R. *v.* FENWICK TUCKER

[COURT OF APPEAL (Luckhoo, Smith and Hercules, JJ.A.), February 1, 2, 3, 4, 5, March 12, 1971]

Criminal Law—Procedure—Trial of appellant at same time on two informations charging same offence—One information charging appellant alone with possession of ganja—Another information charging appellant and another accused jointly with possession of ganja—No prejudice occasioned appellant by trial of both informations at the same time—No legal objection to both informations being tried together.

Criminal Law—Dangerous Drugs Law—Possession of ganja—Nature of proof necessary to show that substance found in possession of accused is ganja within the contemplation of the Dangerous Drugs Law, Cap. 90 [J.].

The appellant, a citizen of the U.S.A., was charged and tried on two informations, the first of which charged him jointly with D.M., also a citizen of the U.S.A., with the offence of having ganja in his possession on February 2, 1970, and the second of which charged him alone with a similar offence allegedly committed on the same date. Both informations were in respect of the same act of possession. There was a joint trial of these two informations with four other informations, one of which charged D.M. jointly with seven Jamaican citizens with having ganja in their possession on February 2, 1970, while the remaining three informations charged D.M. and two of the Jamaican citizens separately with using a motor-car to transport ganja on the same date. The appellant was convicted on the information on which he was charged alone. D.M. and each of his co-accused were convicted on the information on which they were jointly charged. No verdict was recorded on the information which charged the appellant jointly with D.M. Of the other persons convicted, only D.M. gave notice of appeal, but he did not pursue it.

At the start of the trial before a resident magistrate, objection was made to the joint trial of both informations charging the appellant when this was requested by counsel for the prosecution. It was submitted on behalf of the appellant that there was no statutory authority for such a course being taken, and further that at common law, two informations charging one or more persons could not be tried together even with the consent of the parties. The learned resident magistrate overruled the objection. A submission to similar effect was relied on by the appellant on appeal against his conviction. For the Crown it was contended that the joint trial of the two informations against the appellant was authorised by s. 22 (2) (b) of the Criminal Justice (Administration) Law, Cap. 83 [J.], which provides as follows:

"Where, in relation to offences triable summarily . . .

(b) a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, and a person is charged with each or any of such offences,

such charges may be tried at the same time unless the court is of the opinion that such person is likely to be prejudiced or embarrassed in his defence by reason of such joinder."

Held: (i) the case did not fall within the provisions of s. 22 (2) (b) of the Criminal Justice (Administration) Law, Cap. 83 [J.], which contemplates several different or separate offences arising from a single act or series of acts, as here there was a single act of possession which had been made the subject of two charges for one and the same offence;

(ii) there was no statutory authority for the joint trial; but

(iii) the trial of the appellant on two informations which charged the same offence was not in breach of any statute or any other known rule of law nor was it contrary to authority; and

(iv) as it was not, and could not be contended in the circumstances, that the appellant was, or was likely to be, prejudiced by the joint trial, there was, therefore, no legal objection to the joint trial of the informations.

The evidence tendered at the trial in proof that the vegetable matter found in the appellant's possession contained ganja came from a duly appointed analyst, Dr. Ellington, who said that his examination of that matter involved the search for and analysis of that part of the fruiting top of the plant *cannabis sativa* where the distribution of the resin-producing cells is highest and concentration of resin is consequently greatest. He said that the presence of the fruiting top, and the finding of the drug tetra-hydro-cannabinol which is the active principal of the *cannabis sativa* plant, shows that the vegetable matter he examined contained part of the pistillate plant *cannabis sativa* from which the resin had not been extracted, as the fact that the resin was isolated from the fruit and in high concentration indicated that it was the pistillate or female plant he was dealing with, as distinct from the male, which does not produce fruit. He agreed that before the flowering stage of the plant *cannabis sativa* is reached, when the female plant bears pistils and the male stamens, it is not possible to identify the plant by reference to its sex, and he also agreed that there was another plant *cannabis sativa* to be found in Jamaica, which he called an anomaly, and which at the flowering stage has all the characteristics of both the pistillate and staminate plants. The anomaly, he said, is a female with its own pollinating kit and at the flowering stage can be distinguished as an anomaly; but at the fruiting stage it is not possible to tell whether the plant at the flowering stage showed the characteristics of the anomaly or exclusively of the pistillate, using the definition at the pistillate stage. In conclusion, he said that "the anomaly also has fruit, it is pistillate by definition", that at the fruiting stage it is impossible to tell the anomaly from the pistillate because the anomaly is the pistillate and that the fruit is part of the plant and indicates the sex of the plant.

For the defence a botanist, Dr. Coke, testifying as an expert, said that properly the plant is dioecious, meaning that there is a staminate and a pistillate plant, but that at the flowering stage there is a monoecious plant, meaning that the same plant bears separate male and female flowers. He also said that after the flowering stage both the pistillate and the monoecious plants may bear fruit, but he would not say that the monoecious plant has become a pistillate plant at the time of fruit-bearing, as once a plant is monoecious it remains so —it has both sexes, but is not bisexual. He further said that he could not disagree with Dr. Ellington's conclusions as to the vegetable matter examined, not having examined that matter himself.

It was submitted for the appellant that in the state of the expert evidence there was no clear or convincing evidence that the vegetable matter Dr. Ellington examined contained part of the pistillate plant and so contained ganja within the definition of ganja in the Dangerous Drugs Law, Cap. 90.

Held: the finding that what Dr. Ellington examined contained ganja is a finding that could properly have been made on Dr. Ellington's evidence, and there was nothing in Dr. Coke's evidence which contradicted Dr. Ellington's evidence that at the fruiting stage the monoecious plant is pistillate by definition, the totality of the expert evidence being that at the fruiting stage the monoecious plant has pistillate characteristics only. *Dictum* of SHELLEY, J.A., in *R.* v. *Pansford Wilson* (12) applied.

