JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL NO. 47/97

BEFORE: **THE HON. MR. JUSTICE FORTE, J.A.**
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

REGINA V.
JONATHAN OUTAR
RUPERT SENIOR

Ian Ramsay Q.C. and Deborah Martin for the Appellant Outar

Jacqueline Samuels-Brown for the Appellant Senior

Paula Llewellyn Deputy Director of Public Prosecutions and Carol Edwards Crown Counsel for the Crown

April 20 -24 June 22-25 and July 31, 1998

DOWNER, J.A.

The appellants Jonathan Outar and Rupert Senior were found guilty on informations which preferred charges of possession of ganja, taking steps preparatory to exporting ganja, and dealing in ganja. They were found not guilty of unlawfully using a conveyance for carrying ganja contrary to the relevant section of Part III of the Dangerous Drugs Act (the "Act"). Counsel for the appellants, Mr. Ramsay, Q.C. and Miss Deborah Martin for Outar and Mrs. Jacqueline Samuels-Brown for Senior challenged the correctness of the guilty verdicts imposed by His Honour Mr. Courtney Daye . Additionally they contended that it was inappropriate for the Resident

Magistrate to return verdicts of guilty in respect of the contravention of Section 7 A(2) as well as of Section 22(7)(e) of the Act in the circumstances of this case. They also challenged the constitutionality of Section 7A(2) and 22 (7) of the Act as being inconsistent with Section 20(5) of the Constitution which enshrines the presumption of innocence. It should be noted that Paul Brown the driver of the yellow Lada station wagon which was central to this case was found guilty on all informations and the vehicle was forfeited. He did not appeal.

Was the Resident Magistrate entitled to call on the appellants to answer at the close of the Crown's case?

Section 7C of the Act reads:

> "7C. Every person who has in his possession any ganja shall be guilty of an offence and -

After making provision for punishment in the Circuit Court the Section continues:

> (b) "on summary conviction before a Resident Magistrate, shall be liable -
>
> (i) to a fine not exceeding one hundred dollars for each ounce of ganja which the Resident Magistrate is satisfied is the subject-matter of the offence, so, however, that any such fine shall not exceed fifteen thousand dollars; or
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> (ii) to imprisonment for a term not exceeding three years; or
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> (iii) to both such fine and imprisonment."

The comparative leniency of the punishment for possession simpliciter should be noted in contrast to the much harsher penalty for more serious breaches.

Since the charges were joint and several the information correctly reads:

> "Jonathan Outar and Rupert Senior and others in the parish of Clarendon on the 31st day of March, 1995 unlawfully had ganja in their

possession contrary to Section 7C of the Dangerous Drugs Act."

Initially it is appropriate to ascertain the state of the evidence at the close of the Crown's case when a submission of no case to answer was made. The evidence reveals that a police party ambushed a yellow Lada station wagon on the 31st March 1995 on the Spring Plain road in Southern Clarendon. The leader of the party Detective Sgt. Winston Henderson hid in bushes where he espied Outar and Senior who both alighted from the station wagon and went to the trunk. Outar whom he knew before opened the trunk of the vehicle and Senior accompanied him. Furthermore Sgt. Henderson reported that an aircraft painted in red and white landed on the embankment which was freshly cleared for landing. Both Outar and Senior along with others walked towards the aircraft when Sgt. Henderson along with other police officers shouted "police". The police were armed. At that moment some of the miscreants ran but Outar and Senior with raised arms surrendered. The aircraft escaped. Those who ran were caught by other police officers. Miss Llewellyn contended that the six who ran ought to have been found guilty on the basis of the findings of fact by the Resident Magistrate. Had the learned Resident Magistrate taken into account Section 6 of the Justices of the Peace Jurisdiction Act, the status of those who ran as aiders and abettors would have been manifest.

Significantly, under caution Outar said more than once in the presence of Sgt. Henderson "Ah obeah dem obeah me'. The period of observation was ample, and the officer knew Outar before. Having regard to the statement by Outar which was in the nature of an admission, the identification was not an issue and was not challenged in the Court below. Both identifications were challenged in this Court, but these grounds of appeal had little merit.

When the trunk of the Lada station wagon was examined it was found to contain eleven plastic knitted bags. Within these bags were sixty small packages wrapped in masking tape. On further examination by the Analyst the contents were found to be ganja. There were also five plastic containers which on examination had hash oil.

The other aspect of the prosecution's evidence relevant at this stage was the quantity of ganja in the trunk of the Lada station wagon. It was stated thus in the Analyst's certificate:

> "Eleven sealed white knitted plastic bags numbered "1-10" and "12" respectively, each tied with synthetic cord and containing a total of sixty-nine (69) parcels taped with masking tape containing compressed vegetable matter resembling ganja.
>
> One sealed rectangular parcel, numbered "11", containing ten parcels taped with brown masking tape containing compressed vegetable matter resembling ganja.
>
> One sealed white knitted plastic bag, numbered "13" and tied with synthetic cord containing five one gallon white plastic jugs each containing a blackish-green viscous substance resembling hash oil."

The total weight of the ganja was stated to be 542 lbs. 4.9 ozs. As for hash oil the weight was recorded as 48 lbs. 7.9 ozs. and equivalent weight of ganja was recorded as 21,822 lbs. 3 ozs.

