

JAMAICA

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL NOS. 133 & 134/76

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

REGINA

vs.

Thomas Dakin, Bradford Eldo, William Plunkett,
Jeff Brown, Willard Reid, Sheldon Woodward
and Michael Boothe

Mr. Sylvester Morris for the Appellants

Mr. A. Smith for the Prosecution.

March 13 & 14, May 26, 1978

KERR, J.A.

On June 23, 1976, the appellants were convicted in the Resident Magistrate's Court for the parish of St. Thomas of the offence of possession of ganja contrary to Section 7(c) of the Dangerous Drugs Act.

On April 9, 1976, Captain John McFarlane of the Jamaica Defence Force on board Her Majesty's Jamaican Ship, Holland Bay, on patrol in the Territorial Waters $1\frac{1}{2}$ miles off Rocky Point, St. Thomas said that at about 4 p.m. there was on the radar a contact 4 - 8 miles south east of his position travelling in opposite direction. He altered course to intercept and at 5.30 p.m. observed that the contact was of two boats - the "Peters" towing the "Zion", and they were then 8 miles from the coast of Jamaica. When 20 - 25 feet away the Holland Bay hailed the Peters - informing that they were of the Coast Guard and required them to stop. The crew of the Holland Bay were in uniform. The reply from the Peters was to the effect that they were

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not stopping as the Coast Guard had no right to stop them. Despite manoeuvres by the Holland Bay to intercept and stop the Peters that ship continued and eventually only stopped after three bursts of machine gun fire from the Holland Bay across the bows. The Peters was eventually boarded on instructions and directed to follow the Holland Bay. En route to the port of Bowden in St. Thomas, at the request of the Captain of the Peters the Zion was pulled up and the appellant Dakin went on the Zion ostensibly to check to see if it was leaking. While on board the Zion he threw overboard about 4 - 6 parcels.

A.B. Chuck from the Holland Bay recovered one parcel, the others broke up and sank in the heavy seas. The contents of the parcel recovered according to the Government analyst contained about two ounces of ganja. Chuck said some of the parcels were of the size of 20lb. bags and the contents of those that burst of green vegetable matter similar to the contents of the one he rescued. On arriving at Bowden McFarlane boarded the Peters on which were then all seven appellants - he told them they were being held for possession of ganja and warned they might be prosecuted. Appellant Eldo introduced himself as the Captain of the Peters and so did Dakin as the Captain of the Zion. According to Mr. McFarlane, Eldo, in the course of the conversation told him that the Zion had a fuel problem, that it was used as a life boat and was being used to carry cargo plying between America and Jamaica but that the present voyage was from Puerto Rico to Cayman; Dakin supported Eldo as to the voyage and that the Zion had a mechanical fault. Searches of both ships were carried out but neither contraband nor illicit cargo was found. Franklyn Henry, Lloyd Chung and Milton Morris of the Holland Bay corroborated McFarlane. Henry said he inspected the Zion and found neither leak nor mechanical fault. Detective Corporal Bailey to whom the parcel was handed over at Port Royal on April 19,

1976 dried out the parcel before submitting it to the analyst. On information given him in the presence of the appellant Dakin he then and there arrested him for possession of ganja. The other appellants were arrested by him on warrants on April 15. Bailey said he had seen the Peters in Morgan's Harbour in April and July 1975, with Dakin on board.

Both ships are owned by the Coptic Containers Co. Ltd., of George Town, Grand Cayman and were of Cayman registration.

The appellants by the nature and conduct of the defence including their unsworn statements challenged the case for the prosecution stating:-

- (1) That no ganja was found as alleged.
- (2) That they were not in Territorial Waters at the time they were stopped.

In particular, Thomas Dakin stated that he lived in Miami and that the fuel problem of the Zion which developed in Puerto Rico caused the engine to misfire at cruising speed and that when being towed as the propeller rotated freely water leaked through the shuffing box necessitating bailing out twice daily. His crew had been relieved of duty and returned to Miami and that he was the only remaining member of the crew of the Zion on the voyage. At the time of interception he was 15 miles from Jamaica and outside the Territorial Waters. He denied throwing any packages overboard. The statements from the dock by the other appellants were to the same tenor and substance. Bradford Eldo, Captain of the Peters, said that the chart put in by the Prosecution supported his contention that the ships were outside Territorial Waters and that he based his position by mathematical process. He denied that the Holland Bay was flying a flag and said he neither recognized the authority of the ship to stop them nor appreciated

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its signals.