Appeal dismissed.

Cases referred to:

(1) *R.* v. *Yee Loy* (1941), 4 J.L.R. 53.
(2) *Edwards* v. *Jones*, [1947] 1 All E.R. 830; [1947] K.B. 659; 111 J.P. 324; 45 L.G.R. 324, D.C.
(3) *R.* v. *Campbell*, [1956] 2 All E.R. 272; [1956] 3 W.L.R. 219; [1956] 2 Q.B 432; 120 J.P. 359; 100 Sol. Jo. 454; 40 Cr. App. Rep. 95, C.C.A.
(4) *Brangwynne* v. *Evans*, [1962] 1 All E.R. 446; [1962] 1 W.L.R. 267; 126 J.P. 173; 106 Sol. Jo. 197, D.C.
(5) *R.* v. *Motta*, [1920] Clark's Repts. 69 [J.].
(6) *R.* v. *Ashbourne JJ., Ex parte Naden* (1950), 94 Sol. Jo. 148; 48 L.G.R. 268, D.C.
(7) *Lawrence* v. *Same*, [1968] 1 All E.R. 1191; [1968] 2 W.L.R. 1002; [1968] 2 Q.B. 93, D.C.
(8) *R.* v. *Salomons* (1786), 1 Term Rep. 249; 99 E.R. 1077.
(9) *R.* v. *Chandler* (1811), 14 East, 267; 104 E.R. 603.
(10) *R.* v. *Dunmow JJ., Ex parte Anderson*, [1964] 2 All E.R. 943; [1964] 1 W.L.R. 1039; 128 J.P. 468; 108 Sol. Jo. 179, D.C.
(11) *R.* v. *George Green* (1969), 14 W.I.R. 204.
(12) *R.* v. *Pansford Wilson* (1970), p. 1, *ante*.
(13) *R.* v. *Armstrong and Smith* (1970), p. 302, *ante*.

Appeal from conviction by a resident magistrate on information for possession of ganja.

F. M. Phipps, Q.C., and *Miss B. Walters* for the appellant.
J. S. Kerr, Q.C., D.P.P., and *P. Robinson* for the Crown.

SMITH, J.A., delivered the judgment of the court: The appellant was convicted on June 4, 1970, in the resident magistrate's court for the parish of Clarendon, on an information which charged him with having ganja in his possession on February 2, 1970, contrary to s. 7 (c) of the Dangerous Drugs Law, Cap. 90 [J.]. He was sentenced to imprisonment with hard labour for three years. He has appealed against his conviction and sentence.

The appellant, who is a citizen of the United States of America, was charged and tried on two informations. On the first he was jointly charged with Dave Martin, also a citizen of the United States of America, with the offence of having ganja in his possession on February 2, 1970. On the second he was charged alone with a similar offence allegedly committed on the same date. There was a joint trial of these two informations with four others. One of these others charged Dave Martin jointly with seven Jamaican citizens with having ganja in their possession on February 2, 1970. The remaining three charged Martin and two of the Jamaican citizens separately with using a motor-car to transport ganja on the same date. The appellant was convicted

on the information on which he was charged alone. Martin and his co-defendants were each convicted on the information on which they were jointly charged. No verdict was recorded on the information which charged the appellant jointly with Martin. Of the other persons convicted, only Martin gave notice of appeal, but he has not pursued it.

On the night of February 1, 1970, a party of policemen led by Det. Superintendent Jez Marston, acting on information, went to Vernam Field in Clarendon and lay in ambush around a disused airfield there. At about 4.30 a.m. on February 2, a motocade of four motor cars arrived at the airfield. Ten men came from the motor cars, unloaded ten crocus-bags from the boots of the four motor cars, and placed them under a tree nearby. The ten men included Martin and the seven Jamaicans charged with him. At about 6.15 a.m. a small aeroplane landed. Martin went on to the runway and signalled with his arms. The aeroplane stopped beside him and near to the place where the crocus-bags were put. The appellant alighted from the aeroplane. The prosecution's case was that the appellant and Martin spoke together after the appellant alighted. Martin then "rushed" to the spot where the bags were. He took up two of the crocus bags and "rushed" back with them to the appellant, who took them and threw them into the aeroplane. Martin "rushed" back for two more bags and took them to the appellant, who received them and put them also into the aeroplane. Martin went back for another bag. He and others were taking the remaining six bags towards the aeroplane when the police came out of ambush and rushed towards them. The appellant and the other defendants were held and subsequently charged as indicated above.

The four crocus-bags which it was alleged were put into the aeroplane by the appellant, were removed from it by the police. These and the other six bags were opened in the presence of the appellant and the other defendants. Each bag was found to contain a number of packages. Two of the four bags removed from the aeroplane were returned to it. The other eight bags and their contents were subsequently taken to the Government chemist, Dr. Alton Ellington for examination and analysis. Dr. Ellington found that each of seven bags had four brown paper parcels and the eighth had three such parcels. Each parcel contained vegetable matter. The vegetable matter in each varied in weight from 10½ lb. to 9½ lb. He took a sample from each parcel, and after examination and analysis, he was of the opinion that the vegetable matter he examined was ganja.

The appellant's first ground of appeal is as follows:

> "The learned resident magistrate erred in law in ruling that informations Nos. 630/70 and 1264/70 should be tried together. It is submitted that the allegations of fact related to one act of possession and there ought not in the circumstances to be two informations for the same offence. It is further submitted that at common law, two informations, whether or not for the same offence, cannot be tried together, and the provisions of s. 22 (2) of the Criminal Justice (Administration) Law, Cap. 83, could not apply to this case as the defendant/appellant was not charged with two or more offences as provided for in the section."