It was against this background that the Resident Magistrate made his ruling as follows:

> "RULING
>
> Re: Jonathan Outar - Prima facia case made out -
>
> i) Possession of ganja

ii) Dealing in ganja

iii) Trafficking ganja

iv) Taking steps preparatory to export ganja"

"Re: Rupert Senior - prima facie case made out

i) Possession of ganja

ii) Dealing in ganja

iii) Trafficking ganja

iv) Taking steps preparatory to export ganja"

Before ruling, the Resident Magistrate gave detailed reasons for not acceding to the no case submission. Responding to intimations from the Bench the following supplemental ground of appeal was filed.

Ruling on No Case Submission

> "10. That the Learned Resident Magistrate erred in concluding in his ruling on the no-case submissions that it was established that the Appellant was in possession of ganja the subject matter of the charge (See pages 58-62 of the notes of evidence):
>
> That accordingly the burden cast on the Appellant on a case to answer amounted to a Legal burden of disproving the crown's case.
>
> And that therefore the Appellant was denied the substance of a fair trial and his convictions should be quashed."

It is true that there were aspects of the reasons which merited criticism. The reasons were set out in some nine pages of transcript. Although there were nine accused this was far too long. As a general rule if reasons are to be advanced before the ruling they should be concise. Further it should be emphasised that in so far as findings are being made they are for determining whether a prima facie case was

made out. The Resident Magistrate recognised from the outset that he was making a legal ruling. Here are his words:

> "As a matter of law I hold myself guided and bound by the following authorities:
>
> RE: NO CASE SUBMISSION
>
> LORD PARKER'S PRACTICE DIRECTION [1962] 1 All. E.R.448 which provides that:
>
> > 'A submission that there is No Case to answer may be properly made and upheld: (a) When there has been no evidence to prove an essential element in the alleged offence: (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it'..... 'If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but whether evidence is such that a reasonable tribunal might convict'."

In this case having regard to the amount of ganja in the trunk of the station wagon, coupled with the fact that Outar came out of the car and opened the trunk there was sufficient evidence to infer that Outar was in physical control of the ganja. Further Senior also came out of the car and accompanied Outar to the trunk of the car. It therefore was to be inferred that he was in joint control with Outar of the ganja. As for knowledge, that was also to be inferred that both men knew that the packages contained ganja and hash oil. In Outar's case there was the further evidence that when apprehended he replied more than once that he was obeahed. From that statement it

was reasonable to infer that he was admitting that he was in breach of the law and would not have been caught if he not been obeahed.

Regarding the charge of taking steps preparatory to exporting ganja, the evidence at this stage was also cogent. There was the landing of the aircraft, and there was the fact that both accused were seen walking towards the aircraft before it escaped. Further evidence was the manner in which the ganja was packaged.

Section 7A(2) of The Act states:

> "(2) Where there is evidence -
>
> (a) that the ganja for which an accused person has been charged under this section is packaged in such a way as to make it reasonably suitable for exporting; or
>
> (b) that the ganja for which a person is charged was found to be in or at any prescribed port or place,
>
> that evidence shall be prima facie evidence of steps being taken preparatory to the exporting of the ganja by the person charged.
>
> (3) In this section the expressions "export" and "import" shall have the same meanings as in section 12."

In Part V of the Act, Section 12 reads:

> " 'export' with its grammatical variations and cognate expressions, in relation to the Island, means to take or cause to be taken out of the Island by land, air, or water, otherwise than in transit;"

In the context of this case it is also appropriate to make a further reference to Section 12 which reads:

> "
> 1- 'export authorization' means an authorization issued by a competent authority in a country

> from which a dangerous drug is exported, containing full particulars of such drug, and the quantity authorized to be exported, together with the names and addresses of the exporter and the person to whom it is to be sent, and stating the country to which, and the period within which it is to be exported;"

The evidence adduced by the Crown at this stage was sufficient to raise a prima facie case generally and specifically in terms of Section 7A (2) of the Act

For completeness the charge will be cited. It reads:

> On the 31st. March, 1995, in the parish of Clarendon, Jonathan Outar, Rupert Senior and others unlawfully did take steps preparatory to exporting ganja from the Island contrary to Section 7A(1) of The Dangerous Drugs Act."

In this context it is instructive to refer to punishment on summary conviction, to note the greater severity imposed than that for possession simpliciter. The minimal fine here is three hundred dollars for each ounce in contrast to the maximum of one hundred dollars for each ounce for possession simpliciter. It is enacted:

> "7A. -(1) Every person who imports or exports or takes any steps preparatory to exporting ganja shall be guilty of an offence and -
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> ...
>
> (b) on summary conviction before a Resident Magistrate, notwithstanding section 44 of the Interpretation Act, shall be liable -
>
> (i) to a fine which shall not be less than three hundred dollars, nor more than five hundred dollars, for each ounce of ganja which the Resident Magistrate is satisfied is the subject-matter of the offence, so, however, that any such fine shall not exceed five hundred thousand dollars; or
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> (ii) to imprisonment for a term not exceeding three years; or
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> (iii) to both such fine and imprisonment.

Having regard to the quantity of ganja it does not seem that the Resident Magistrate could impose a fine less than five hundred thousand dollars ($500,000.00) on the informations for taking steps preparatory to exporting and dealing which he did impose. These were the second and third informations. As regards a custodial sentence however there was a discretion.

In this context it is important to note the observation of the Privy Council in **Bernal and Moore** unreported Privy Council Appeal No. 56 delivered 28th April, 1997, which was anticipated in the Court of Appeal. The Board said:

> "The Resident Magistrate then passed the sentences to which their Lordships have already referred. Perhaps rather surprisingly the sentence of imprisonment was imposed on the first information rather than on the second or third informations which might well have been regarded as more serious offences. Their Lordships, however, are not concerned with that aspect of the matter."

