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JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL NO. 3/96

**BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (Ag.)**

**REGINA
v.
ANDREW CHIN
JEANETTE MOYSTON
DENNIS GRANT**

Ian Ramsay and Deborah Martin for Andrew Chin

Norma Linton and Fara Brown for Jeanette Moyston

**Howard Hamilton, Q.C., Glen Cruickshank and
Norman Manley for Dennis Grant**

Audrey Clarke and Paulette Tyndale for the Crown

June 24, 25, 26, 27 and July 18, 1996

DOWNER, J.A.:

The principal issue which is raised in this appeal may be stated in the following terms:

Where the crown's evidence tends to support the alibi evidence of the principal appellant as regards possession of ganja in contravention of section 7(c)

of the Dangerous Drugs Act, is it open to this court to affirm the conviction in view of the law on identification and section 304 of the Judicature (Resident Magistrates) Act?

Let it be stated at the outset that the answer must be in the negative.

The facts necessary to decide this aspect can be set out shortly by citing the relevant passages of the Resident Magistrate's notes of evidence. It was a recognition case and this is how the only witness as to identification, Inspector Victor Hamilton, put it:

"On Monday the 23/11/92 at about 5:00 p.m. we anchored about 10 miles off the coast of Ocho Rios. At about 5:45 p.m. two (sic) I saw a fishing boat travelling towards our vessel. There were two men aboard the fishing boat. This fishing boat pulled alongside our vessel by then I was below the deck but in a position where I did see the men in the fishing boat.

There were two persons in the fishing boat. I recognized one of the men as being Andy Chin - I know him before that day I know him for about three years before prior to now 1992. In that three years I would see him an average of about 3 - 4 - 5 times per year.

I able to recognize him. There was a light by arrangement that shone towards the fishing boat - This is what you would call white light - a bulb attached to vessel."

Under cross-examination Hamilton said:

"Mr. Chin had one foot on our boat."

Inspector Hamilton does not tell us of the conditions when he met the appellant Chin other than that he saw him previously. On the scene of the crime, however,

he had a good opportunity for seeing him as he recalled that he saw him unloading 74 packages which was later found to be ganja. This unloading of ganja took approximately 25 to 30 minutes. After Chin completed his task, Inspector Hamilton said:

"I packed the packages in an area in our vessel where they were under my control and were always in my view. We immediately set sail for Guantanamo Bay, Cuba."

It is pertinent to ask why Chin was not arrested then as he was caught in the act. Further, why was the "feeder boat" not seized and detained pursuant to section 24 of the Dangerous Drugs Act (the Act). That was the salutary course taken in *Bernard Pianka & others v. R.* [1977] 15 J.L.R. 175. As regards time, he saw Chin at 5:45 p.m. and he left in the "mother boat", as it was called in evidence, at about 6:15 p.m. For the conviction to be affirmed on the possession of ganja, which is the initial charge, the identification evidence must have made Her Honour Mrs. Sarah James, the Resident Magistrate, feel sure.

However, before returning a judgment of guilty, the learned Resident Magistrate must examine the evidence surrounding the identification and take into account submissions made at the end of the Crown's case. As regards the surrounding circumstances, the crucial evidence comes from Freddie Castro, an undercover guard for the Drug Enforcement Administration Agency of the United States of America (The D.E.A.). He was one of a party who deliberately set out to entrap the appellant Chin to export ganja to the United States. Generally, the

issue of credibility was for the court below. The quality of his evidence, as it tended to support Chin's alibi, must, however, be analysed in this court.

It is important to note that there were at least three other men on the "mother boat" with Inspector Hamilton. There was Constable Peart of the Narcotics Squad and Hamilton tells us of two white men. As for the details of the "mother boat", it was about 40-60 feet in length and was a luxury boat. Hamilton told the court he saw Chin from a concealed position below deck and that Chin had one foot on the "mother boat". Also, he reported, the deck of the "mother boat" was higher than the canoe.

The initial meeting between Chin and Castro took place on 11th November, 1992, and Castro explained the size of his boat and how he required the ganja to be packaged. Chin would supply the ganja. It was to be bags weighing 30 pounds and to be fluffy rather than compact.