For reasons that are obscure none of the appellants gave evidence on oath though they appear to be intelligent and qualified to speak authoritatively on technical matters pertaining to ships and seas and sailing.

In the end the magistrate accepted the evidence of the Captain and crew of the Holland Bay and recorded the following:-

"Findings:

1. I find that the Peters with the Zion were within the Territorial Waters of Jamaica and thus within the jurisdiction of the Court. Accept the evidence of Captain McFarlane and Lieutenant Hall to this effect. Both witnesses are trained navigators. Reject the Statements of the Accused man that they were outside the 12 miles limit.
2. There is evidence that the men on board the Holland were in uniform and that ship was painted grey - international colour.
3. Accept the evidence of Captain McFarlane that he tried to stop the Peters and the Zion; that his men boarded the Peters with difficulty. His testimony is supported.
4. Reject the Statements of the defendants that they did not hear what the men on board the Holland were saying. It is significant that Dakin in his statement said that 'we shouted to the men on board the vessel that we were in international water and that they appeared to be pirates and that they had no authority to board us'.
5. That the accused man Dakin throw overboard the Zion a number of packages including exhibit 3 the one which was taken from the sea by the witness Chuck. His testimony is supported by Captain McFarlane and Morris.
6. I find that exhibit 3 was the same parcel that was taken from the sea by Chuck. The testimony of Dr. McLeod was that there was a likelihood that it came in contact with water. There were different accounts as to the condition of the paper bag. I do not concede these discrepancies to be material.
7. I accept Captain McFarlane's testimony that he took possession of exhibit 3 which he kept in his custody until he handed it over to Corporal Bailey. There is evidence which I accept that the bag and contents were placed in the sun to be dried.
8. I accept the evidence of the witnesses for the prosecution as regards the conduct of the Accused man and the remarks made by them.

9. Find that there is no evidence that the Zion had leaking problems. Accept the evidence of Captain McFarlane that Eldo said that the Zion was used by him as a life boat.
10. I I reject the statements of the Accused man. I find them to be fanciful and incapable of belief.
11. I draw the reasonable inference that the contents of the other parcels destroyed were similar to exhibit 3.
 - (b) That all seven men were in control. They were all travelling in the Peters, and
 - (c) That they knew that the contents of the parcels destroyed and exhibit 3 were ganja having regard to their conduct".

At the hearing of the appeal, Counsel for the appellants abandoned ground 1 of the grounds of appeal, which had broadly challenged the special statutory summary jurisdiction of the Resident Magistrate over offences committed in the Territorial Sea, because he considered the recent judgment of the Privy Council in Pianka v. The Queen (1977) 3 W.L.R. p. 859 effectively answered the question raised in this ground.

However, he argued fully in support of the more specific contention as set out in the following grounds taken together:-

"Ground 2:

That the arrest and/or prosecution of the appellants is in breach of Article 19 of the International Convention and Schedule 1 of the Territorial Sea Act and is accordingly contrary to law.

Ground 3:

That the arrest and/or prosecution of the appellants and the seizure of the motor vessels Peters Boat and Zion was without jurisdiction and contrary to law by virtue of the provisions of Section 4 of the Territorial Sea Act and the Schedule thereto, more particularly articles 14(2), 14(3), 19(1) and 19(5) (as regards passing through and/or right of innocent passage)".

He submitted that as the ships were foreign ships, they were in innocent passage through the Territorial Sea, that the action of the Holland Bay was not covered by the exceptions provided by Article 19(1), and in particular that having regard to the quantity of ganja analysed it was unreasonable of the Magistrate to infer that the other

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parcels contained ganja but even if it could be so inferred, the total amount would be insufficient to support the finding that the ships or either of them were engaged in the illicit traffic of narcotic drugs - and that in any event as there was no evidence to connect the drug with Jamaica the action of the Holland Bay was in contravention of Article 19 (5).