This court will be concerned with those aspects of the case which were not dealt with in **Bernal and Moore** before their Lordships' Board.

The third charge was contravention of Section 7B and Section 22(7) of the Act. It is helpful to set out the charge.

> "Jonathan Outar, Rupert Senior and others on 31st March, 1995, in the parish of Clarendon did unlawfully deal in ganja contrary to Section 7B(a) and (Section 22(7)(e)) of The Dangerous Drugs Act"

The relevant section of the Act is Section 7B(a) & (e) which read:

> "7B. Every person who -
>
> (a) cultivates, gathers, produces, sells or otherwise deals in ganja; or
>
> ...
>
> shall be guilty of an offence and
>
> ...

> (e) on summary conviction before a Resident Magistrate, notwithstanding section 44 of the Interpretation Act, shall be liable -
>
> (i) to a fine which shall not be less than one hundred dollars, nor more than two hundred dollars, for each ounce of ganja which the Resident Magistrate is satisfied is the subject-matter of the offence, so however, that any such fine shall not exceed five hundred thousand dollars; or
>
> (ii) to imprisonment for a term not exceeding three years; or
>
> (iii) to both such fine and imprisonment"

Be it noted that the monetary fine for each ounce of ganja is less than that for acts preparatory to exporting but the maximum fine of five hundred thousand dollars is the same. Again it seems that the mandatory monetary fine was taken into account by the Resident Magistrate. The point to note is that dealing in this section [7 B(a)] does not necessarily involve possession. A buyer for instance may be a dealer without being in physical custody or control. Or one could be involved in unlawful exporting by preparing documents or raising funds to effect a purchase of ganja without being in possession. A middleman need not be in physical control of the ganja to deal with it.

The other relevant section is to be found in Part VI General. Section 22(7) (e) 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."

In this section a dealer must be found in possession of more than eight ounces (8 ozs.) The structure of the Act suggests that "found" means found by the Court. So that a deemed dealer must be guilty of possession simpliciter contrary to 7C of the Act. He is deemed to be a dealer unless he proves the contrary. The constitutional issue will be addressed later but at this stage the evidence certainly warranted an explanation from both accused on all the informations. It is also necessary to note that in **Bernal and Moore** they did not pursue all the grounds of appeal in the Privy Council which were argued in the Court of Appeal. The Privy Council said at page 7 of their unreported judgment:

> " 1. The Court of Appeal also considered, in relation to the charges of dealing in ganja and taking steps preparatory to the export of ganja, the statutory presumptions contained respectively in section 22(7)(e) of the Dangerous Drugs Act and in section 7A(2) of the Dangerous Drugs Act. In view, however, of the reduced number of issues which were argued before their Lordships' Board it is unnecessary to make further reference to these statutory presumptions."

It may be that the appellants' counsel in **Bernal and Moore** realised that they would be faced with the following statement of principle by Lord Diplock in **Ong Ah Chuan v Public Prosecutor** [1980] 3 W.L.R. 855 at 863 and 866. In **Bernal and Moore** the charge was dealing. In **Ong** the charge was conveying. So the following passage is appropriate.

> "Whether the quantities involved be large or small, however, the inference is always rebuttable. The accused himself best knows why he was conveying the drugs from one place to another and, if he can satisfy the court, upon the balance of probabilities only, that they were destined for his own consupmtion he is entitled to be acquitted of the offence of trafficking under section 3."

Then the second passage reads:

> "In a crime of specific intent where the difference between it and some lesser offence is the particular purpose with which an act, in itself unlawful, was done, in their Lordships' view it borders on the fanciful to suggest that a law offends against some fundamental rule of natural justice because it provides that upon the prosecution's proving that certain acts consistent with that purpose and in themselves unlawful were done by the accused, the court shall infer that they were in fact done for that purpose unless there is evidence adduced which on the balance of probabilities suffices to displace the inference. The purpose with which he did an act is peculiarly within the knowledge of the accused. There is nothing unfair in requiring him to satisfy the court that he did the acts for some less heinous purpose if such be the fact. Presumptions of this kind are a common feature of modern legislation concerning the possession and use of things that present danger to society like addictive drugs, explosives, arms and ammunition." [Emphasis suppled.]

Were the verdicts of guilty properly returned in respect of

(i) Possession of ganja;

(ii) Taking steps preparatory to exporting ganja;

(iii) Dealing with ganja?

As to (i)

The principal cases on possession in this jurisdiction are **D.P.P. v Brooks**(1974) 12 J.L.R. 1374 and **Bernal and Moore.** In **Bernal and Moore,** (supra) Sir Brian Neill in delivering the opinion of the Privy Council after referring to **Brooks** said that:

> "The *actus reus* required to constitute an offence under section 7C of the Dangerous Drugs Act is that the dangerous drugs should be physically in the custody or under the control of the accused. The mens rea which is required is knowledge by the accused that that which he has in his custody or under his control is the dangerous drug. Proof

> of this knowledge will depend on the circumstances of the case and on the evidence and any inferences which can be drawn from the evidence. The court which has to determine the issue of knowledge will have to look at all the evidence and, always remembering the burden of proof which rests on the Crown, decide what inference or inferences should be drawn. There will be great variations in the circumstances of different cases. It will be for the tribunal of fact to investigate these circumstances to decide whether or not the accused had knowledge (a) that he had the sack (or as the case may be) and its contents in his possession or control, and (b) that the contents consisted of the prohibited substance."