Times are important in this case, and Castro arranged with Chin and the captain of the fishing boat which would be used to convey the ganja. At this meeting, apart from Chin and the captain of the fishing boat, there was Renee Gallan, a partner of Castro in the venture to entrap Chin. Be it noted that he was a confidential informer for the D.E.A. He told the court that he gave Moyston money in Miami to seal the deal. Surprisingly, he did not even count the money he gave her nor could he recall the time. The reckoning he could do was that it was three weeks after September or October after his visit to Jamaica. Moyston lived with Chin as man and wife and is the second appellant in this case. The

third is Enos Grant, also known as Dennis Grant, who runs a taxi and has been frequently employed by Chin who is a man of business. Chin's business operations are based in Ocho Rios.

It is now necessary to return to Castro's narrative so as to record his evidence. This evidence must be contrasted with that of Inspector Hamilton for if doubt is cast on Hamilton's evidence, that ought to have been an issue in a submission of no case to answer. So what did Castro say in relation to Chin's movement, bearing in mind Hamilton had Chin unloading ganja to the "mother boat" with ganja between 5:45 and 6:15 p.m. on November 23, 1992.

Here is the crucial evidence:

"He gave me a VHF hand held radio to contact vessel for example. VHF a signal name in radio.

I given a pair of binoculars - He gave me these things.

He was using his cellular phone back and forth. He not saying anything."

The circumstances were that Castro was given binoculars and the inference must be that it was to view what was happening with the "mother boat", if he needed to, and a radio to contact the boat. Moreover, he told the court that he did make contact with the "mother boat". Then he continued thus:

"He left the house about 6:00 p.m.

After Chin left the house I stayed with Gallan and Chin's wife contacted the DEA boat that was coming in to pick up the stuff by radio.

I use the radio that Mr. Chin gave me to contact the boat.

"We stayed there about 7:30 - 8:00 p.m. Mr. Chin came back to the home with 3 or 4 more individuals I not remember their name.

He said 'Your boat is being loaded at this moment or should be loaded by now.' Chin received a call through his cellular. I present I not hear conversation. After he received call he said to me 'Your boat is already loaded'."

Since a specific trap was set for Chin, the accomplice evidence ought to have been cogent as it is only after cogent evidence that a judgment of guilty ought to be returned. The evidence was that the feeding of the "mother boat" with ganja took place ten miles out at sea. So for Hamilton's evidence to be accepted as it was, then the times attested by him and Castro ought to coincide. Yet if Chin left his house at 6:00 p.m. it would be difficult for him to be on the "feeder boat" at about 5:45 p.m. Further, Hamilton states that the "mother boat" left for Cuba at about 6:15. If this is accurate, how could Chin be reporting to Castro that the "mother boat" was being loaded between 7:30 to 8:00 p.m. Yet this is what Castro said Chin told him and it is part of the Crown's case. Could it be that those who set the trap were determined to tell the court that they themselves were trapped? This aspect of the evidence must again be analysed as it forms part of dealing in ganja, and exporting ganja contrary to sections 7(B)(a) and 7A(1) of the Dangerous Drugs Act. (The Act)

There are two aspects to consider. The discrepancy as to the time and the evidential nature of Castro's evidence as to what Chin told him. Miss Clarke for the Crown, in her able analysis, contended that the time difference was not

serious. If the unloading was completed by 6:15 p.m. then Chin had between 6:15 p.m. and 8:00 p.m. to return to his house.

Now, as to evidential value of the conversation between Castro and Chin, as reported by Chin, Miss Clarke stated that the Crown was not relying on the truth of Chin's statements to Castro but only on the fact that they were said. But can this evidence be discounted that easily? If Chin's alibi is made part of the Crown's case, and there is a conflict, it ought to have been resolved so that the Resident Magistrate could feel sure about Hamilton's identification evidence.

There is a further aspect of the conversation between Chin and Castro, as related by Castro, which must be recorded. It went thus:

"We opened Champagne - we ordered Kentucky Fried Chicken. We drank Champagne ate Kentucky Fried Chicken.

I gathered my boat loaded.

We were having a party drinking Champagne.

I next to Mr. Chin. He received a call on a cellular phone. He answered call like this 'Yes Mr. Miller.' They spoke very fast I not understand what he said.

After he finished call - Chin come to me and said 'I have being told your boat is a DEA boat. I said no. You're crazy. He said I am going to have another call that is coming to me to verify if you are or if you are not a DEA agent.

