J A M A I C A

IN THE COURT OF APPEAL

R.M.C.A. No. 167/1970

BEFORE: The Hon. Mr. Justice Eccleston - Presiding
The Hon. Mr. Justice Fox
The Hon. Mr. Justice Luckhoo
The Hon. Mr. Justice Smith
The Hon. Mr. Justice Edun

REGINA v. WILLIAM ARMSTRONG and KENT SMITH

Mr. V. Blake, Q.C. and Mr. D. Scharchmidt for the appellants
Mr. J. Kerr, Q.C., Director of Public Prosecutions and Mr. P. Robinson for the Crown.

JANUARY 18 - 22; FEBRUARY 5, 1971

LUCKHOO, J.A. :

On October 30, 1970, the appellants Armstrong and Smith were convicted by the Resident Magistrate for the parish of Portland on informations which charged them jointly and separately with the unlawful possession on October 4, 1970, of ganja, contrary to s. 7(c) of the Dangerous Drugs Law, Cap. 90. They were each sentenced to imprisonment for a period of 3 years at hard labour. They now appeal against their convictions and sentences.

The hearing of this appeal commenced on December 14, 1970 before the court comprised of Shelley, Fox and Smith JJ.A. and on December 17, 1970, the attention of counsel was attracted to the judgment of the court (Waddington, Luckhoo and Edun, JJ.A.) in R. v. English Mills R.M.C.A. No. 6/1970 decided on March 20, 1970, where the court held that a certificate signed by a government analyst tendered by the prosecution and admitted in evidence in that case in proof that the substance alleged to have been found in that defendant's possession contained ganja was as worded sufficient for that purpose. A certificate signed by the same government analyst,

Dr. Mootoo, similarly worded was tendered by the prosecution and admitted in evidence in the instant case for a like purpose and was held by the learned trial Resident Magistrate to be sufficient for that purpose. As challenge was being made in the instant appeal to the learned Resident Magistrate's finding in that regard and would necessarily involve argument challenging the correctness of the decision of the court in R. v. English Mills (ubi. sup.) counsel for the appellants requested that the appeal be heard before a court comprising five judges. His request was granted and the appeal was accordingly set down for hearing before this bench.

The appellants do not challenge the finding of the learned Resident Magistrate that they were in possession of the contents of four bags containing vegetable matter which the prosecution alleged to be ganja. They urge, however, that the prosecution failed to discharge the onus that lay upon it of establishing that the contents of the bags were or contained ganja within the meaning of the Dangerous Drugs Law, Cap. 90. Ganja as defined by s. 2 of the Dangerous Drugs Law, Cap. 90, "includes all parts of the pistillate plant known as cannabis sativa from which the resin has not been extracted and includes any resin obtained from that plant but does not include medicinal preparations made from that plant". It is common ground that ganja within the contemplation of s. 7(c) of Cap. 90 does not include any part of the staminate plant cannabis sativa (see R. v. George Green Cr. App. No. 15/1969). At the trial before the learned Resident Magistrate the prosecution sought to take advantage of the provisions of s. 26 of the Dangerous Drugs Law, Cap. 90 as repealed and re-enacted by s. 2 of the Dangerous Drugs (Amendment) Law, 1954 (No. 28 of 1954) by tendering in evidence the certificate of a duly appointed government analyst in proof that each of the bags contained ganja. That enactment provides as follows:-

> "In any proceedings against any person for an offence against this Law the production of a certificate signed by a Government Analyst appointed under the provisions of section 12 of the Foods and Drugs (Adulteration) Law, shall be sufficient evidence of all the facts therein stated, unless the person charged requires that the Government Analyst be summoned as a witness, when in such case the Court shall cause him to attend and give evidence in the same way as any other witness."

According to the certificate the four bags contained respectively 27, 30, 22 and 30 pounds of vegetable matter in weight. In respect of the contents of each bag the analyst certified as follows -

> "The resin constituent characteristic of the pistillate plant cannabis sativa was detected - Ganja."