Be it noted that in **Brooks** the respondent Brooks ran when confronted by uniformed police with a van loaded with ganja in the vicinity of Braco which at that time had a small airport. In **Bernal** and **Moore** the appellants were found to be in joint possession where intent was inferred from their conduct. In this case the appellants had physical control and they knew the parcels in the trunk of the Lada contained ganja so the intent to possess was not difficult to infer. The Resident Magistrate found that both appellants came out of the station wagon and Outar opened the trunk. The ganja was in the trunk. Further, Outar responded to the police presence by stating that he was obeahed. The defence was fanciful in both instances. Outar stated that he was on his way to his father when he fell among friends, when the police arrived. Outar's caution statement puts him on the spot. So the challenge as to the weakness of the identification evidence must fail. Moreover, although it was not explained as to how often Sgt. Henderson saw Outar before he was arrested it was never challenged that Sgt. Henderson knew Outar. This therefore was a recognition case. Senior also put himself in the vicinity. According to his unsworn statement he was in the bushes tending his cows. Both these versions were by way of unsworn statements.

The issue of identification was raised by both appellants and Outar's ground reads:

> "IDENTIFICATION
>
> 9. That in holding that the Appellant Outar was present in the yellow Lada motor car and in joint possession of the prohibited substances the Learned Resident Magistrate fell in error by failing to advert to the issue of visual Identification and/or recognition in this context and consequently failed to warn himself of the inherent dangers of such evidence in relation to this Appellant."

Senior raised his tale of the cows thus:

> "1. A serious issue of identification arose in respect of the Appellant upon the testimony of Sergeant Henderson, and on the Defence put forward by the Appellant: that the Learned Resident Magistrate completely failed to recognise that issue and to apply the principle of law governing this special category of evidence."

To answer the ground, recourse must be had to the manner in which the trial was conducted. In **Bernal** and **Moore** (supra), in the Privy Council Sir Brian Neill said at page 15.

> "Their Lordships would reject the criticism that the Resident Magistrate failed to pay due regard to the Judicature (Resident Magistrates) Act. Section 291 does not require a Resident Magistrate to set out every possibility in his findings of fact and then give his reasons for rejecting some possibilities and accepting others. His task is to find the facts and to provide an intelligible narrative to connect those facts together.
>
> Their Lordships are satisfied that on the evidence before the Resident Magistrate and in the light of the issues which were debated before him he cannot be criticised for not dealing specifically with the possibility of a switch before the cases ever reached the car. Accordingly for the foregoing reasons their Lordships would reject the appellant

> of the yellow lada car. I accept the evidence of Det. Henderson. He was another passenger in the yellow Lada motor car. From his conduct and the surrounding circumstances I hold he had joint control with the driver."

Because of the force with which Ms. Deborah Martin for Outar and Mrs. Jacqueline Samuels-Brown for Senior argued this ground, it is necessary to advert to the notes of evidence to ascertain if their strictures that the Resident Magistrate's findings were flawed were sound. Here is how the evidence from Det. Sgt. Henderson emerged:

> "Having spoken to Mr. Grant I arranged a group of Police personnel numbered 13. At about 1:30 p.m. that same day I come to the Spring Plain area of Clarendon in two vehicles with the same 13 men which include Det. Sgt. Worrel and Det. Cpl. Graham. I went to the same area I divide the police party into three groups. Det. Sgt. Worrell and a group went to the Southern end of the road. Det. Cpl. Graham and another group went to the Northern end. I stayed with a party in the area I had observed where the tree was freshly cut. I hid in the bushes.
>
> Before the other two groups departed to their position, I gave them certain instructions. I arrived at the area at 1:30 p.m. At about 1:45 p.m. we went to our respective position in the bushes. At about 2:30 p.m. whilst in the bushes I was hiding in the bushes about 40 yards from the main road. Whilst there at about 2.30 p.m. I observe a yellow Lada station wagon motor car Reg. 1104 as it arrived. It stopped in the immediate area where the trees were cut. The driver reversed the car on to the embankment with the back towards me. I saw three men come out of the car. One of whom I identified as Jonathan Outar who I knew before since 1972. Two other persons came out of the car. They were Paul Brown and Rupert Senior. I see Mr. Outar here in court. He is seated third from the end.(Witness point to 3rd accused). Mr. Rupert Senior is the next to Mr. Outar (witness point to 4th accused Rupert Senior). Mr. Paul Brown is the

> person in the red shirt to Mr. Senior (witness point to fifth accused Paul Brown in dock).
>
> After these three men came out of the yellow Lada motor car they stood right beside the car speaking to each other."

He continued thus:

> "When all these men were at the yellow Lada motor car I saw Mr. Outar open the trunk of the yellow Lada motor car. All the men went to the rear of the yellow Lada car and were observing the contents of the car in which I saw packages."

Here is how the confrontation took place:

> "As the aircraft stopped I called Det. Sgt. Worrel and Det. Cpl. Graham on my radio and gave them certain instructions. When the men went to the aircraft, I rushed towards the men and shouted 'Police' 'Police'. Mr. Outar, Mr. Senior and Mr. Brown stopped and surrendered. They put their hands in the air and stopped. Mr. Outar, Mr. Senior and Mr. Brown were walking at the back of the group of nine men. As I rushed from the bushes it was Mr. Outar, Mr. Senior and Mr. Brown who were the persons nearest to me."