I had cellular phone. I called my answering machine in Miami I left it on so conversation taking place could be recorded. When I did that he approached me and said if you are a DEA I am going to kill you."

At the end of the Crown's case, there were these factors to take into account if reliance was to be placed on Inspector Hamilton's evidence as to identification.

Despite the elaborate preparations to trap Chin, the police took the opinion of the Director of Public Prosecutions and Chin was arrested on 29th June, 1993, some seven months after he was in Inspector Hamilton's grasp.

Then, Renee Gallan, another accomplice, told the court:

"I looked from the porch out to sea using binoculars.

When I say I didn't see Villa I mean I didn't see it from Chin's house.

When I say I saw smuggling operation I could see the mother ship. I can't see the small boat.

I saw no small boat during this smuggling operation. ... I saw nothing being loaded from the small boat onto the mother ship. The mother ship is Freddie's boat.

It is called the mother ship - A big boat that carries drugs from one place to another. ...

On the porch with me were Freddie Castro, Janet Moyston, Garth - and Andy Chin joined us later. ...

Andy not join in the watching operation. He was working. ... I started watching about 6:00 p.m."

Then the cross-examination continued thus:

"He joined me about 10:30 - 11 p.m. on the porch."

Be it noted that Castro gives Chin's return some two hours earlier, another surprising discrepancy. Surprising because, as was noted previously, Chin confirms he was with Gallan at Chin's house.

These were the factors surrounding Chin's identification which the learned Resident Magistrate ought to have examined.

Be it noted that the defence raised the issue of mistaken identity directly after completion of the Crown's case. Mr. Hamilton, who represented Chin below, was recorded as follows:

"(2) The identification of the accused Chin on the relevant date is both unsatisfactory and is contradicted by witnesses called for the Crown."

Then he raised the issue of the arrest thus:

"This is a case in which the 'authorities' choose not to make any arrest when the offences were alleged committed in this jurisdiction and when the accused Chin was seen in 'Flagrante delicto' committing an offence from which he could not possibly escape but now - some 8 mths later the accused is arrested and informed of these offences committed by him."

It was against that background that all three accused were called on to answer the possession and other charges preferred.

On appeal, the issue raised of mistaken identity was projected in a rather indirect way in the original grounds of appeal thus:

"(iv) The Learned Trial Judge, in giving her reasons for judgment, failed to take into proper consideration the violent conflict in evidence between the Crown witnesses, Freddie Castro and Detective Inspector Victor Hamilton, on the vital issue as to the whereabouts of the Appellant at the alleged time of possession."

In his supplementary grounds on the issue, Mr. Ramsay gave identification pride of place, though it played a secondary role in his argument. Here is how it was put in the supplementary ground:

“1. RE POSSESSION (Inf. 4181/93)

That in her Findings of Fact the Learned Resident Magistrate stated (See P. 6 last paragraph) ‘I find therefore on the evidence that Chin was in actual control and custody of ganja. He was seen loading the boat on 23/11/92.’ (His emphasis).

“Hence a conviction of Possession of Ganja in relation to Chin rested on the resolution of a material conflict between the Crown’s witnesses; that is, as between Castro and Inspector Hamilton: If Castro was correct as to when Chin left the house (about 6 p.m.), then he could hardly have been on a boat ten (10) miles out to sea at quarter to six p.m. (Inspector Hamilton’s evidence).

That the Learned Resident Magistrate failed to demonstrate in her Findings of Fact how she resolved this problem, and/or her reasons for preferring one Crown witness to the other where there was a discrepancy on a critical issue.

Wherefore it is submitted that the conviction should be quashed and the sentence set aside.

2. DEALING (Inf. 4182/93)

That it is submitted that the offence of Dealing in Ganja was correctly viewed by the Learned Resident Magistrate as a ‘deeming’ offence, which arose upon proof of the Appellant being ‘found in possession’: That accordingly if the conviction for Possession is bad in fact and law, as is submitted above, then the conviction and sentence for Dealing ought also to be quashed.”

As regards actual dealing, it ought to be emphasised that all the appellants were charged for contravening section 7B(a) of the Act which reads:

"7B. Every person who -

(a) cultivates, gathers, produces, sells, or otherwise deals in ganja;...

shall be guilty of an offence..."

Yet the basis of the Resident Magistrate's conviction for dealing is section 22(7) of the Act. That deeming section reads:

"(7) A person, other than a person lawfully authorized, found in possession of more than -

...