In convicting the appellants the learned Resident Magistrate must have accepted and acted on the analyst's certificate in proof that the bags contained ganja, there being no other evidence adduced in relation to this element of the charges laid. The admissibility of the certificate was not challenged at the hearing before the learned Resident Magistrate by counsel who appeared for the appellants and no request was made that the analyst be summoned as a witness. No point in relation to the contents of the certificate was sought to be made when counsel addressed the learned Resident Magistrate at the conclusion of the defence (which amounted to a denial of possession of the bags containing the vegetable matter) and indeed the point which is now being advanced on appeal on behalf of the appellants was not specifically taken in any of the numerous grounds of appeal filed on November 17, 1970. The point first emerged when a supplementary ground of appeal was filed on December 11, 1970.

Counsel for the appellants, Mr. Blake, has contended that the certificate contains a finding of fact - "the resin characteristic of the pistillate plant cannabis sativa was detected" and a conclusion based upon that finding namely, that the material was ganja and that the meaning of the analyst's certificate as worded is that the analyst found a resin constituent which was peculiar to or a distinguishing feature of the pistillate plant <u>cannabis sativa.</u> This, Mr. Blake has submitted, is merely <u>prima facie</u> evidence that the bags contained ganja and in resolving the issue whether the certificate established beyond reasonable doubt that the bags contained ganja, which was a matter of science, the learned Resident Magistrate could have had resorted to works of reference and he could have taken judicial notice after enquiry of the fact that the resin constituent of the pistillate plant is identical with the resin constituent of the

staminate plant and could have held consequently that the certificate was ambiguous or equivocal and did not prove beyond reasonable doubt that the vegetable matter found in the bags was or contained ganja. The Resident Magistrate having omitted to do so, it is now open to this court, Mr. Blake contends, to apply the doctrine of judicial notice and to resolve the matter. In support of this submission Mr. Blake has referred us to a number of decided cases as well as to an article contributed by G.D. Nokes under the caption "The Limits of Judicial Notice" in volume 74 of the Law Quarterly Review at pp. 59-75 and to Cross on Evidence (3rd Edition) pp. 130-137. Mr. Blake has further submitted that repeated proof of matters in earlier cases, written and oral statements to the court are also sources from which a court may acquire knowledge in order to take judicial notice of facts after enquiry. As to the limits of judicial notice Mr. Blake has conceded that the court will not take judicial notice of a fact which is disputable or controvertible nor will it take judicial notice of particular as opposed to general facts.

The learned Director of Public Prosecutions, Mr. Kerr, has contended that in the light of testimony the analyst has given in other cases on record before the court in which he stated his method of analysis at or about the same time as he made his examination of the vegetable matter in the instant case the analyst is saying that the resin he found was resin from the pistillate plant <u>cannabis sativa</u> which he had detected and analysed and that it is reasonable to infer that counsel for the appellants before the learned Resident Magistrate had no doubt that the analyst so meant for the record shows that no question was ever raised before the learned Resident Magistrate that the certificate was ambiguous or capable of any other meaning. In any event, Mr. Kerr urges, challenge may only be made to the analyst's certificate either by calling the analyst to testify or by adducing evidence in rebuttal of what the analyst certifies, the doctrine of judicial notice not applying because the fact to be noticed is of a specific nature, so highly scientific and technical, that in every case expert evidence is required. Further, a court should not take judicial notice of a disputable fact, as is

shown to be the case here when consideration is given to the works of reference submitted by Mr. Blake for the consideration of the court.