Further Sgt. Henderson testified that:

> "WITNESS CONTINUED I told the three men I notice them arrive in the yellow Lada motor car and they came out and were speaking with the other six men and when the aircraft arrived they were walking towards it. I spoke to these men before the other six men were brought back. After six men were brought back I arrested all the nine men. I charge them for Possession of Ganja, Dealing in Ganja, Trafficking in Ganja, and Taking steps preparatory to exporting ganja."

Then he said:

> "I then arrested Jonathan Outar (Point to third accused in dock). I caution him. He said "Ah obeah dem obeah me.
>
> I then arrested Rupert Senior (witness point to fourth accused). I caution him after arrest. He did not say anything."

Under cross examination by the experienced counsel Mr Cruickshank for Outar, Sgt. Henderson responded thus:

> "When I rushed out of the bushes when the men were going to the aircraft Mr. Outar was about 20 yards from the aircraft. I could have said yesterday that aircraft stop and turned about 20 yards from where the men were. When I say about 20 yards it could have been more than 20 yards. My estimate of about 20 yards does not amount to 40 yards. I would say the aircraft stop about 30 yards to 40 yards from the men. Mr. Outar was between 30 yards to 40 yards from the aircraft. I was about from where I am in the witness box to the table (distance estimated to 6 yards) when he surrendered. I did not call out his name. He call to me. He said "Mr. Henderson." Then he said "Ah obeah dem obeah me." My statement does not have that spontaneous expression. Yes Mr. Outar did call to me. It is not correct Mr. Outar told me he was going to Milk River. Yes, I did caution Mr. Outar. I did not ask him what he was doing there. Yes I know Mr. Outar lives in Mandeville."

The cross examination of Det. Sgt. Henderson was continued by Mr. A. Hines for Senior and the tale of the cows commenced. Here was his response:

> "I saw cows there. Two boys were leading the cows."

Continuing the cross examination the response followed thus:

> "When the yellow Lada came up it stopped. I could see in trunk of the car. The second vehicle came, turn and stop and stop about one car length from the yellow car. Yes I hid myself away. Between myself and the road there was one plant. There were shrubs around. The members of the party were placed on the other side of the road. I was

> able to see who came from the yellow Lada. I could not see where these men came from the car. I don't agree I could not say who came from where because I was not paying attention because of the distance I was. I can't say who come out first, second or third from the yellow car."

The further response was:

> "No gunshots were fired that day by any members of my party. Men did not run into the bush and my party fire at the airplane. When the nine men were walking to the plane they were not walking in rows of three. They were almost in single file. The three men at the back surrendered. Danger could come from the plane. It could come from any where. I was of the view that the plane was landing illegally. It was not my intention to immobilise the plane by shooting at it. I have never experienced person in an aircraft firing to persons on the ground."

The identification was not challenged on the ground that Senior was not there. His case was that he was tending to his cows in the bushes. Here was the additional response of Detective Sergeant Henderson:

> "I did not physically hold anybody there that day. I did not see anybody physically hold Mr. Senior. I did not see Mr. Senior carried from the other side of the road where he was tending his cattle. I don't know of some of my men running to the bush on the other side where men were escaping and shots fired on that side. I don't know of my men asking Mr. Senior in the bush if him see men running there. I don't know of my men bringing back Mr. Senior out of the bush I don't know of my men complaining against me for not putting some men on the other side of the bush so that the men would not escape. Yes I saw Mr. Senior going towards a plane. Yes he stopped when I shouted 'Police'. I am speaking the truth."

In view of the manner in which the issue of identification was raised at the trial, coupled with the cogency of the evidence of Sgt. Henderson, the grounds of appeal on this aspect must fail.

Of the authorities cited **R v Searle and Others** [1971] Crim. L.R. 592 and **R v Strong & Berry** reported in the Times 26th January, 1989, the latter is helpful. In that case The Court of Appeal (Lord Lane, C.J. Mr. Justice Rose and Mr. Justice Pill) said:

> "What then did joint possession in these circumstances entail?
>
> It had to entail that, although no one of them had the packages or any of them on his person or in his pockets, yet each had the right to say what should be done with the cannabis - a right shared with his colleagues.
>
> As Lord Widgery, giving the judgment of the Court of Appeal, said in **R v Searle** (unreported, July 5, 1971): 'The sort of direction to which the deputy recorder should have opened the jury's mind was to ask them to consider whether these drugs formed a kind of common pool from which all had the right to draw'."

When this principle is applied to the facts of this case both appellants together with the driver Paul Brown had a right to say what was to be done with the ganja.

As to ii

Regarding 'taking steps preparatory to exporting' the Crown led evidence that the ganja was packaged in a manner suitable for export as ordained, pursuant to Section 7A(2) of the Act. There was the aircraft which landed on the embankment and there was the evidence of the appellants walking towards the aircraft. On these primary facts even without the statutory presumption a prima facie case was made out. The court could and did draw the inference that the ganja found in the trunk of the Lada station wagon was prepared for export by the appellants. **R.v. Hopeton Morgan** (1986) 21 J.L.R. 484 at page 488 contains a useful statement in that regard. It reads:

> "It is possible to conceive of situations in which such an inference could be drawn, for example if

> the packaged ganja had been found at an airstrip or airport. But it would not be helpful to multiply by example circumstances of this sort in which the inference could be drawn."

As Lord Parker's **Practice Direction** (supra) illustrates, it is the judges in controlling the procedures in their courts who have developed the law of evidence and they have been assisted from time to time in this regard by the intervention of Parliament. All that Parliament has done in this case is to define circumstances in which a prima facie case will arise. In this case the Crown did lead evidence to establish a prima facie case and thus conformed to the statutory presumption.