(e) eight ounces of ganja,

is deemed to have such drug for the purpose of selling or otherwise dealing therein, unless the contrary is proved by him."

Here is how she recorded her finding on this aspect:

"I find therefore on the evidence that Chin was in actual control and custody of ganja. He was seen loading the boat on the 23/11/92.

The amount was 3,417 pounds 14 ounces and by virtue of section (c) (sic) Amendment to section 22 of the Dangerous Drugs Act being found with over 8 ounces i.e. 1/2 pound he is deemed to be dealing in ganja."

See **Brian Bernal and Christopher Moore v. R** RMCA 30 & 31/95 at pages 90-140 delivered 6th January, 1966 where both appellants were charged and convicted pursuant to this deeming section. Also **Brian Bernal v. R** M.1/96 at

page 15. If the identification was faulty, then Chin was never in custody of ganja. In addition, he was never charged under the deeming section. Could a judgment of guilty, contrary to section 7B of the Act for actual dealing, be substituted by virtue of section 24(2) of the Judicature (Appellate Jurisdiction) Act? That section reads:

“ (2) Where an appellant has been convicted of an offence and the Resident Magistrate or jury could on the indictment have found him guilty of some other offence, and on the finding of the Resident Magistrate or jury it appears to the Court that the Resident Magistrate or jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the judgment passed or verdict found by the Resident Magistrate or jury a judgment or verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.” [Emphasis supplied]

Could Chin be guilty contrary to section 7(B) of the Act as charged for actual dealing? Assuming there was evidence of actual dealing, section 24(2) of The Act could have been brought into play. That section reads:

“**24(2)** Where any conveyance is seized pursuant to this section and -

(a) any person is convicted of an offence against this Act; and

(b) the Court is satisfied that -

(i) that person owns the conveyance used in the commission of the offence; or

(ii) that the owner of the conveyance permitted it to be so used; or

"(iii) that the circumstances are otherwise such that it is just so to do,

the Court shall, upon the application of the prosecution, order the forfeiture of the conveyance."

It is incredible that police officers did not intercept either the trucks or the feeder boat under this section. Then section 302 of the Judicature (Resident Magistrates) Act would be applicable to the judgment if substitution pursuant to Section 24(2) of the Judicature (Appellate Jurisdiction) Act ought to have been applied. Section 302 reads:

"302. It shall be lawful for the Court of Appeal to amend all defects and errors in any proceeding in a case tried by a Magistrate on indictment or information in virtue of a special statutory summary jurisdiction, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made as to the Court may seem fit."

Wherever Resident Magistrate is mentioned, in section 24(2) of the Judicature (Appellate Jurisdiction) Act supra it embraces the jurisdiction both on information and indictment. Wherever the phrase "jury on indictment" or "verdict" appears it refers to the Supreme Court while the word "judgment" refers to a conviction by a Resident Magistrate. Section 304 of the Judicature (Resident Magistrates) Act, must be read in conjunction with section 24(2) of the Judicature (Appellate Jurisdiction) Act. That section reads:

"304. No judgment, order, or conviction of a Magistrate shall be reversed or quashed on appeal for any error or mistake in the form or substance of

"such judgment, order, or conviction, unless the Court is of opinion that such error or mistake has caused, or may have caused, or may cause injustice to the party against whom such judgment, order, or conviction has been given or made."

Equally, section 293 of the said Act states:

"Criminal Appeals

293. An appeal from any judgment of a Magistrate in any case tried by him on indictment or an information in virtue of a special statutory summary jurisdiction, shall lie to the Court of Appeal."

Both these sections show the legislative consistency in the use of judgment when referring to convictions in the Resident Magistrate's Court. Such convictions embrace both judgments on information and judgment on indictments. These are in harmony with section 24(2) of the Judicature (Appellate Jurisdiction) Act.

The crucial fact, however, was that there was no evidence of Chin's actual dealing in ganja. There were conversations on the Crown's case about ganja but there is no evidence to prove that the movement of a truck which was noted, contained ganja. Here again, proof of the contents by scientific means, could have been obtained if the conveyance was intercepted. Why was it not done? Despite this glaring gap in the Crown's case, the learned Resident Magistrate made the following finding:

"Re: Trafficking I find that trucks and in particular a blue and white truck register number indicated Supra was seen to leave his premises with ganja by

witnesses whose evidence I accept and rely on so the offence of transporting is proven.”

