He had indeed an actual basis for special damage which he refused to plead but which he succeeded in proving.

Although the learned trial judge awarded the £2,016 as special damage, it would seem that he really failed to distinguish between general and special damages for the purpose of this award. This is what he states at p. 25 of the record:

> "In the light of these considerations, it will be seen that the curious (but not unknown) position arises where, for the purpose of pleading, the plaintiff has properly dealt in his statement of claim with damages arising from loss of income under the head of special damage, whilst in connection with the proof of these damages, the cases which indicate the rule under which these damages are to be assessed, described these damages as "general damages". This difference in the use of terminology in no way obscures, however, the principles which apply in either situation."

Counsel for the respondent submitted that the learned trial judge did not act on any wrong principle in his consideration of the matter. If he went wrong on the principle relating to general and special damages, then the mere fact that it is put under the wrong head will not cause a court to deprive the respondent of his damages. If he pleaded special, there is no reason why it could not be given as general. He ought to get it under either head so long as it is reasonable. In other words, if the respondent failed to prove what he claimed as special damage, the trial judge could award it as general damages.

I am afraid that this contention runs contrary to the authorities on pleading and proof referred to above. There are two circumstances in which an award of general damages can properly be made to the respondent for his loss of earnings prior to the date of trial which have not crystallised so as to be included in a special damage claim:

(1) for the chance of getting some work at his usual rate of pay where he wasn't working at all at the date of the accident;

(2) for loss of a chance of getting something more than the salary he was actually earning at the date of the accident during the period of his disability.

As regards the first circumstance, it cannot apply here as the respondent was actually working and earning at the date of the accident. The second circumstance could have applied, but as the respondent did not plead the salary he was actually getting and did not amend his pleading, he precluded himself from being caught by the second circumstance. He had only a mere possible contingency of increasing his earnings above that of a bartender.

Counsel for the respondent further submitted that this was a finding of fact made by the trial judge on a balance of probabilities, and having evaluated the contingency of the respondent getting employment on a ship, unless that evaluation is clearly wrong the Court of Appeal would not interfere.

The classic statement of the grounds upon which the Court of Appeal would interfere with an assessment of damages appears in the judgment of GREER, L.J., in *Flint* v. *Lovell* (10) ([1935] 1 K.B. at p. 360):

> "This court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

It would appear, that on the evidence, the learned trial judge treated the possibility of the respondent being employed as a ship steward for twelve months from January 18, 1961, as a certainty. In fact, the respondent's loss of earnings as a steward had not crystallised into an actual loss, and therefore could not be awarded as special damage. Where special damage is pleaded it must be proved and the claim, in the absence of such proof, is not assessable under the head of general damages.

The respondent in his evidence stated that he was claiming loss of income for twelve months at $1 per day per person, plus $44 a month basic pay. The learned trial judge found as a fact that his maximum loss as a room steward for twelve months was at the rate of $480 or £168 per month—clearly what was pleaded but not proved. What the respondent proved quite unequivocally was that at the time of the accident he had been working as a bartender, but that was not pleaded and could not be recovered by way of general damages—*Hayward* v. *Pullinger & Partners, Ltd.* (5). In the instant case, the position in the end was that what the respondent pleaded he did not prove and he actually proved what he did not plead.

I am afraid I do not accept the proposition that in the absence of proof of the special damage as pleaded, it was still open to the learned trial judge to award the sum of £2,016 so claimed as general damages or at all. In point of fact the learned trial judge did not award it as general damages. He awarded it as special damage. In my view he proceeded on a wrong principle in so doing. This was a completely erroneous evaluation of the respondent's losses based on an erroneous approach. On the evidence, all that the respondent could recover was twelve months as a bartender, but this, aforesaid, was not pleaded.

In the judgment of £2,313 4s. 9d. with costs to be taxed or agreed, the sum of £1,300 was allowed for loss of income, but I would allow the appeal and set aside that judgment. I would substitute therefor judgment for the respondent in the sum of £1,013 4s. 9d.