As to iii

Was it appropriate to return a verdict against the appellants in this case for dealing in ganja? They were found guilty of possession of ganja together with the statutory inchoate offence of taking steps preparatory to exporting ganja. If the full offence had been completed there would have been exporting of ganja contrary to Section 7A of the Act. Exporting, as selling ganja and taking steps preparatory to exporting, are specific forms of dealing expressly mentioned in the Act. It was appropriate for the Crown to charge this additional offence of dealing, but is it appropriate for the court to return a verdict on this offence also? The general and correct procedure in a court of first instance in circumstances where the charges are in the alternative was to have returned 'no verdict' on one information and the appropriate sentence on the other. Alternatively if the charges are not in the alternative as in this case the practice is to return a verdict of guilty on one information and a nominal sentence, and the appropriate custodial sentence on the other since the amount of the fine is mandatory.

The important point to note is that the same ganja for which guilty verdicts for 'possession' and 'taking steps preparatory' were returned was now being used to give rise to an additional verdict for "dealing". If the evidence was such that the ganja was found stored in a home or place of business the charge of "dealing" in addition to the charge of possession would have been appropriate. In such circumstances there would have been no additional charge for "taking steps."

The comparable charge in England to "dealing" is "possession with intent to supply" contrary to the Misuse of Drugs Act. This issue was adverted to by the Bench and the response of the appellants was to draft the following supplementary ground:

> **"MUTUALLY EXCLUSIVE CHARGES:**
>
> 11. That in the circumstances of the case the charges of Dealing In Ganja and Taking Steps Preparatory to Exporting Ganja were mutually exclusive: And that accordingly the convictions on both charges cannot stand."

Were it not for the constitutional issues raised concerning the validity of Section 22(7) of the Act it might have been appropriate to set aside the verdict on this information pursuant to Section 304 of the Judicature (Resident Magistrates) Act. That section reads:

> "304. No judgment, order, or conviction of a Magistrate shall be reversed or quashed on appeal for an 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."

It could have been argued that to return an order of guilty on the information for "dealing" and a custodial sentence coupled with a substantial fine was an injustice to both appellants.

In this case however, if the verdicts on this information were simply set aside then the issue which was fully argued as to whether Section 22(7) of the Act is in conformity with the Constitution would be avoided. This is an issue of exceptional public importance and was argued with great skill by Mr. Ramsay, Q.C. So this court could vary the custodial sentence and set aside the fine on this information pursuant to Section 305(2) of the Judicature (Resident Magistrates) Act which reads:

> "(2) The Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other less severe sentence warranted in law by the judgment in substitution therefor as it thinks ought to have been passed"

Were Sections 7A(2) and Section 22(7)(e) of the Act unconstitutional having regard to Section 20(5) of The Constitution?

Fundamental Rights and Freedoms have always held a special significance in common law jurisdictions. Magna Carta, The Petition of Rights, and the Bill of Rights are notable instances of legislative intervention in that regard. The Bill of Rights of the American Constitution is a notable example of entrenched rights. After World War II the move to protect fundamental rights and freedoms was the policy of the victors and found expression in the Universal Declaration of Human Rights and the Charter of the United Nations. The European Convention of Human Rights was another example and Chapter III in the Jamaican Constitution was modelled on that Convention.

In interpreting our constitutional provisions, decisions from other jurisdictions or international tribunals are to be treated with respect. Nonetheless special attention must be paid to the wording of our Constitution which recognises that the rights of the individual must be balanced against the rights of others and the public interest. Moreover, there is Parliament with legislative powers to govern for "peace order and

good government". Freedoms can only be protected in an ordered society. In the light of this, the Constitution is frequently invoked in criminal proceedings, because in such circumstances the citizens' rights have oftentimes need to be reconciled with the public interest. It is Parliament, by legislating in accordance with the principles enunciated in Chapter III; and the judiciary, in performing its constitutional role of developing the common law and interpreting statutes and the Constitution which together determine where the balance lies. Before embarking on an analysis of the relevant sections of the Constitution it is appropriate to emphasise that in this jurisdiction, Parliament has repealed the Unlawful Possession Act and the Vagrancy Act which offended the Chapter III provisions although they were saved by Section 26(8) of the Constitution.

In this context, Section 13 of the Constitution must set the stage. It reads:

> "13. Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -
>
> (a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
>
> (b) freedom of conscience, of expression and of peaceful assembly and association; and
> (c) respect for his private and family life,
>
> the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, subject to such limitations of that protection as are contained in those provisions being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the

> rights and freedoms of others or the public interest." [Emphasis supplied].

The framers of our Constitution in many instances expressly stated the limitations on fundamental rights and freedoms while in other jurisdictions the limitations are implied by the judiciary in the process of interpreting the Constitution.

Section 20 of the Constitution sets out the principles which legislation and the courts must follow to ensure a fair hearing in the administration of justice in the criminal law. Section 20(1) reads:

> "20. - (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

So at the outset, the concept of a "fair hearing" is recognised to be of cardinal importance in protecting fundamental rights during the course of criminal trials.

Turning to Section 20(5) the principles governing the law of evidence are stated. They are common law principles and they are capable of growth and development to meet new situations. In the seminal case of **R v Warner** [1969] 2 A.C. 256 Lord Wilberforce and Lord Pearce recognised that a "reverse onus" might be necessary in legislation dealing with dangerous drugs. As Miss Llewellyn for the Crown pointed out, this was adverted to in the Court of Appeal in **Bernal and Moore** unreported R.M.C.A. 30 & 31/95 in the main judgment delivered on 26th January, 1996 at p.90 and on the initial application for fresh evidence on Motion 1/96 at pages 14-15 in the reasons for judgment of the court and they did not challenge the constitutionality of this issue in the Privy Council.