Information No. 630/70 charged the appellant jointly with Martin and on No. 1264/70 he was charged alone.

It is admitted by the Crown that both informations were in respect of the same act of possession. In other words the appellant was charged twice with the same offence. Objection to this was taken at the start of the trial by counsel for the appellant after counsel for the prosecution had opened the case and asked for joint trial of all the charges. The reason for the duplication of the charge was given by counsel for the prosecution at the end of the prosecution's case when counsel for the appellant asked that the prosecution be made

to elect on which of the informations they were asking for a verdict. Counsel for the prosecution, as appears on the record, said that the prosecution's case was that the appellant and Martin were in joint possession of the four bags loaded on to the aeroplane; that Martin had also been charged with the others apart from the appellant, with possession of eight bags; and that the independent charge against the appellant was laid because there was some doubt "as to whether the prosecution could properly ask for 'no verdict' to be entered against Martin on the joint charge." Later counsel said that the charges were preferred against Martin and the appellant in the alternative.

Before us, learned counsel for the appellant repeated the submissions made in the first ground of appeal and expanded on them. He submitted that at common law, two informations charging one or more individuals cannot be tried together even with the consent of the parties. Reference was made to *R.* v. *Yee Loy* (1); *Edwards* v. *Jones* (2); *R.* v. *Campbell* (3); and *Brangwynne* v. *Evans* (4). It was submitted that s. 22 of the Criminal Justice (Administration) Law, Cap. 83 [J.], creates an exception to the common law rule, but that the exception does not cover the present situation in that the charges against the appellant are not for different offences. It was said that the situation can be rescued only if the case can be brought within s. 22 and since it cannot, the conviction must be quashed.

On behalf of the Crown, it was contended that the joint trial of the two informations against the appellant was authorised by s. 22 (2) (b) of the Criminal Justice (Administration) Law. Subsection (2) of s. 22 of that Law is in the following terms:

> (2) Where, in relation to offences triable summarily—
>
> (a) a person is charged with two or more offences arising out of acts so connected as to form the same transaction; or
>
> (b) a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, and a person is charged with each or any of such offences,
>
> such charges may be tried at the same time unless the court is of the opinion that such person is likely to be prejudiced or embarrassed in his defence by reason of such joinder.

In our view, the case under consideration does not fall within the provisions of para. (b) of sub-s. (2). We think that para. (b) contemplates several different or separate offences arising from a single act or series of acts. We are concerned here with a single act of possession which has been made the subject of two charges for one and the same offence. The fact that the appellant was charged jointly with Martin for possession of ganja does not make this offence different from that with which he was charged singly. Where a person commits an offence jointly with another, he may be charged either singly or jointly with that other, but the offence remains the same however he is charged. On the case presented by the prosecution, there was no necessity to charge the appellant singly. If the evidence supported a joint possession with Martin of the bags the appellant put into the aeroplane, then both could have been convicted on the information charging them jointly. If it was found that Martin's possession ceased when the bags were handed to the appellant, Martin would have had to be acquitted on that charge, while the appellant would remain liable to conviction. Whereas in Martin's case it can be said that there may have been successive separate acts of possession and that the charges against him based on each act of possession were different, the same cannot be said of the appellant where, as has been stated, there was one act of possession.

It was not contended that the joint trial of the charges against the appellant was authorised by para. (a) of sub-s. (2) of s. 22. There was, therefore, no statutory authority for the joint trial. The question now is whether this must result in the quashing of the conviction, as was submitted. This calls for an examination of the submission, and the cases referred to in support, that there is a common law rule which was broken.

In *R.* v. *Yee Loy* (1), the appellant and another defendant were tried by consent on separate informations. It was held that a resident magistrate has no jurisdiction to try two separate informations against two defendants at one and the same time, even by consent. This decision may have led to the enactment in 1942 of the provisions contained in s. 22 of the Criminal Justice (Administration) Law. In *Yee Loy*'s case (1), reference was made to *R.* v. *Motta* (5), in which the Full Court of the Supreme Court held that it was not permissible to try together two informations charging the same person with separate offences, one of which is triable by a resident magistrate summarily in his court and the other in petty sessions.

In *Edwards* v. *Jones* (2) the offences of dangerous driving and careless driving were charged in the same information. This was held wrong, being contrary to provisions in s. 10 of the Summary Jurisdiction Act 1848 [U.K.], that every information shall be for one offence only. There is a similar provision in s. 9 of the Justices of the Peace Jurisdiction Law, Cap. 188 [J.].

Brangwynne v. *Evans* (4) was a case in which the appellant was tried at the same time on three informations, each of which charged him with stealing articles from one of three different shops in the same town on the same day. He did not consent to the joint trial of the informations. He was convicted on each charge. It was held that the procedure which the justice adopted (in trying the informations together without consent) was contrary to law and the convictions were consequently quashed. It is on this case that the greatest reliance was placed in support of the appellant's contention. *R.* v. *Campbell* (3) does not take the matter any further.

In none of the cases cited was express reference made to any rule at common law that two informations cannot be tried together. *Edwards* v. *Jones* (2) was not concerned with the joint trial of two informations, but reliance was placed on statements made by LORD GODDARD, C.J., in that case, which are clearly *obiter*. LORD GODDARD said ([1947] 1 All E.R. at p. 832):

> "There is no ground for saying that, if an information discloses two offences, the justices can hear the two offences together and then say: 'We will convict on one.' That would be giving the go-by to the provisions of s. 10 of the Summary Jurisdiction Act 1848, which makes it perfectly clear that in a justices' court a defendant can only be called on to answer one charge at a time. If there are two informations against a defendant, on which the facts are very much the same, it is, of course, open to the defendant to agree to the two summonses being heard at once. That is constantly done."