The first question to be determined is the meaning of the words set out in the analyst's certificate. We do not think that it is at all competent for the court to look at testimony this analyst has given in other cases stating his method of analysis in order to interpret the certificate he has given in this case despite the fact that in the other cases his evidence on examination in chief was worded identically or practically so with the wording of the certificate in the instant case elucidated when cross-examined to show that his method of analysis was first to discover a pistillate plant by looking for fruiting tops and then to ascertain whether or not the resin had been extracted therefrom. Such a mode of construction would be in the teeth of counsel's own contention that one of the characteristics which run through the doctrine of judicial notice is the generality of the facts to be judicially noticed. The analogy sought to be drawn by counsel to the case of Ivor Ellis v. R. Cr. App. No. 50/1969 is not apt. In that case the court referred to sworn testimony of Mr. Walsh, a government analyst in another case R. v. George Green to show that what Mr. Walsh purported to certify in Ellis' case was not factual by reason of his admission on oath in Green's case at a date later than the date his certificate bore in Ellis' case that he had never performed any test which could distinguish between the staminate or pistillate plants cannabis sativa. Ellis' case, as the judgment therein stated, was a wholly exceptional case and it is clear that Mr. Walsh's testimony in Green's case was not used to construe the meaning of the words used in the certificate in Ellis' case. The words used in the certificate "the resin constituent characteristic of the pistillate plant cannabis sativa was detected" we think mean that the resinous part distinctive of the pistillate plant cannabis sativa was detected in the material examined. The next question is whether the learned Resident Magistrate or this court can on his or its own motion or at the request of counsel look at scientific books of reference, treatises or papers or at

evidence adduced in other cases and say that the statement of fact contained in the certificate is shown conclusively to be erroneous and therefore speaks falsely in the way contended for by counsel for the appellants. It is in this regard that the cases and works referred to by counsel must be discussed. It is not urged that the matters of fact - there are two -

(i) that both the staminate and the pistillate plants cannabis sativa contain resin;

(ii) that the resin from each are indistinguishable -

are notorious facts in the sense that they are included in mankind's common fund of knowledge and as such must be judicially noticed. It is, however, contended by Mr. Blake that a court will,without evidence, take judicial notice of all matters which, though not notorious facts, are capable of immediate and accurate demonstration by resort to authoritative works dealing with the particular matter and that coming within that category are scientific matters of the kind now asked to be judicially noticed. In support of this contention Mr. Blake has referred us to the following passage in the judgment of Lord Sumner in Commonwealth Shipping Representative v. P. & O. Branch Service (1923) A.C. at pp. 211, 212 -

> "My Lords, to require that a judge should affect a cloistered aloofness from facts that every other man in Court is fully aware of, and should insist on having proof on oath of what, as a man of the world, he knows already better than any witness can tell him, is a rule that may easily become pedantic and futile. Least of all would it be possible to require this detached and blindfold attitude towards events which the course of the late war has burnt into the memories of us all. It does not, however, seem to me, as at present advised, that the month and day at or about which a particular military movement was carried out, or that the existence between the Gallipoli Peninsula and Mudros Bay of the relation of active front to supply base, are matters as to which everybody can be deemed to be fully and accurately informed or of which judges can be required, in the legal sense of the words, to take judicial notice; still less is the fact - which is a matter of expert military training - that, in such a relation and about such a time, the simultaneous removal of such things as ambulance wagons from the base would have any particular connection with the operations going forward at the active front. At any rate, I have not found any authority which goes nearly so far, and there are many which, surprising as they are in any case, would be absurd, if the rule really went to this extent.
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> I do not, however, think that this is a true

> "case of taking judicial notice, for that involves that, at the stage when evidence of material facts can be properly received, certain facts may be deemed to be established, although not proved by sworn testimony, or by the production, out of the proper custody, of documents, which speak for themselves. Judicial notice refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer."