It must be emphasised that constitutional provisions are stated in broad and ample terms to permit the legislature and the courts to respond to felt needs. Because the constitutional provisions express enduring principles, express amendments ought to be infrequent unless there is need to give expression to new principles. Hence the task of the Legislature and the Courts is to develop the principles expressed in the Constitution when new problems arise. The common law principle regarding the onus of proof in criminal trials in Section 20 (5) is expressed thus:

> " Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty:"

This wording was construed in **Attorney-General of The Gambia v Jobe** [1985] LRC 556 or [1984] A.C. 689. The headnote in the first report accurately summarises the issue thus:

> "(5) Section 8 (5) of the Act defined new offences which might be committed by the principal suspect or by any other person whose property has been seized and who failed to come forward to prove that the property was acquired lawfully, or who failed to satisfy the court that the property was acquired lawfully. This provision was ***ultra vires*** and void as a plain and flagrant infringement of the constitutional provision protecting the presumption of innocence."

Lord Diplock in analysing the relevant section of the Special Criminal Court Act said:

> "Section 8(5), however, stands on a different footing from the four earlier sub-sections. In the first place it does not deal with the pre-trial procedure in the prosecution of a person charged with an offence of dishonesty affecting public funds or public property. (In dealing with section 8(5) it is convenient to call such a person "the principal

> suspect".) In the second place, and more importantly, what it does is to create a separate and brand new criminal offence which can be committed not only by the principal suspect himself but also by any other person whose property has been seized by the police in purported exercise of the power conferred on them under sub-section (3). The offence so created attracts the same mandatory sentence of imprisonment, for a maximum of seven and a minimum of five years, as that imposed by section 11 of the Act upon the principal suspect if he is convicted of the offence of dishonesty affecting public funds or public property."

Lord Diplock continues thus:

> "The sub-section creates two offences, one under paragraph (a), the other under paragraph (b). Their Lordships will deal with the case of a person, other than the principal suspect, who has had property seized from him by the police. He commits an offence under paragraph (a) if he "fails to come forward to prove" that the property that has been seized was acquired lawfully. In the context of paragraph (b) this must mean if he fails to appear before the Special Criminal Court upon his own initiative; while if he does so, or if he is arrested and brought before the Court on a charge of having committed an offence under paragraph (a), paragraph (b) places upon him the onus of proving his innocence.
>
> In their Lordships' view this is a plain and flagrant infringement of section 20(2) (a) of the Constitution: viz -
>
> '20.(2) Every person who is charged with a criminal offence -
>
> (a) shall be presumed to be innocent until he is proved or has pleaded guilty'."

In declaring Section 8(5) unconstitutional Lord Diplock said:

> "While the wording of sub-section (5) is inapt to cover the case of a principal suspect who has already been brought before the court, since he

> can hardly be described as failing to "come forward", it would apply to a principal suspect whose tangible moveable property the police had managed to seize although they had not been able to find him inside the frontiers of The Gambia in order to arrest him. This would have the arbitrary and unjust consequence that by seizing the principal suspect's property but making no effort to arrest him the police could avoid the onus of proof which would otherwise lie upon them of proving that the principal suspect had been guilty of dishonesty which affected public property.
>
> Section 8(5) of the Act contravenes the Constitution; it is *ultra vires* and therefore void."

It should be noted that both pre-existing laws The unlawful Possession Act and The Vagrancy Act, which had flaws similar to Section 8(5) of the Gambian Act were repealed as they offended Chapter III provisions of our Constitution although they were saved by Section 26(8). The issue to be determined in the instant case however is whether as Mr. Ramsay has contended Section 7A(2) and 22(7)(e) of the Dangerous Drugs Act offend Section 20(5) of the Constitution.

There is a competing principle, which in the public interest must be given legislative expression or judicial recognition in order to punish those who contravene the law. The courts before the appointed day administered laws which made provisions for the person charged to prove particular facts. These were exceptional cases. Lord Woolf in **Attorney General of Hong Kong v Lee Kwong-Kut** [1993] 3 W.L.R. 329 at 347 gave the reasons why such exceptions are acknowledged in any civilised legal system. His Lordship said:

> "While the Hong Kong judiciary should be zealous in upholding individual rights under the Hong Kong Bill it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense and kept in proportion. If this is not done the

> Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public. In order to maintain the balance between the individual and society as a whole rigid and inflexible standards should not be imposed on the legislature's attempt to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crimes."

The proviso to Section 20(5) of the Constitution reads:

> "Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this subsection to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts."

It is an example of the foresight of those who framed the Constitution. The principle could have been developed by the courts as being a necessary implication if individual rights ought to be reconciled with the public interest, but it was made explicit in this proviso so as to put the matter beyond debate.

Against this background Section 7A(2) of the Act where Parliament sets out the nature of the evidence which gives rise to a prima facie case i.e. if ganja is packaged in such a way as to make it reasonably suitable for export, or found in or at a prescribed port or place is in harmony with Section 20(5) of the Constitution. The Crown must marshall the evidence stipulated and the person charged is then obliged to raise particular facts, an evidential burden which the court must take into consideration before deciding whether the burden of proof on the Crown, to make the tribunal sure of guilt is discharged.