He referred to the provisions of s. 35 of the Road Traffic Act 1934 [U.K.], which permits a charge of careless driving to be preferred during the hearing of a charge of reckless or dangerous driving, and continued:

> "Observe the careful provision which is made in that section to prevent the two charges being heard together . . . That emphasises the point which I have been making that the defendant is never to be called on to answer two charges at the same time unless there are two separate informations and he consents to their being heard together."

It is to be observed that LORD GODDARD does not attribute his statement that "a defendant is never to be called on to answer two charges at the same time unless there are two separate informations and he consents to their being heard together" to any common law rule. It is clear from the early part of the first passage quoted that the principle which he enunciates was extracted by him from the provisions of s. 10 of the Act of 1848.

LORD PARKER, C.J., in the *Brangwynne* case (4) puts the matter much higher than LORD GODDARD did. He said ((4), [1962] 1 All E.R. at p. 446):

> "I am quite satisfied . . . that it has always been a principle of our law that a defendant can only be called on to answer one charge at a time in a magistrate's court."

He cites the provisions of s. 10 of the Act of 1848 as an illustration and continues (*ibid.*, at p. 447):

> "That is a good illustration of the principle to which I have referred, and although there is no statutory provision on the point, it would seem to follow that if that principle is to be adhered to, two informations, albeit each containing one charge, ought not to be tried at the same time, unless, of course, the defendant consents."

The only authorities cited by LORD PARKER for what he said "has always been a principle of our law" where the passages in *Edwards* v. *Jones* (2) already quoted and *R.* v. *Ashbourne JJ., Ex parte Naden*, (6). LORD PARKER said ((4), [1962] 1 All E.R. at p. 447) that the whole basis of the decision in the latter case "is that unless the defendant consents either expressly or impliedly, it is wrong for two informations to be heard at the same time." Any doubt about the origin of the principle stated by LORD PARKER is removed by a statement made by him in *Lawrence* v. *Same* (7). In that case, the learned Lord Chief Justice said ([1968] 2 W.L.R. at p. 1064):

> "It has always, *or at any rate since s.* 10 *of the Summary Jurisdiction Act* 1848, *was passed*, been impossible for magistrates to try more than one information alleging one offence at the same time; that of course is apart from the defendant consenting to the trial of more than one offence. That is now to be found in r. 14 of the Magistrates' Courts Rules 1952, and is supported by abundant authority, of which a recent one is *Brangwynne* v. *Evans* (4)."

If there is a common law rule, it is strange that no reference is made to it in any of the cases. If there is such a rule it is not clear what precisely are its terms. Learned counsel for the appellant was unable to point to a statement of the rule anywhere. If the rule exists it certainly is not as wide as stated by counsel. It is quite clear from the passages in the judgments of LORD GODDARD and LORD PARKER quoted above, that there is no legal objection to a joint trial with the consent of the defendant. The indications are against the existence of any such rule at common law. No English case prior to *Edwards* v. *Jones* (2) in 1947 was cited, and we have been unable to find any in which the joint trial of two separate informations against the same defendant was held to be wrong. Certainly in Jamaica in 1920 such a trial may have been permissible. In *R.* v. *Motta* (5) decided in that year, the Full Court said ([1920] Clark's Repts. at p. 71): "This was not a case of two offences cognizable by the same tribunal, in which case different considerations might apply."

The problem that arises in this case, namely, the propriety of the joint summary trial of the same offence charged twice, does not appear to have ever before arisen for decision. This is not surprising. The procedure is an unusual one. None of the authorities cited is directly in point. We have, therefore, to decide the question on basic principles. Before 1848 in England, it was not unknown for two or more offences to be charged in the same information and tried together. Such was the case in *R.* v. *Salomons* (8). The conviction was held bad in that case as it was a conviction for "the said offence", hence it did not appear of what offence the defendant was convicted. But there was no suggestion that the information was bad or that the offences could not be tried together (see also *R.* v. *Chandler* (9)). One of the reasons for the provisions in s. 10 of the Act of 1848 may have been to avoid uncertainty and confusion

in the recording of convictions, as in the *Salomons* case (8), but there can be no doubt, in our view, that the main reason for the provision and for the principle extracted form it by LORD GODDARD and LORD PARKER in the cases cited above is to ensure that a defendant is not prejudiced or embarrassed in his defence by being compelled to answer two or more charges at the same time. That the foundation of the principle is prejudice or embarrassment is shown by the fact that there may be a joint trial with the consent of the defendant where he is charged in separate informations. No question of prejudice can arise if he consents. Even implied consent is sufficient (see *R.* v. *Ashbourne, JJ., Ex parte Naden* (6) and *R.* v. *Dunmow, JJ., Ex parte Anderson* (10)). He cannot, of course, consent to a joint trial of offences charged in the same information as to so charge him is prohibited by statute.

The trial of the appellant on two informations which charged the same offence in each was not in breach of any statute or of any known rule of law, nor was it contrary to authority. It was not, and could not be in the circumstances, contended before us that the appellant was, or was likely to be, prejudiced by the joint trial. There was, therefore, no legal objection to the learned resident magistrate ruling that the charges should be tried together. Though, as we have said, there was no legal necessity to charge the appellant alone on a separate information, there is no ground on which we can hold that to charge him twice in the circumstances was legally objectionable. For these reasons the first ground of appeal fails.