The language used in that passage indicates that not all matters which are capable of ascertainment upon inquiry by a judge are matters which may properly be judicially noticed. That this is so seems to be borne out in a passage in the judgment of Dixon, J. in the case of Australian Communist Party v. The Commonwealth (1950-51) 83 C.L.R. at p. 196 also referred to by Mr. Blake in support of his contention -

> "Just as courts may use the general facts of history as ascertained or ascertainable from the accepted writings of serious historians (cf Read v. Bishop of London [1892] A.C. 644 at p. 653, and the note to Evans v. Getting [1834] 6 Car. & P. 537), and employ the common knowledge of educated men upon many matters and for verification refer to standard works of literature and the like (cf. Darby v. Ouseley [1857] 1 H. & N. 1 at p. 8 (arguendo) and 12, so we may rely upon a knowledge of the general nature and development of the accepted tenets and doctrines of Communism as a political philosophy, ascertained or verified, not from the polemics of the subject, but from serious studies and inquiries and historical narratives. We may take into account the course of open and notorious international events of a public nature. And with respect to our own country, matters of common knowledge and experience are open to us (cf. Ex parte Liebmann [1916] 1 K.B. 268). But we are not entitled to inform ourselves of and take into our consideration particular features of the Constitution of the Union of Socialist Soviet Republics, per Slesser L.J., A/S Rendal v. Arcos, Ltd (1936) 1 ALL E.R. 623 at pp. 630, 631, and per Lord Wright (1937) 3 All E.R. 577 at pp. 582, 583."

It is the last sentence of this passage that really bears upon the problem that confronts us. Are we entitled to inform ourselves of and take into consideration the features of the plant cannabis sativa? The answer to that question depends upon whether the object of the exercise is to ascertain "the general nature and development" of the plant cannabis sativa - staminate and pistillate - or to ascertain its "particular features". If the former on the authority relied on by Mr. Blake it would be legally proper, if the latter it would not.

In R. v. George Green (ubi. sup.) the Court was referred

to several medico-legal and other scientific treatises in seeking to ascertain the meaning of the word "ganja" in its ordinary connotation. That case is of little assistance in determining the question now in issue. Ivor Ellis v. R. (ubi. sup.) as already explained does not assist in the determination of the question. As Mr. Blake observed there seems to be a paucity of reported cases on this question in so far as they relate to scientific matters. However, reference may be made to McCarthy v. Owners of the ship Melita (1924) 130 L.T. 445, a case under the English Workmen's Compensation Act, 1906. The applicant who had been employed to the appellants as a coal trimmer, met with an accident being knocked unconscious by and buried under some 50 tons of coal which in the course of his employment had been dislodged. He was paid full compensation up to a certain date when payment of compensation was stopped as the appellants considered that he was no longer incapacitated by any disability due to the accident, and if he was, that such incapacity was due to natural causes entirely unconnected with the accident. In consequence the applicant made application for arbitration under the Workmen's Compensation Act, 1906. His claim for compensation was heard when the medical evidence was that he had been medically examined at a date between the date of the cesser of payment of compensation and the date of the hearing and was found to be suffering from valvular disease of the heart, which was fairly advanced, and mitral stenosis. Mitral stenosis was of slow development and the examining doctor had never known it to be caused by an accident but considered that it was due to a pre-existing disease. The work of a trimmer would accelerate the development of it, though on the date of the cesser of payment of compensation he was in no worse condition than if there had been no accident. Traumatic neurasthenia might increase for months after an accident. Judgment was reserved by the County Court judge who subsequently asked the parties through the Registrar to give him references in medical text books on the question as to whether traumatic neurasthenia might definitely accentuate mitral stenosis. The applicant's solicitor supplied this information both to the judge and to the appellants but the appellants never replied to the Registrar's

to the giving of the information either then or when judgment was given awarding the applicant £1 per week for partial incapacity on the ground that the condition of the applicant was due to some extent to the accident. The appellants appealed to the Court of Appeal from that decision on the ground that the information asked for and given between the date of the trial and judgment was not admissible in evidence, and that the award should have been limited to continue only until the date which ought to have been fixed by the judge, when in the ordinary course of the progress of mitral stenosis, without any accident having happened, the applicant would have been rendered by that disease completely unable to work. Pollock M.R. in delivering the leading judgment in the Court of Appeal said at p. 447 -

> "It is now said that that evidence was not admissible, and could have been ruled out if protested against. We are of opinion that as no objection was taken to the letter at the time of its receipt, or when the judgment was delivered, it is too late to take objection to it now. I go further and say that I do not not think that the evidence so sent to the judge added or made any difference to the evidence given on July 20. It may have given the source from which the doctors founded their opinion, but the judge could deal with that evidence quite apart from the source from which it was derived. That evidence we have held to be admissible."