On apportionment, in accordance with the consent judgment at page 27 of the record, this will be a final sum of £506 12s. 4d.

As regards costs, the respondent to have costs to be taxed or agreed up to July 2, 1965. Thereafter the appellants to have all costs in the court below as well as costs of the appeal.

Appeal allowed.

Solicitors: *Livingston, Alexander & Levy* (for the defendants/appellants); *Silvera & Silvera* (for the plaintiff/respondent).

R. *v.* TRAILLE

[COURT OF APPEAL (Waddington and Eccleston, JJ.A., and Hercules, J.A.(Ag.)), November 28, December 19, 1969]

Procedure—Summary trial of appellant accused on information of possession of ganja together with two other persons accused on another information of possession of ganja—Whether informations accusing of "different offences committed in the course of the same transaction"—Meaning of "transaction"—Several separate possessions of ganja by the separate parties—Whether trial valid—Dangerous Drugs Law, Cap. 90 [J.]—Criminal Justice (Administration) Law, Cap. 83 [J.], s. 22 (1).

Section 22 (1) of the Criminal Justice (Administration) Law, Cap. 83 [J.], provides as follows:

"22. (1) Where, in relation to offences triable summarily—

(a) persons are accused of similar offences committed in the course of the same transaction; or

(b) persons are accused of an offence and persons are accused of aiding and abetting the commission of such offence, or of an attempt to commit such offence; or

(c) persons are accused of different offences committed in the course of the same transaction, or arising out of the same, or closely connected, facts,

they may be tried at the same time unless the Court is of the opinion that they, or any one of them, are likely to be prejudiced or embarrassed in their, or his defence by reason of such joint trial."

The appellant was convicted in the resident magistrate's court for the parish of St. Ann on an information charging him with the possession of ganja, contrary to s. 7 (c) of the Dangerous Drugs Law, Cap. 90 [J.]. He was tried jointly with Herbert and Isolyn Walker, husband and wife, who were charged on one information with possession of ganja. The informations were laid consequent upon a search carried out by the police at Herbert Walker's premises at Drumilly, St. Ann, at about 4.30 a.m. on December 4, 1968. In a room in the house occupied by the Walkers ganja was found. In another room of the same house the appellant was found sitting on a suitcase and on his person being searched a quantity of seeds and some vegetable matter were found which turned out to be ganja seeds and ganja mixed with tobacco, respectively. There was no evidence that the Walkers on the one hand and the appellant on the other hand had any connection or interchange of relationship or association with one another before or during the events of the early morning of December 4, 1968. During the course of the trial the Crown offered no further evidence against the Walkers and the information against them was consequently dismissed.

The trial then proceeded on the information laid against the appellant only and he was convicted.

On appeal, it was submitted on behalf of the appellant that the learned resident magistrate in allowing the information laid against the appellant to be tried jointly with that laid against the Walkers acted in contravention of s. 22 (1) of the Criminal Justice (Administration) Law, Cap. 83 [J.] and that consequently the trial was a nullity. For the Crown it was submitted that the learned resident magistrate was empowered under para. (c) of s. 22 (1) of that law to try the informations together as the word "different" in that paragraph meant either separate offences of the same nature or offences of the same type and the three parties tried were committing three independent offences unconnected with each other and so were committing different offences. It was also contended on behalf of the Crown that the witnesses involved and the facts of those three offences were so closely connected that the learned resident magistrate was empowered by para. (c) of s. 22 (1) of Cap. 83 [J.] to embark on a joint trial.

Held: (i) the provisions of para. (c) of s. 22 (1) of the Criminal Justice (Administration) Law, Cap. 83 [J.], are inapplicable to the facts of this case. The words "different offences" in that paragraph are used in contra-distinction to the words "similar offences" used in para. (a) of that subsection and read in this light the offences charged were not different offences but were all similar and would therefore fall under para. (a) if they were committed in the course of the same transaction;

(ii) the word "transaction" means "the carrying on or completion of an action or course of action". On the facts of the case it is clear that the several possessions of ganja by the several parties were separate and there is no evidence that the possession of one party was even known to the other. In

the circumstances it cannot be said that the offences were committed in the course of the same transaction;

(iii) the information against the appellant should have been tried separately and the joint trial was therefore a nullity.