In his second ground of appeal the appellant complained that the verdict on which his conviction was based was unreasonable and cannot be supported having regard to the evidence. The verdict was said to be unreasonable firstly, because there was no or no sufficient evidence that the exhibits in the case were ganja as defined by s. 2 of the Dangerous Drugs Law. Ganja is there defined as including "all parts of the pistillate plant known as *cannabis sativa* from which the resin has not been extracted . . ." It was held by this court in *R.* v. *George Green* (11) that this definition restricts ganja to the pistillate plant *cannabis sativa* and no part of the staminate plant is included. In addition to the evidence of Dr. Ellington, expert evidence was given on behalf of the appellant by Dr. Lloyd Coke, a lecturer in the department of botany at the University of the West Indies.

Dr. Ellington said that he took the fruiting tops from each of the parcels in the eight bags and analysed them. He said that his examination involved the search for, and analysis of, that part of the fruiting top of the plant *cannabis sativa* where the distribution of resin producing cells is highest and concentration of resin is consequently greatest. He found that the vegetable matter contained the drug tetra-hydra-cannabinol, which is the active principle of the *cannabis sativa* plant. He said that the presence of the fruiting top and the finding of the drug shows that the vegetable matter contained part of the pistillate plant *cannabis sativa* from which the resin has not been extracted; that the fact that the resin was isolated from the fruit and in high concentration indicates that it is the pistillate or female plant he was dealing with as distinct from the male, which does not produce fruit. He formed the opinion that the matter he examined and analysed was ganja. In cross-examination, Dr. Ellington said that the pistillate plant bears pistils at its stage of flowering while the staminate at that stage bears stamens; that before the plant starts to flower, one cannot identify it as male or female; that there is a third plant, which he calls an anomaly; that this anomaly has been found in Jamaica, and at the flowering stage has all the characteristics of both pistillate and staminate; that the anomaly is a female with its own pollinating kit, and at the flowering stage can be distinguished as an anomaly; that the pistillate part of the flower will produce fruit; that at a stage when the *cannabis sativa* plant has fruit it is not possible to tell whether the plant at the flowering stage

showed the characteristics for the anomaly or exclusively the pistillate, using the definition at the flowering stage. In re-examination, Dr. Ellington said that when he took the samples the plant was at the fruiting stage; that because of the high concentration of resin he formed the opinion that he was dealing with the pistillate plant. He said that at the fruiting stage the pistillate plant produces fruit, the staminate produces nothing; that "the anomaly also has fruit, it is a pistillate by definition." To further questions in cross-examination and re-examination, he said that at the fruiting stage it is impossible to tell the anomaly from the pistillate because the anomaly is the pistillate, and that the fruit is part of the plant and indicates the sex of the plant.

Dr. Coke agreed that before the flowering stage, there is no means known to science by which the sex of the *cannabis sativa* plant can be determined. He said that, properly speaking, the plant is dioecious, meaning there is a staminate and a pistillate plant. He said that at the flowering stage there is a monoecious plant, meaning that the same plant bears separate male and female flowers; that at the flowering stage he would not call a monoecious plant a staminate or a pistillate; that after the flowering stage both the pistillate and the monoecious plants may bear fruit; that he would not say that the monoecious plant has become a pistillate at the time of fruit bearing; that it is not because both plants bear fruit that they are pistillate; that once a plant is monoecious it remains a monoecious plant—it has both sexes. In cross-examination Dr. Coke said that he could not disagree with Dr. Ellington, not having examined what he (Dr. Ellington) examined in this case. He said that pistillate means bearing a pistil and that the fruit is developed from the pistils; that given fruiting tops alone one cannot say that a plant is a pistillate plant or is not a pistillate plant. To a question by the court he said that the monoecious plant is not bisexual.

It was submitted that on the state of the expert evidence, there is no clear and convincing evidence that the exhibits were pistillate or exclusively pistillate as the Law requires and as was stated in the *George Green* case (11). It was said that it was not established to the degree of proof required in a criminal case that the exhibits were ganja.

In *R.* v. *Pansford Wilson* (12), a case in which the appellant was also charged with having ganja in his possession, this court had before it expert evidence from both Dr. Ellington and Dr. Coke. A similar submission to that made in this case was made in that case on the effect of the expert evidence. Dr. Ellington said in that case, that in the hybrid (or monoecious) plant "one finds fruiting top which is characteristic of female and if test is applied to fruiting top I would get same reaction (as in the pistillate plant)." SHELLEY, J.A., quoted this passage from Dr. Ellington's evidence in the judgment of the court and said:

> "In other words, a fruiting top which is characteristic of the female that came from a hybrid plant would be indistinguishable from that from a purely pistillate plant. In short it is indistinguishable from the very thing which the law seeks to prohibit."

It was held that it was rightly held that the vegetable matter in that case was ganja.

Learned counsel for the appellant submitted that we should not follow the decision in *R.* v. *Pansford Wilson* (12) as in that case it was never considered whether or not scientifically it would be accurate to say that the monoecious plant became pistillate and nothing else at the fruiting stage. This submission is, of course, based on Dr. Coke's evidence that he would not say that the monoecious plant becomes a pistillate plant at the time of fruit bearing. Dr. Ellington's opinion was that at the fruiting stage it is impossible to tell the anomaly from the pistillate because the anomaly is the pistillate—"it is pistillate by definition". The learned resident magistrate in the present case accepted Dr. Ellington's evidence and found that the samples taken by him from the contents of the bags and analysed were ganja as defined in the Dangerous Drugs Law. In his findings the learned resident magistrate said: "There seems to be a monoecious plant but my finding in this case is that all accused in possession of the pistillate plant known as *cannabis sativa* from which resin not extracted within meaning of the Dangerous Drugs Law, Cap. 90." In our view, the finding that what Dr. Ellington examined was ganja is a finding which could properly be made on Dr. Ellington's evidence. Though Dr. Coke said that "once a plant is monoecious it remains a monoecious plant—it has both sexes", this seems, on his evidence, to be based on mere theory. It seems clear from his evidence that the monoecious plant can be identified only at the flowering stage. There is nothing that he said which contradicts Dr. Ellington's evidence that at the fruiting stage the monoecious plant is pistillate by definition. He does not say, as one would have expected if it were the fact, that at the fruiting stage the monoecious plant has any male characteristic which is identifiable. What the totality of the expert evidence amounts to is that at the fruiting stage the monoecious plant has pistillate characteristics only. This falls squarely within the decision in *R.* v. *Pansford Wilson* (12) with which we entirely agree.

