Evidence was given by the accused as to circumstances which the Learned Resident Magistrate should take into account as to whether under Section 24(2)(b) of the Dangerous Drugs Act an Order for forfeiture of the said Motor Vessel "Erin" should be made or not and the accused's Attorney-at-Law addressed the Learned Resident Magistrate on such evidence but nevertheless the Learned Resident Magistrate made an Order for forfeiture without mentioning whether she took such evidence into consideration or not. Further the order for forfeiture entirely defeats the rights of the Assignee under the Bill of Sale."

He submitted in effect that the Bill of Sale Act - Section 2 expressly exempt "Ship or Vessel" from the provisions of that statute and the effect of the present Bill of Sale must be interpreted according to its wording and against the background of common law principles. Accordingly, the Small Business Loan Board a statutory corporation was by the terms of the Bill of Sale the owner of the Vessel and as there was no evidence that as "owner" the Board permitted the Vessel to be used for the conveyance of Dangerous Drugs the Order for forfeiture was invalid.

After hearing from the Attorney for the Prosecution we reserved our judgment. In the course of deliberations we were concerned as to whether or not those provisions of the Merchant Shipping Act relating to mortgages of Ships were applicable to Jamaica and we intimated to Counsel on either side our desire to hear arguments on this point. However, for various reasons including the unavailability of Counsel we have been unable to reconstitute the panel for a convenient date and with the pending departure of one member for another Commonwealth jurisdiction this is no longer feasible. In the interim we have had discussions and our researches fail to reveal any extension to Jamaica of the relevant Sections

of the Merchant Shipping Act either by precedent or statutory provisions and accordingly we have come to our decision without any reference or consideration of those provisions of that Act.

In our view the answer to the question raised on appeal rests upon an interpretation of Section 24 of the Dangerous Drugs Act and to the meaning of "owner" therein:-

Section 24 reads:-

- "(1) If any constable has reasonable cause to suspect that any conveyance is being used or has been used for the commission of any offence against this Act, he may without a warrant search and, if such search reveals evidence that the conveyance is being used or has been used for the commission of any offence as aforesaid, seize and detain such conveyance.
- (2) On the conviction of any person for an offence against this Act, the Court shall, upon the application of the prosecution, order the forfeiture of any conveyance used in the commission of the offence, and seized pursuant to this section, if the Court is satisfied that -
 - (a) such person owns the conveyance, or the owner thereof permitted it to be so used; or
 - (b) the circumstances are otherwise such that it is just so to order.
- (3) If, upon the application of any person prejudiced by an order made by the Court under subsection (2), the Court is satisfied that it is just to revoke such order, the Court may, upon such terms and conditions (if any) as it deems meet, revoke that order.
- (4) Any application to the Court under subsection (3) for the revocation of an order shall be made within three months of the date of the order:

Provided that where the applicant satisfies the Court that, in the special circumstances of the case, it was not reasonably practicable for him to make such application within the period of three months aforesaid, the time (whether expired or not) for making that application may be extended by the Court as it thinks just."

Notwithstanding the particular terms of the Bill of Sale, its primary purpose is to make the article security for the debt. Collateral but independent of this is the borrower's liability on the personal covenant.

To determine whether or not the term "owner" in the Act should be given a restricted or broad interpretation regard should be had to the mischief at which the provisions are aimed and to the secondary question whether the appellant falls within that interpretation regard must be had to the realities.

The provision is manifestly concerned with conveyances used in the traffic of Dangerous Drugs and by the sanction of forfeiture to punish any owner concerned in the illicit venture. At the material time the appellant was the master and registered owner under the Fishing Industry Act as evidenced by the licence K147 - Exhibit 3. Ostensibly, therefore, he is the owner.

The purpose of the act must be weighed against such proprietary rights as the holder of the Bill of Sale may have. The owner of a Vessel intent upon the illegal enterprise of conveying narcotics could escape the provisions of the Law by executing a Bill of Sale for a comparatively small loan against the value of the boat. In the instant case the equitable interest of the appellant in the Erin far exceeds that of the Small Loan Board, the ratio being approximately 3:1. Apart from Mr. Grossett giving evidence as to the outstanding balance on the loan the Board has shown no further interest in the case. Accordingly, we interpret "owner" in the statute to include a person having an equitable interest in the ship. We note with interest that in the Merchant Shipping Act - 1894 - Section 546 -

in relation to the reference to arbitration of disputes between "owners" and salvors, "owner" is broadly interpreted to include all persons interested - The *Lorisa* (1863) Brown and Lush 59 at p. 60.

If by the Order for forfeiture the Board was prejudiced then an application by the Board for revocation of the Order could have been made under the provisions of Section 24(3) and (4) of the Dangerous Drugs Act. Under these provisions the Court has power to revoke the Order upon such terms and conditions as it deems meet.

In the circumstances we hold that for the purposes of the Act the Resident Magistrate on the evidence was correct in holding that the applicant was the "owner" - and the Order for forfeiture was validly made.

The appeal against sentences is therefore dismissed and the sentences are affirmed.