" The following amongst other Articles from the Schedule to the Territorial Sea Act are relevant:-

"Section III. - Right of innocent passage

Sub-section A. - Rules applicable to all ships

ARTICLE 14

1. Subject to the provisions of these Articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the Territorial Sea.
2.
3.
4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. Such passage shall take place in conformity with these Articles and with other rules of international law.

ARTICLE 16

1. The coastal State may take the necessary steps in its Territorial Sea to prevent passage which is not innocent.

ARTICLE 19

1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the Territorial Sea to arrest any person or to conduct any investigation in connexion with any crime committed on board the ship during its passage, save only in the following cases:-
 - (a) If the consequences of the crime extend to the coastal State; or
 - (b) If the crime is of a kind to disturb the peace of the country or the good order of the Territorial Sea; or
 - (c) If the assistance of the local authorities has been requested by the Captain of the ship or by the consul of the country whose flag the ship flies; or

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- (d) If it is necessary for the suppression of illicit traffic in narcotic drugs.
2.
 3.
 4.
 5. The coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connexion with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters".

Article 19 (1) and (2) were carefully considered and interpreted by the Privy Council in Pianka v. R. (Supra) at p. 870:-

"By section 4(5) of the Territorial Sea Act 1971 it appears that jurisdiction may not be asserted in such a way as to constitute a breach of article 19 of the Convention. This article appears in Section III of Part I of the Convention which deals with the right of innocent passage, a right which has long been recognised as limiting the jurisdiction of the coastal state over foreign merchant ships, and which was codified by the Convention of 1958.

.....

Though paragraph 1 is drafted in a hortatory rather than in a prohibitory form, their lordships consider that through the reference to it in section 4 (5) of the Territorial Sea Act 1971 it becomes necessary under the law of Jamaica for the coastal state to comply with its provisions. Whether or not the provisions of paragraphs (a) and (b) of article 19 (1) apply to this case depends to a large extent upon the detailed facts as to the nature of the "passage" and the nature of the crime..... Their lordships are of opinion that these provisions should receive a liberal construction and they agree with the Court of Appeal's appreciation of the facts. They are also of opinion that paragraph (d) applies by virtue of the 1961 Convention on Narcotics to which Jamaica became a party in 1964. Cannabis (to which ganja is equated by the Dangerous Drugs Act, section 2) is one of the drugs to which (by Schedule IV) the Convention applies. The defence under section 4(5) of the Act of 1971 therefore fails".

In the instant case we are of the view that the magistrate correctly inferred from all the circumstances including the conduct of Dakin that all the packets contained ganja. Although she did not expressly state that the ships were engaged in illicit traffic in narcotics, having regard to the addresses by Counsel on this aspect of the matter, such a

finding is implicit and reasonable. That there is considerable traffic in ganja in and through the Caribbean Sea and Territorial Waters of Jamaica is notorious. From the evidence generally it is clear that the action of the Holland Bay was concerned with the suppression of illicit traffic in narcotics.

Accordingly, reading and construing Articles 14 (4) and 19 (5) to harmonize with the interpretation given to 19 (1) in the Pianka case we hold that the provisions of 19 (1)(d) are applicable to the circumstances of the case and cover the conduct of the Holland Bay.

The following grounds of appeal deal generally with the evidence relevant to possession:-

"Ground 4:

There was no evidence specifically that the crew of the Peters Boat - Appellants Eldo, Plunkett, Brown, Reid, Woodward and Boothe or one or other of them were in "possession of ganja" jointly or severally.

Ground 5:

There was no evidence or no sufficient evidence that the Appellants or one or other of them were jointly or severally in possession of ganja.

Ground 6:

That the crown has failed to discharge the onus of proof both with regard to jurisdiction as well as regards possession in the Appellants jointly and severally.

Ground 7:

That the verdict is unsafe and unreasonable having regard to the evidence."