The Court of Appeal in that case did not say that it was legally proper for the county court judge to make his own enquiries of this scientific matter by reference to medical treatises but our understanding of what Pollock, M.R. is reported to have said is that in the absence of objection to the course taken by the judge the appellants could not on appeal be heard to say that they did not consent to that course being adopted - at any rate in a proceeding in the nature of a civil case. There appears the following note on p. 379 of 22 English & Empire Digest (R.) in respect of the Scottish case of McKay v. Davidson (1831) 5 Wils. & S. 206 affg., 6 SL (Ct of Sess.) 308 -

> "Text books - Medical text books - Held: incompetent to refer to medical text books in opposition to or in explanation of the testimony of medical witnesses, whose opinions must be taken as facts in the case."

McQuaker v. Goddard (1940) 1 K.B. 687 cited by Mr. Blake is the

type of case where as the footnote (t) at p. 339 of 15 Halsbury's Laws of England (3rd Edition) so aptly puts it "information may be given to assist the court in forming its view as to what the ordinary course of nature is in the matter before it, it being a matter of which the court is supposed to have complete knowledge and of which it is bound to take judicial notice.". In that case the question whether a camel is a domestic or a wild animal was answered after the judge had consulted books about camels and heard witnesses. As Clauson, L.J. pointed out in that case the judge takes judicial notice of the ordinary course of nature and in this particular case in regard to the position of camels among other animals and may if unacquainted with such fact refer to any person or any document or book of reference for his satisfaction in relation thereto. In the same way a court may take judicial notice of the position of the plant cannabis sativa among other plants but that case does not go as far as saying that a court may take judicial notice after enquiry of particular attributes (whether of differences or likenesses) of camels or different species of camels: nor would it in relation to the matter of particular attributes of the plant cannabis sativa. Glenister & Glenister (1945) P. 30 is another case where judicial notice after enquiry was taken as to what the ordinary course of nature is in the matter before it. A member of that court (Lord Merriman) when the matter came on appeal recollected, after his memory was stirred by a memorandum procured by counsel from a hospital, that in a number of earlier cases it had been proved without dispute that gonorrhoea is a disease which may lie dormant for a long and indefinite period. Indeed,none of the cases already referred to can be said to be authority for Mr. Blake's submission that it is competent for this court to inform itself on matters of fact as distinct from opinions held by textbook writers as to the particular botanical and chemical attributes of the staminate and pistillate plants cannabis sativa. Again scientific works are receivable in evidence not to prove facts but to show the opinion of eminent men upon particular subjects, proof having been given that they are generally accepted as authoritative by persons in

that branch of science.

Mr. Blake has also contended that it is competent for the court to have regard to previous cases where the same proposition has been proved without dispute. While we are aware of the fact that in previous cases before the court where a government analyst has testified evidence is given of the mode of examination performed in identifying matter as ganja and that invariably the pistillate plant is identified by reference to its fruiting top, we do not recollect it has ever been proved that it is impossible by reference to the resinous content to determine whether a plant cannabis sativa is staminate or pistillate. It may well be that some analysts conceive that it is impossible to identify the staminate from the pistillate plant except by reference to the fruiting top of the pistillate plant, but we do not recollect that Dr. Mootoo the analyst in the instant case has testified in any case that he was of that view. The only instance within our recollection when it was stated that the resinous exudate from the staminate and pistillate plants were identical and therefore not characteristic of or peculiar to either was when Mr. Walsh so testified in R. v. George Green (ubi. sup.) However, as Mr. Walsh himself conceded he had never in his examinations made any test to differentiate between the staminate and pistillate plants so how could he be in a position to say as a matter of fact that the staminate plant contained resin, a fortiori that if it did, that resin was indistinguishable from resin contained in the pistillate plant. It was therefore a matter of evidence to show that what Dr. Mootoo's certificate purported to certify was contrary to scientific fact. No such evidence was adduced. The appellants cannot now in the way they now seek to do impeach the accuracy of the statements made in the analyst's certificate which were rendered by the statutory enactment already referred to as sufficient proof that the vegetable matter found in the possession of the appellants contained ganja. In any event, perhaps we should add that examination of the extracts of scientific journals submitted by Mr. Blake