It was contended that it was wrong in law for Dr. Ellington to say in his evidence that he formed the opinion that the matter he examined was ganja and that it was wrong for the resident magistrate to have accepted and acted upon that "legal opinion". It was said that Dr. Ellington was a scientific and not a legal expert and was, therefore, not qualified to express this opinion. In our view this contention is without merit. Dr. Ellington said in cross-examination: "I would have thought that samples were sent to me to make scientific investigation and to relate it to the law. I related it to the law in my understanding of the law." We can find nothing wrong with this approach. The resident magistrate was in no way bound by this expression of opinion and there is nothing to show, as is contended, that he blindly accepted and acted upon the opinion without considering the evidence on which the opinion was based. We hold that there was ample evidence to support the finding that the samples which Dr. Ellington examined were ganja within the meaning of the Dangerous Drugs Law.

The second ground on which the verdict was said to be unreasonable was that the learned resident magistrate failed to assess the evidence in the case and draw proper inferences therefrom. It was said that he gave no weight to the cogent independent and unchallenged evidence for the defence.

The appellant gave evidence and called several witnesses. He said that he is a professional sports fisherman. He arrived in Jamaica on January 26, 1970, in a private aeroplane, which was chartered and piloted by Douglas Rhodie. His purpose in coming here was to go to the Playboy Club in order to "check out surrounding waters to see if it was feasible to move my business of fishing and water-sports" and also for the purpose of "doing some preliminary work for Mr. (Mike) Silva for advertising purposes in Playboy International magazine." Mr. Silva is a vice-president of Playboy International and he had spoken to Mr. Silva prior to his arrival in Jamaica. He said that Rhodie called him on the telephone, told him that he heard that he was going to Jamaica, and offered him the use of his (Rhodie's) aeroplane. It was arranged that he would pay Rhodie's expenses but not for the hireage of the aeroplane. He did not know who paid the hireage and did not ask. Rhodie gave him the impression that he was coming to Jamaica to assist him (appellant) with the aircraft in his survey work. He knew of no other purpose for Rhodie coming to Jamaica and he did not know him prior to the telephone conversation with him. He said that on his arrival in Jamaica on January 26, he and Rhodie registered at the Playboy

Club at Boscobel, Ocho Rios. His reservation was for period Monday, January 26, to Wednesday, January 28. On January 27, he started the aircraft survey work with Rhodie piloting the aircraft, and was engaged on this from 9 a.m. to 5 p.m., when they returned to the club. They used the Boscobel airstrip. On January 28, he and Rhodie flew to the Palisadoes airport, leaving Boscobel at about 7.30 a.m. and returning there at about 6 p.m. He was engaged in Kingston all day on business connected with his mission to Jamaica. On the same day he extended his reservation at the Playboy Club for two days as he realised "the job I had to do was much longer than I expected". He said that he completed his business on Friday, January 30, and left Boscobel in the aeroplane piloted by Rhodie. They flew to the Palisadoes airport. He expected to leave Jamaica on the Saturday morning, January 31. The bills incurred at the Playboy Club for Rhodie and himself were paid by Mr. Silva, who telephoned from Chicago and made arrangements with Playboy about the bills. When he arrived at the airport on Saturday morning with Rhodie, the latter tried to get someone to repair a mechanical defect in the aeroplane which Rhodie said had developed the previous day. The defect was not fixed until late in the afternoon of January 31, so it was decided that they would leave Jamaica on the following morning, February 1. On the following morning Rhodie said he could not fly the aeroplane then because of adverse weather conditions. On the morning of February 2, Rhodie got him up at about 4 a.m. at the Hotel Kingston where they spent the night and told him that the weather was fine and he wanted to leave then. They went to the Palisadoes airport and boarded the aeroplane. He expected to be flown to Miami in the United States of America. About ten minutes after the aeroplane took off Rhodie told him he was going to stop to pick up something. He could do nothing about it. He did not enquire what he was going to pick up. Soon after the aeroplane landed and taxied to a stop at the intersection of two runways. Rhodie asked him to help him load some bags on to the aeroplane and pointed to bags under a tree. He opened the door and stepped out. Rhodie shouted to the defendant Martin, who was on the runway: "Hand me those bags underneath the tree." He (appellant) was then seeing Martin for the first time. He did not speak to Martin. Martin handed him two bags which he handed to Rhodie in the aeroplane. At this stage there were gunshots, he was scared and he jumped back into the aeroplane. He was subsequently taken off the aeroplane by the police. He said that when he received the bags and put them on the aeroplane he was not receiving them for himself but for Rhodie. He never asked Rhodie what was in the bags, did not know what was in them and never became curious.

Deputy Superintendent Marston gave evidence of having received certain information on January 25, as a result of which he was present at the Palisadoes airport on January 26, and witnessed the arrival of the aeroplane on which the appellant came to Jamaica. The appellant and another American (Rhodie) landed from the aeroplane and reported at the Customs. Later he saw them re-board the aeroplane, which left the airport. Mr. Marston said that on January 28 he saw the appellant and the defendants Martin and Delroy Hamilton drinking and talking together at the Playboy Club at about 12.30 p.m. The learned resident magistrate found that "Martin, Tucker (the appellant), and Delroy Hamilton seen together at Playboy Club on or about January 28, 1970, by Marston."