On the issue of possession of ganja Counsel conceded in the course of argument that there was clear evidence of possession in Dakin. However, as regards the other appellants, who were the Captain and crew of the Peters he submitted that there was not sufficient evidence to establish joint possession in them. Apart from the fact that the Peters was towing the Zion, there was no evidence of any other association by the

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be a reasonable inference. The crew of the Peters might have been quite unaware of there being any ganja on board the Zion. On the question of joint possession, the case of Hays and Hamilton is unhelpful. In that case the five persons charged were together in the same car in which a considerable quantity of ganja was found - both in the passenger compartment as well as in the trunk - and the Court criticized the Resident Magistrate for acquitting three of the defendants at the conclusion of the case for the prosecution and without calling on them to answer. The differences between the facts of that case and the instant case are so obvious that further comment is unnecessary. In R. v. McCarthy (Supra) Fenton Atkinson J. reviewed the facts at page 96 thus:-

"The facts were that, on May 30, 1963, at about mid-day, the appellant and Hemmings were seen to come out of Hemmings' house and get into a van which was driven away by the appellant. Police officers followed the van to a place called Brickfields where they saw the van parked beside a wood. A few minutes later the appellant and Hemmings came together out of the wood and Hemmings had in one hand something wrapped in a handkerchief and the appellant was examining it. Hemmings then placed his handkerchief in his jacket pocket and the two men then walked to the parked van. The appellant got into the driving seat and Hemmings was getting into the passenger seat when the officers came over to the van, whereupon both men ran away. Hemmings, as he ran, throw away the handkerchief, which was later found by the police, and in it were a stick of gelignite, a length of fuse and a detonator. They were chased and caught....."

and concluded at page 97:-

"In the view of this court, a man may properly be convicted of aiding and abetting this offence if it is found:-

- (a) that he knew that the principal offender had explosives in his possession or under his control;
- (b) that he knew facts giving rise to a reasonable suspicion that the principal offender did not have such explosives in his possession or under his control for a lawful object;

- (c) that he was present actively encouraging or in some way helping the principal offender in the commission of this offence.

The court has carefully considered the summing-up by the learned chairman, which adequately explained the law. On the facts, he told the jury that there was evidence for them to consider that the appellant helped Hennings to commit the crime of unlawful possession of the one stick of gelignite in that he drove him to the wood where he obtained that explosive, and, having apparently seen what Hennings was carrying, and with full knowledge of the facts constituting the principal offence, was ready to drive him away. In our judgment, there was sufficient evidence of aiding and abetting to be left to the jury, and there is no ground for this court to interfere".

On careful reading, it is clear that the passage quoted by Counsel is no more than a hypothetical observation. His relying on it not only did disservice to the judgment but demonstrates the dangers inherent in interpreting a passage in a judgment in isolation from its context and divorced from the circumstances to which it related and thus treating it by itself as a general proposition.

In our view the evidence falls far short of establishing the three factual plinths upon which the conviction in McCarthy's case so firmly rested.

In the circumstances the appeal of Dakin is dismissed and the conviction and sentence affirmed; the appeals by the other appellants are allowed and the convictions quashed.

crew of the Peters with that boat and their conduct when hailed by the Holland Bay was not unequivocal - since they consistently maintained:-

- (a) That they were not within the Territorial Waters of Jamaica and/or
- (b) Their ship was in exercise of the right to innocent passage, and
- (c) That in any event Dakin the Captain of the Zion was the person solely in charge of the Zion at all material times.

In reply Counsel for the prosecution argued ~~that~~ there was sufficient evidence from which a joint enterprise may be inferred; he drew attention to the conversation between the Captains, Eldo of the "Peters" and McFarlane of the "Holland Bay" as to the use being made of the Zion, that the magistrate found that the Zion was neither ~~looking~~ nor of defective engine, and to the conduct of the crew of the "Peters" when the Holland Bay tried to stop that ship. In support he referred to the facts and judgment in R. v. Haye & Hamilton (1974) 18 W.I.R. p. 360. He further contended that the Captain and crew of the Peters assisted Dakin in keeping possession of the ganja and accordingly aided and abetted the offence and could be convicted on this charge along with the principal offender. For this proposition he relied on this statement from R. v. McCarthy (1963) 1 A.E. Rep. p. 95 at 97:-

"But it is possible to envisage circumstances in which A may have the sole possession and control, over an explosive, while B, without having any share in such possession or control, is present actively encouraging A or helping him in some way to maintain his possession or control".

We do not share Crown Counsel's views. In our opinion the prosecution's case beginning as it did so far from the start of the voyage in Puerto Rico and with the Captain of the Zion being at all times present and in control of that ship, the finding of a joint enterprise or expedition in respect of the carriage of ganja on the Zion would not