Appeal allowed. New trial ordered.

Case referred to:

(1) *R.* v. *Brandon* (1964), 6 W.I.R. 346.

Appeal from conviction by the resident magistrate for the parish of St. Ann.

H. G. Edwards, Q.C., for the appellant.
K. Atterbury for the Crown.

ECCLESTON, J.A., delivered the judgment of the court: The appellant was convicted by the learned resident magistrate for the parish of St. Ann on June 13, 1969, for the offence of possession of ganja, contrary to s. 7 (c) of the Dangerous Drugs Law, Cap. 90. The prosecution of the appellant arose as a result of a search carried out by the police at the premises of Herbert Walker at Drumilly, St. Ann on December 4, 1968.

Corporal Anderson, having obtained a search warrant under the Dangerous Drugs Law, accompanied by other police officers went to these premises at 4.30 a.m. and after reading the search warrant effected a search in a room of the house occupied by Herbert Walker and his wife Isolyn Walker. Ganja was found in this room and both the Walkers were arrested for being in possession of ganja.

In another room of the same house the appellant was seen sitting on a suit case. He was searched by constable Lovell who found ganja seeds knotted in a handkerchief in the left side pocket of his trousers, and a white paper bag containing vegetable matter in the left hip pocket of his said trousers. He was arrested by constable Lovell. The contents from both pockets of the appellants were sealed in separate envelopes and taken to the government analyst whose certificate stated that the white paper bag contained tobacco and ganja. The amount of ganja was about ½ ounce in weight. The handkerchief contained seeds and other vegetable matter. The resin constituent characteristic of the pistillate plant *cannabis sativa* was detected in the contents of the handkerchief—ganja.

Both Herbert and Isolyn Walker were charged on one information and the appellant was charged on a separate information.

At the commencement of the trial all three accused were arraigned and each pleaded not guilty. The record disclosed that the clerk of courts stated that both cases arose out of one set of circumstances. There is nothing on the record to show that any objection was taken to the cases being tried together or that separate trials were requested. Thereafter, the trial of both charges continued against the three defendants with Mr. Manning appearing on behalf of all three accused persons.

Corporal Anderson and acting corporal Eccles gave evidence which was confined to the finding of the ganja in the room occupied by Herbert and Isolyn Walker.

The trial was then adjourned to June 13, 1969. The record discloses the following:

"On 13/6/69. Crown offers no further evidence on information No. 3773/68 against the Walkers."

The trial of the appellant was then continued and Constables Lovell and McFarlane gave evidence of the search of the appellant and what was found in his pockets.

The appellant gave evidence on oath and was cross examined.

Only one ground of appeal has been taken on behalf of appellant and that is that the learned resident magistrate erred in allowing the information against the appellant to be tried jointly with the information charging Herbert and Isolyn Walker. It was the submission of counsel that the provisions of s. 22 (1) of the Criminal Justice (Administration) Law, Cap. 83 had been contravened and that consequently the trial was a nullity. The subsection reads:

"22. (1) Where, in relation to offences triable summarily—

(a) persons are accused of similar offences committed in the course of the same transaction; or

(b) persons are accused of an offence and persons are accused of aiding and abetting the commission of such offence, or of an attempt to commit such offence; or

(c) persons are accused of different offences committed in the course of the same transaction, or arising out of the same, or closely connected, facts,

they may be tried at the same time unless the Court is of the opinion that they, or any one of them, are likely to be prejudiced or embarrassed in their, or his defence by reason of such joint trial."