Her previous finding was as follows:

“I find that on the 23/11/92 Detective Graham went to Ocho Rios and met with Special Agent Marc Lewski. Set up surveillance at Chin’s premises and saw white male that he had seen at Courtleigh Hotel and Chin.

I find and accept that he saw truck moving in and out of Chin’s place.

I accepted that he saw a white and blue truck licence 525 CC.”

These were unwarranted findings. There was no proof that ganja was contained in this truck.

So the conviction for dealing based on the deeming provision as recorded by the Resident Magistrate cannot stand because of the lack of reliable identification evidence. Also there can be no substitution as there was no evidence to connect Chin with dealing in ganja found on the “mother boat”. To reiterate, at its highest the Crown had Chin in conversations about ganja but there was no evidence of ganja related to those conversations. Also, once the identification goes then there could be no exporting by Chin or the other appellants.

The Defence

In approaching the appellant’s defence of alibi, quite apart from the necessary cautious approach with which the learned Resident Magistrate must examine the identification evidence of Inspector Hamilton, there is need for a

further cautious approach having regard to the fact that the Crown has admitted that there were elaborate preparations to trap the appellant Chin. So times are important and the failure to arrest on the spot or shortly thereafter are factors to be taken into account. After all, Chin had a place of business in Ocho Rios and his house in Columbus Heights does not seem to be unknown. Moreover, he was under surveillance by the D.E.A. and a police officer for some time before the trap was set. Additionally, there was Castro stating what Chin told him which has been recounted. This evidence of what Chin said to Castro and the other circumstances were capable of casting doubts on the accuracy of Inspector Hamilton's identification.

There was more: the defence called Henry Pottinger, a licenced coxswain who had competency to operate in Ocho Rios. His opinion was that, even with the most powerful engine, a fishing vessel could take 40 minutes to travel 10 miles. But Inspector Hamilton claimed to have recognised Chin at 5:45 p.m. and by 6:30 p.m. Chin had departed, on Hamilton's account. Bear in mind that Castro said Chin left his house at about 6:00 o'clock. Moreover, Pottinger gave the following evidence:

"A fishing canoe is going to anchor out there it cannot carry as much rope to anchor out there.

If canoe tied up out there under favourable condition. They would always be bobbing because of currents and swells that run alongside vessel, from waists up legs cannot be seen. Fishing vessel is lower."

Under these difficult conditions reliable identification would have been unlikely. In this regard, it is to be noted that while Renee Gallan saw the "mother boat" with binoculars, he did not see any fishing vessel.

It is now appropriate to examine the learned Resident Magistrate's findings on the identification of Chin in the fishing boat on 23rd November, 1992.

Here in full is the learned Resident Magistrate's finding on identification:

"Now with regard to the area of identification. This is in relation to accused Chin on the 23/11/92 loading package later found out containing ganja from one boat to another. This is the evidence of Detective Hamilton (Inspector). He said that he said he saw Chin whom he knew before. He recognized him. He said he knew Chin for three (3) years before. He sees him on an average of 3 - 4 - 5 times per year.

The last time he said he saw him prior to the 23/11/92 was the middle of August - September '92. He said there were lights on the boat and a particular light. He was about 5 yards from Accused Chin.

He said there was nothing between them to obstruct his view and he said he saw Chin throw large packages of ganja aboard the vessel he was in. He said he looked at front view of Chin for about 15 minutes.

Visual identification has joined the special categories of evidence where corroboration is desirable - I have warned myself in the fullest sense of the dangers of convicting, of acting upon the uncorroborated evidence of visual identification and bearing in mind and taking into consideration the surrounding circumstances, the opportunity, the light, the fact that Chin was known to Detective Hamilton before, he had seen him recently, I accept Detective Hamilton's evidence when he said he saw Chin loading the packages from one boat to another. I have warned myself and I am satisfied that I feel sure that it was the accused Chin whom I (sic) saw.

"I accept his evidence as to location of boat about 10 miles off coast of Ocho Rios.

I realized that there is a discrepancy between the prosecution's witnesses with regards to the time that Chin left the house and the time he arrived at the boat anchored off the coast of Ocho Rios. To my mind this does not affect the main area of proof."