characteristics of the plant cannabis sativa does not lead us to the conclusion that the pistillate plant cannabis sativa cannot possibly be distinguished from the staminate plant by examination performed by a chemist, of the respective resin contents of the plants.

In our view the learned Resident Magistrate has not been shown to be in error in convicting the appellants and there is no valid reason why this court should interfere with the convictions.

As to sentence it is necessary to state that the appellants, citizens of the United States of America were apprehended by the police at Ken Jones Airport while about to embark on an aircraft bound for the United States of America. The case for the prosecution was that they had come to Jamaica from the United States of America for the purpose of purchasing ganja to be taken back to that country. The total quantity of vegetable matter containing ganja which was taken from their possession by the police was 109 lbs. One Cecilia DeLevey and her daughter were also about to embark in the aircraft at the time of the appellants' apprehension. In their defence the appellants alleged that the aircraft had been hired from its owners Lease-a-Plane (of whom the appellant Kent Smith was the General Manager and a Vice-President) by some person who turned out to be Cecilia DeLevey's former husband, one John Crabtree. The appellant Kent Smith piloted the aircraft with the appellant Armstrong, DeLevey and her daughter aboard from Florida to Ken Jones Airport. Armstrong alleged that he was sent by Crabtree "to collect a business proposition" Crabtree had previously made and was directed by Crabtree to contact one George Legister in Jamaica. He made contact with Legister who conveyed four bags (which eventually turned out to contain ganja) to Ken Jones Airport. These bags with their contents were seized by the police. Mr. Blake has submitted that the sentence of 3 years imprisonment imposed on the appellants is manifestly excessive. The appellants are first offenders and the maximum sentence which may be imposed on a first offender for being in

possession of ganja is 3 years. Mr. Blake urges that the court should take the view that the appellants were collectors for Crabtree who although not before the court was the person who masterminded the operation and employed the appellant, Kent Smith, as pilot of the aircraft, to convey, and the appellant Armstrong to collect the ganja for transportation. It would be unjust, Mr. Blake contends, for the maximum sentence to be imposed on the appellants when Crabtree, were he apprehended and convicted, could not be given any longer term of imprisonment. Mr. Blake urged that the sentences imposed on the appellants be accordingly reduced; additionally, that the court exercise its powers under s. 15 of the Aliens Law, Cap. 9 by making a recommendation to the appropriate Minister of Government that the appellants be deported in lieu of such lesser term of imprisonment that the court may impose on the appellants. A similar plea made to the learned Magistrate was rejected.

The appellants must have appreciated that if apprehended on an operation of this kind and of this magnitude they would, when convicted, have to be severely dealt with. It is notorious that the offence for which the appellants have been convicted is very prevalent in Jamaica despite the fact that the law prescribes therefor a minimum penalty of 18 months imprisonment on a first conviction. In the circumstances of this case it cannot fairly be said that the sentences imposed on the appellants were manifestly excessive or for that matter unduly severe. We see no good reason for a recommendation being made in either case to the appropriate Minister of Government for deportation in lieu of the period of imprisonment imposed.

By a majority, the appeals of the appellants are dismissed and the convictions and sentences imposed on them are affirmed.