It is the submission of counsel for the appellant that in order to come within the provisions of para. (a) of s. 22 (1) not only must the offences be similar, but they must be committed in the course of the same transaction, and so the test is: was the offence of being in possession of ganja committed by the appellant in the course of the same transaction as the offence of being in possession of ganja committed by the Walkers? The same transaction would not mean that if the police searched several people one after the other and found ganja on them that their possession would be in the course of the same transaction, because in that case, the transaction would be related to the offender and not to the offence. It would rather be where several persons set out and commit an offence together or where persons are acting in a common design or, are together and commit an offence for their mutual benefit and in furtherance of one transaction.

He further submitted that para. (b) of the subsection did not apply, and as regards para. (c) it is his submission that that paragraph does not apply because these are not different, but similar offences, and in any event they were not committed in the course of the same transaction nor did they arise out of the same or closely connected facts."

It is the submission of counsel for the appellant that whether or not the appellant had ganja in his possession would depend on his own mental condition and physical possession and that would not be in any way connected with the fact of any one else having ganja in their possession.

It was the submission of counsel for the Crown that the learned resident magistrate was empowered to try the cases together under para. (c).

He submitted that the word "different" in this paragraph meant:

(1) separate offences of the same nature; or

(2) offences of the same type.

He submitted that the three parties tried were committing three independent offences unconnected with each other and so were committing different offences. Further, the witnesses involved and the facts of those three offences were so closely connected that the learned resident magistrate was empowered by the subsection to embark on one trial. He submitted that if the court should find that there was a defect in the procedure at the trial resort should be had to s. 302 of the Judicature (Resident Magistrates) Law, Cap. 179 which gives the Court of Appeal power to amend defects and errors.

The court is of the view that para. (c) does not apply. We think that the words "different offences" are used in this paragraph in contra-distinction to the words "similar offences" used in para. (a). Read in this light, then clearly the offences were not different offences, but were all similar, *i.e.* unlawful possession of ganja, and would therefore fall under para. (a) if they were committed in the course of the same transaction.

If the learned resident magistrate was wrong in trying these cases together, then the trial would be a nullity, and there would be nothing to amend under s. 302 of Cap. 179.

In the case of *R.* v. *Brandon* (1), the provisions of s. 22 (2) (a) of Cap. 83 arose for decision and it is interesting to note that HENRIQUES, J.A., as he then was, in giving the judgment of the court had this to say ((1964), 6 W.I.R. at p. 349):

"Neither the industry of counsel nor the researches of the court in the available time at its disposal had been able to discover any criminal case in which the word 'transaction' had been judicially considered or defined. In this regard however reference may be had to volume 10, part 1 of the NEW ENGLISH DICTIONARY, where, among other definitions, there is the following: 'the carrying on or completion of an action or course of action'."

Counsel in the instant case states he is in no better position than was counsel in that case and he has not been able to throw any further light on the meaning of this word.

The appellant was sleeping in a separate room from the other two parties when the police awakened them and there is no evidence that they had any connection or interchange of relationship or association with one another before or during the events of the early morning of December 4, 1968. In applying the definition of "transaction" mentioned above to the facts of the instant case, it is clear that the several possessions of ganja by the several parties were separate and there is no evidence that the possession of one party was even known to the other. In the circumstances, we cannot say these offences were committed in the course of the same transaction.

We are of the view that the cases should have been tried separately and the joint trial was therefore a nullity.

The appeal is accordingly allowed, the conviction quashed and a new trial ordered before another resident magistrate.

Appeal allowed. New trial ordered.

R. *v.* BARIFFE (NO. 2)

[COURT OF APPEAL (Waddington and Luckhoo, JJ.A., and Hercules, J.A.(Ag.)), October 6, 7, November 12, 14, December 19, 1969]

Criminal Law—Evidence—Admissibility, at trial on indictment for assault with intent to rob, of deposition of Crown witness taken at preliminary inquiry —Crown witness absent from island at time of trial—Acquittal on indictment for robbery with aggravation charged at first trial—Identity in issue—Defence of alibi—Discretion of trial judge to admit deposition of Crown witness absent from the island at time of trial—Whether discretion properly exercised in admitting deposition—Justices of the Peace Jurisdiction Law, Cap. 188 [*J.*], *s.* 34.