The critical finding which must be examined is that despite the discrepancy, she found that it did not affect the main area of proof which was identification. Moreover, the manner in which she recorded her findings demonstrates that she failed to take into account the evidence of Henry Pottinger which could have made the identification evidence suspect as the conditions were difficult. She also ignored the evidence of Renee Gallan who failed to see a "feeder boat".

There was another area of her findings which showed that she did not realise the consequence of expressly finding that she relied on Castro's evidence.

Here is how she recorded her findings of that evidence:

"With regards to witness Castro I find that he is akin to an Agent Provocateur working along with Special Agent Marc. I do not find that he can be seen as an accomplice.

I find him as involving himself in the offence, merely a party to the offence for the purpose of getting evidence. It is not necessary that his evidence be corroborated.

However I have still warned myself of the dangers inherent in acting on this type of evidence and I

“accept Castro as a witness of truth, and I am prepared to rely on his evidence.”

How could the Resident Magistrate find this evidence reliable? Apart from the discrepancy between his evidence and that of Hamilton, as regards time, his report of what Chin said to him ought to have some bearing on the issue of identification. As this was a planned trap for Chin and Castro had the means to communicate with the “mother boat” while Chin had departed from his home, it was reasonable to expect some evidence from Castro to counter Chin's report on the boat. This is important as Hamilton had the “mother boat” leaving Jamaica for Cuba at 6:30 p.m., while Castro had Chin saying that the boat left after 8:00 p.m.

In our view, the evidence on identification was unsatisfactory without some supporting evidence in a situation where the D.E.A. and the police set out to trap Chin. Moreover, nowhere in her findings of fact did the learned Resident Magistrate hint that she considered the evidence of Joel Bremmur. He is a sergeant of police, marine division, Ocho Rios and is a qualified navigator. Be it noted that he was subpoenaed and secured permission from the Commissioner of Police to give evidence in this matter. He said:

“Ten miles off shore of Ocho Rios I would not expect vessel to anchor off the shore.

Ocean Liner - depth of water impossible for canoe and cruise ship.

It is impossible for a canoe to anchor...”

As to time canoe would take to do journey:

"Biggest engine a canoe is 78 HP that fitted unto a canoe without load - Calm water will do 20 miles - 1 hour 10 minutes or 1 hour. Half that distance - half that time.

Assuming canoe carrying two passengers and 3,000 pounds of weight.

Same favourable condition - go much slower. I would add rightly another 20 minutes either way."

Here again, if the Resident Magistrate relied on Castro for time, how could he reach the "mother boat" at 5:45 p.m., as Hamilton stated, when the "feeder boat" was loaded and had Chin and another man in that boat, according to Hamilton. To reiterate, Castro had Chin departing from his house at 6:00 p.m. In our view, the learned Resident Magistrate's finding that Chin was properly identified was unreasonable. To affirm the finding would be an injustice to Chin within the intendment of section 304 of the Judicature (Resident Magistrates) Act. To reiterate that section reads:

"No judgment, order, or conviction of a Magistrate shall be reversed or quashed on appeal for any error or mistake in the form or substance of such judgment, order, or conviction, unless the Court is of opinion that such error or mistake has caused, or may have caused, or may cause injustice to the party against whom such judgment, order, or conviction has been given or made."

The two principal charges against Chin were as follows:

"INFORMATION 4181/93

On Monday the 23rd day of November in the year 1992 one Andrew Chin, Jannett Moyston and Enos Grant of the said parish of Saint Ann with force made at Ocho Rios and within the jurisdiction of this Court

"unlawfully had in their possession ganja, contrary to Section 7 (c) of the Dangerous Drugs Act.

INFORMATION 4182/93

On Monday the 23rd day of November in the year 1992 one Andrew Chin, Jannett Moyston and Enos Grant of the said parish of Saint Ann with force made at Ocho Rios and within the jurisdiction of this Court unlawfully did deal in ganja Contrary to Section 7 (B)(a) of the Dangerous Drugs Act."

These are the foundation charges and if convictions on them are set aside then the other convictions must also be set aside. Equally, if the charges against Chin go, so must the charges against Moyston, regarded as Chin's wife, and Enos Grant who allegedly was retained by Chin to transport the D.E.A. undercover agents as the need arose. It was never in evidence how Grant or Moyston was connected with the ganja on the "feeder boat", if indeed there was a feeder boat.