It was submitted that the evidence of Marston was so eroded in cross-examination that it was unworthy of acceptance, particularly where his evidence related to his seeing the appellant at the Playboy Club in company with Martin and Hamilton. Learned counsel for the appellant examined this aspect of Marston's evidence in detail and submitted that the evidence was unreliable and ought not to have been accepted. We agree. The appellant adduced fairly

conclusive evidence that he was in Kingston at the relevant time on January 28. Evidence was given by air-traffic control officers that Rhodie's aeroplane, in which the appellant said he flew to the Palisadoes airport on that day, was at that airport between 8.04 a.m. and 6.01 p.m. on January 28. At the lowest, Mr. Marston was confused about the dates when and places where he saw the appellant between January 26 and February 2. His evidence about seeing the appellant at the Playboy Club on January 28, stood alone. From the terms of the resident magistrate's finding he seems to have believed that the appellant and the others were seen by Marston together, as he said, but he was uncertain about the date on which they were seen. It was conceded on behalf of the Crown that this aspect of Marston's evidence was unreliable and that it could not properly ground a finding in a criminal case.

It was contended on behalf of the appellant that Marston's evidence about January 28 was the foundation of the learned resident magistrate's finding that he was satisfied that the appellant, Martin and the Jamaicans were acting in furtherance of a common design to possess and export ganja. So, it was argued, if this court finds that the resident magistrate wrongly accepted that evidence, then his decision is open to question. It was submitted that there was no other evidence to support a finding of common design, and if the resident magistrate was not justified in finding a common design, this court cannot say that the appellant would inevitably have been convicted. Learned counsel for the Crown admitted that the utility of this aspect of Marston's evidence was to found the inference that there was a common design, as found by the resident magistrate, and to show that the appellant had knowledge of the contents of the bags he handled on February 2. But it was argued that a finding that there was a common design between the appellant and Martin was not necessary to support the conviction of the appellant. It was submitted that a proper perspective of this part of Marston's evidence shows that it was not the mainstay or crux of the prosecution's case but was rather only a part of the whole body of circumstances alleged by the prosecution as pointing to the guilt of the appellant. Included in these circumstances, it was said, was the evidence of the rental of a motor-car by the appellant which it was established was in the motorcade which transported the bags containing ganja to Vernam Field as well as the conduct of the appellant on the morning of February 2.

The appellant admitted that one of the motor-cars, which it was proved was in the motorcade, was hired by him on January 30. His evidence was that he hired a motor car on January 27, which he returned on January 29, as he had planned leaving Jamaica on January 31. He rented the other car on January 30, because Rhodie told him on that day at Boscobel that the aeroplane had a mechanical defect and said that he (appellant) should rent a car and drive to Kingston to fetch an aviation mechanic. He rented the car at Ocho Rios and drove it to the Boscobel airstrip. There Rhodie told him that he had solved the problem with the defect and it would no longer be necessary to go to Kingston to get the mechanic. He said that he left the car at the Boscobel airstrip as Rhodie said he had arranged for it to be picked up. He left the keys in the car and had nothing to do with the car after that. Learned counsel for the appellant submitted that the appellant's evidence about the motor-car was uncontradicted, was a reasonable explanation, and ought not to be rejected. He said it ought to have created doubt in the resident magistrate's mind as to whether there was any sinister reason for the appellant having hired the second motor-car. The resident magistrate was, of course, not obliged to accept the appellant's evidence because there was no direct evidence to contradict it. In deciding whether the evidence was uncontradicted or amounted to a reasonable explanation it cannot be considered in isolation. A proper assessment of it can only be made when considered with the rest of the evidence in the case.

The appellant's case at the trial was that Rhodie was the villain and that it was he who was in league with the other defendants to export ganja. Counsel described him as the "evil genius in the scheme". The prosecution's case was that Rhodie, who was not a witness at the trial, was working with the local police and giving them information from time to time. Deputy Superintendent Marston said, in evidence, that he "received information from the pilot of the 'plane on which Tucker (the appellant) landed at Palisadoes and who was the pilot of 'plane on which ganja was placed. He was my informer." Later in cross-examination he said: "I got information sometime from pilot of 'plane. Sometimes I got information from another contact." Still later he said: "This pilot was one of my informants. All along the pilot was working with me on my side." And: "I got specific information and this led me to believe that ganja would be at a specific place at a specific time. I got information from Mr. Rhodie and two other persons." It was argued that the resident magistrate could only find that Rhodie was a police informer if he accepted Marston's evidence on that point; that because Marston was so unreliable, so discredited, his evidence on this should not be accepted. We see no justification for holding that Marston's entire evidence was unreliable. The evidence in the case certainly suggests that Marston had prior information about the movements of the aeroplane. This makes his evidence that the pilot was his informant more credible.

It was submitted that the appellant's explanation of his conduct on the morning of February 2, in leaving the aeroplane and loading the bags on to it, is not unreasonable; that there is no evidence to the contrary and his evidence ought, therefore, to have been accepted by the court. Once it was accepted that Rhodie, the pilot, was working with the police, the appellant's case, that he was merely a casual handler of the bags, fell to the ground. There was no one else in the aeroplane, so the only reasonable inference to be drawn was that he was receiving the bags of ganja for his own purposes. But this apart, we think there was ample evidence to support a finding that the appellant was not innocently assisting the pilot as he said.