It is perhaps useful to set out the other three informations to demonstrate that if the appeal against the informations for possession and dealing are to be allowed, then the appeal against the other informations must be allowed also.

Here are the other three informations:

"INFORMATION 4183/93

On Monday the 23rd day of November in the year 1992 one Andrew Chin, Jannett Moyston and Enos Grant of the said parish of Saint Ann with force made at Ocho Rios and within the jurisdiction of this Court did export ganja from the island of Jamaica Contrary to Section 7 (A) Sub-section 1 of the Dangerous Drugs Act.

"INFORMATION 2279/94"

On Monday the 23rd day of November in the year 1992 one Andrew Chin, Jannett Moyston and Enos Grant of the said parish of Saint Ann with force made at Ocho Rios and within the jurisdiction of this Court were persons who used a conveyance to wit a motor truck for the purpose of transporting ganja Contrary to Section 22 (1) (e) (sic) of the Dangerous Drugs Act."

The correct section ought to have been 7(B)(c) of the Dangerous Drugs Act.

"INFORMATION 4184/93"

On Monday the 23rd day of November in the year 1992 one Andrew Chin, Jannett Moyston and Enos Grant of the said parish of Saint Ann with force made at Ocho Rios and within the jurisdiction of this Court did unlawfully used a conveyance to wit a fishing boat for conveying ganja Contrary to Section 7 (B) (c) of the Dangerous Drugs Act."

As regards Moyston, Renee Gallan said he paid money to her in Miami, but he could not recall when or how much. Edwin Scheer said that he paid Moyston US\$30,000 and he did together with Renee Gallan. Again, Edwin Scheer said towards the end of October 1992 he and Renee Gallan gave Moyston \$75,000 to arrange a ganja shipment. The identification of Moyston was suspect. It was done by photograph. It is difficult to understand how Moyston can be guilty of procuring Chin if the conviction of Chin goes. She was alleged to be connected with the ganja on the "feeder boat", but the identity of Chin on the feeder boat is suspect so she must be acquitted. There was no evidence to link any of the accused with ganja being transported in trucks or

fishing boats. This must be so, as the contents of the truck were never examined and the existence of the feeder boat was doubtful.

It is true that Hamilton gives evidence about contraband on the "mother boat" which was later proved to be ganja. However, there was no evidence to prove that the motor truck which the Resident Magistrate found had ganja, indeed had any contents.

Bear in mind that Chin has denied all this episode related by the Crown. Further, there are Crown witnesses who deny the possibility of the loading account related by Hamilton. There is Crown evidence doubting the presence of the "feeder boat". On this basis, the information for export cannot stand. There is Crown evidence that a trap was being set for Chin. How could the Resident Magistrate find for the Crown on the basis of Castro's evidence that Chin's conversation implicated Chin as dealing in ganja? Or how could the movement of trucks from Chin's place of business be evidence of the conveying of ganja when the trucks were not intercepted. In our view, for the Resident Magistrate to so find when no evidence was adduced by the Crown as to the contents of the trucks amounts to a miscarriage of justice.

Conclusion

It is unusual for a case involving contravention of the Dangerous Drugs Act to be dependent on the quality of the identification evidence. Yet this was such a case. The unresolved conflict between two Crown witnesses as to the

time Chin left his house to alight on the alleged "feeder" was crucial to the Crown's case on possession and export.

Additionally, the powerful evidence for the defence coming from a police officer as to speed of the feeder boat, the time it would take to travel 10 miles out to sea in Ocho Rios loaded and how it 's speed would have been checked by the load even with the most powerful engine, casts doubt on the evidence of Inspector Hamilton who testified that he saw Chin on the "feeder boat". It is also surprising that a trap was set for Chin by experienced well-trained officers in the Narcotics Squad of the Constabulary Force and the Drug Enforcement Administration of the United States of America, yet vital evidence as recording time of identifying Chin at the moment when he was alleged to be unloading ganja or shortly thereafter was not secured. This was what was known as a "sting operation" to entrap Chin yet two confidential informers of the D.E.A. were, according to the Crown's evidence, entrapped by Chin and were virtual prisoners in his house on the very night when Chin ought to have been arrested had the operation been successful!

The evidence in this case does not satisfy the strict tests laid down by the Privy Council, and rightly enforced by this court, where identification evidence is the principal or sole feature to establish guilt. Consequently, the appeals are allowed, the convictions quashed and sentences are set aside.