The appellant admitted most of what the police witnesses said took place after the aeroplane landed. But his evidence differed in certain significant respects. He said that the engine of the aeroplane was not switched off after it landed and that the pilot was at the controls with the engine running while the bags were being put on. Superintendent Marston said that the engine was cut off and he was supported in this by Det. Sergeant Green who said: "the engine of the aircraft was not running when it was being loaded". Detective Inspector Smythe and Det. Sergeant Green said that the appellant and Martin spoke together on the runway before Martin went to fetch the first bags. The appellant denied that he spoke to Martin at any time. The police witnesses said that Martin handed four bags to the appellant which he put into the aeroplane. In this they were supported by the evidence of the defendant Martin. The appellant said he received two bags only. If the version of the evidence given by the police witnesses is accepted, the appellant's evidence of innocently assisting Rhodie becomes incredible. It is incredible that the appellant would have agreed to assist in loading, and thus handling, the bags in circumstances which must certainly have appeared to him to have been at least highly suspicious while Rhodie sat in the aeroplane doing nothing, and with Martin and several other men on the ground who could have passed up the bags. The fact that there was a rendezvous in the early hours of the morning at a disused airfield, that the appellant alone alighted and spoke to Martin, that he received four bags and placed them on the aeroplane (and it was reasonable to infer that he would have received the balance if they had not been interrupted), that a motor-car hired by him was used to transport some of the bags—all this evidence, if believed, when taken together, is, in our view, sufficient proof of the fact that the appellant was acting on his own behalf in receiving the bags. On the question whether or not the appellant's evidence should be believed, the resident magistrate was entitled to take into account the fact that though the appellant said he was acting innocently on the occasion, he said nothing when he was taken from the aeroplane by the police or when the police told him that the bags contained ganja or yet when one of the Jamaican defendants said in his presence: "A white man business."

We hold that there was abundant evidence, which was obviously accepted by the learned resident magistrate, on which it could be found that the appellant was not assisting the pilot as he said, but had received the bags, found to contain ganja, for his own purposes. It would follow from this finding that the appellant had dominion and control over them and had not merely handled them casually, as was contended. It would also be reasonable to infer from all the circumstances that the appellant knew that the bags contained ganja and had landed in order to collect them for transportation abroad.

On the appeal against conviction, there remains to be considered the submissions concerning the information on which the verdict against the appellant was recorded. As has been stated, the appellant was convicted on the information which charged him alone. The learned resident magistrate recorded the finding that "Martin and Tucker (appellant) also in possession of ganja placed on aeroplane". It was submitted that if the resident magistrate had properly assessed the evidence and applied a judicial mind to it, having found as indicated above, he ought not in law to have convicted the appellant on the information which charged him alone. It was said that this court is in a position to say that because of the confusion in the informations the resident magistrate did not apply a judicial mind to the legal concept of possession, that he failed to distinguish between possession and casual handling, and the verdict ought not to be allowed to stand. It was contended that the conviction cannot be rescued by this court substituting a conviction on the joint charge (with Martin) for the "bad conviction" on the single charge. As we have said, once it was accepted that the appellant was acting on his own behalf, there could be no doubt that he was legally in possession of the bags he received and their contents. The question whether the resident magistrate had properly appreciated and applied the law regarding possession—i.e. dominion and control as against casual handling—would not, therefore, arise.

It is clear that the resident magistrate concluded that Martin was in joint possession with the Jamaican defendants of all the bags taken to Vernam Field and also in joint possession with the appellant of the bags handed to him. When he came to decide how to record his verdicts he no doubt had in mind, and was influenced by, the doubt expressed by counsel for the prosecution whether a "no verdict", as it was called, could be entered in respect of Martin on the information charging him jointly with the appellant. It does not appear to us that there could have been any objection to this course. But having decided that Martin should be convicted with the Jamaicans, with the doubt in mind, he recorded the verdict in respect of the appellant on the alternative charge. No valid reason has been advanced, and we can think of none, why the conviction should be held to be bad because of the course adopted. As we have said, there is no legal objection to a person who commits an offence jointly with another being charged and tried separately. The appellant was charged twice for the same act of possession. In view of the statement made by counsel for the prosecution at the trial giving the reason for the appellant being charged as he was, and the case being conducted on this basis, it cannot, in our view, be said that the conviction recorded against the appellant amounts to a finding that the appellant was in exclusive possession and not in joint possession with Martin as was expressly found.

For the reasons we have given the second ground of appeal also fails.

The sentence imposed upon the appellant is the maximum penalty prescribed for the offence on a first conviction. It was said that this was the appellant's first conviction under the Dangerous Drugs Law. It was submitted that the only apparent justification for the maximum term of imprisonment being imposed was (a) the fact that the appellant is a foreigner and (b) that a large quantity of ganja was involved. There is no ground for saying that the maximum penalty was imposed on the appellant merely because he is a foreigner. Two of the Jamaicans tried with him were given a similar sentence. As regards the quantity of ganja, it was said that the amount which came into the appellant's possession was a small fraction of the whole. Assuming, without deciding, that the resident magistrate could not properly take into account the fact that the appellant clearly intended to take all the bags and their contents, the "small fraction" consisted of the contents of the two bags in evidence which it was held that the appellant received. The vegetable matter in these two bags was said by Dr. Ellington to weigh 83 lb. As was said recently by this court in *R.* v. *Armstrong and Smith* (13), it is notorious that the offence for which the appellant was convicted is very prevalent in this country despite the minimum penalty of 18 months' imprisonment on a first conviction prescribed. It is also notorious that there is considerable traffic in ganja between this country and abroad, particularly the United States of America. In our view, a court is justified in imposing a severe sentence in order to discourage this traffic. It is well to emphasise that the term of imprisonment to which the appellant was sentenced is the maximum penalty prescribed *for a first conviction*. So it was contemplated that there could be cases in which the maximum penalty for a first conviction could properly be imposed. We cannot say that this is not such a case.

The appeal is dismissed and the conviction and sentence affirmed.

Appeal dismissed.