To my mind the appellants have failed to establish that Section 7A(2) of the Act contravenes Section 20(5) of The Constitution. Consequently that ground of appeal which reads:

"TAKING STEPS PREPARATORY TO EXPORT

> 8. That the presumption under Section 7 A(2) of Taking Steps preparatory to the export of Ganja is constitutionally objectionable as a prima facie case of guilt is statutorily established upon the accused being charged under the Section in circumstances which require no nexus to the accused other than the charge itself: That accordingly the onus of proof is reversed and the presumption of innocence entrenched in S. 20(5) of the Constitution, violated",

has not been successful.

Mr. Ramsay, Q.C. presented a formidable challenge to the constitutionality of Section 22(7) of the Act which he contended reverses the presumption of innocence and required the appellants to prove that they were not dealers when they were found to be in possession of substantial quantities of the prohibited substance. He argued that the persons charged were obliged to rebut the presumption that they were dealers in ganja. It was a submission which required the most careful consideration.

It is necessary to set out Section 22(7)(e) of the Act again for ease of reference. It reads:

> "22(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."

The charge must be analysed with concepts of the criminal law. The Crown must prove possession of more than 8 ozs. before the deeming takes effect. If the person charged is lawfully authorised then it is easy for that person to produce his authority. If possession is proved then the person charged must answer this additional

charge of being a dealer. The principles which must govern the answering of a charge to ensure a fair hearing in conformity with Section 20(1) of the Constitution are set out in Section 20(6). They are as follows:

> "(6) Every person who is charged with a criminal offence -
>
> (a) shall be informed as soon as reasonably practicable, in a language which he understands, of the nature of the offence charged;
>
> (b) shall be given adequate time and facilities for the preparation of his defence;
>
> (c) shall be permitted to defend himself in person or by a legal representative of his own choice;
>
> (d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution."

If a burden of proving particular facts is imposed on the person charged it is important that he is entitled to be a witness or that he can address the court as is customary in this jurisdiction from the dock. So when the Crown has established possession of more than 8 ozs. of ganja, the burden of showing that the accused did not intend to sell or otherwise deal with it, is cast on the accused. The state of a man's mind, or intent it has been said can be proved as any other fact in issue. If the burden is placed on him to prove on a balance of probabilities that having been found with a large quantity of ganja he did not intend to sell or otherwise deal in ganja, a reverse onus is imposed on him and it is within the ambit of the proviso to Section 20(5) of the

Constitution. The purpose for which he intended to use the ganja for which he was found to be in possession was peculiarily within the knowledge of the accused.

The issue is whether the common law or the Legislature can in such cases in the public interest in accordance with the proviso, develop the law of evidence in this direction. This depends on the principle expounded in the words "to the extent that the law in question imposes upon any person charged the burden of proving particular facts".

Such a course was permissible both at common law and by statute prior to the appointed day in 1962. The presumption of recent possession as evidence of receiving stolen goods knowing them to be stolen in the Law of Larceny, Section 2 of the Prevention of Corruption Act 1916 U.K. as explained in **R v Carr -Briant** 29 Cr. App R 76, Section 42 of The Larceny Act pronounced on in **R v Ward 11** Cr. App R 245 are examples of this approach. A notable example is exaplained in **Public Prosecution v Yuvaraj** [1970] 2 W.L.R. 226 at 322 which deals with the presumption of corruption by a public servant. It reads:

> "Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disapprove any fact: it is sufficient for his acquittal if any of the facts which, if they existed, would constitute the offence with which he is charged, are 'not proved'. But exceptionally, as in the present case, an enactment creating an offence provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist 'unless the contrary is proved'. In such a case the consequence of finding that that particular fact is 'disproved' will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction. Where this is the consequence of a fact being 'disproved' there can be no grounds in public policy for requiring that exceptional degree of certainty as excludes all reasonable doubt that that fact does not exist. In their Lordships' opinion the general

> rule applies in such a case and it is sufficient if the court considers that upon the evidence before it, it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities." [Emphasis supplied].

The principles embodied in Section 20(6) of The Constitution make it manifest that the person charged is entitled to defend himself in person or by Counsel and that that evidence may be marshalled on his behalf. Section 22(7)(e) of the Act presumes that if a person charged is found by the Court with more than 8 ozs. of ganja he is a dealer. For to be in possession of such a quantity, raises the presumption either at common law or by statute that it was acquired by dealing and it will be disposed of by dealing. It must be emphasised that it was circumstantial evidence that could have been presumed by the common law. The burden of establishing particular facts to set aside the deeming position of being seller or dealer are peculiarly within the knowledge of the person charged and so within the ambit of the proviso of Section 20(5) of The Constitution.

Mr. Ramsay in his careful submission relied on The **Queen v Oakes** [1987] L.R.C. (Const) at 477 to demonstrate that Section 22(7)(e) of the Act was unconstitutional. It is noteworthy that the amount of prohibited drugs found on Oakes was 8 one gram vials of cannibas in the form of hash oil. The Canadian legislation makes no provision for a minimum amount, before the person found in possession can also be charged for trafficking. Again there is no specific proviso comparable to Section 20(5) of our Constitution in the Canadian Charter of Rights. For these reasons I do not think we should follow **Oakes** in this jurisdiction. In **Oakes** at page 495 the following passage appears:

> "In **Leary v United States** 395 US 6(1969) Justice Harlan articulated a more stringent test for invalidity at page 36:
>
> > '... a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend'."

In the **Hong Kong** case (supra) at page 340 Lord Woolf approved of this statement of principle. So there are instances in the United States where a reverse onus imposed by the legislative may be in conformity with the due process clause in the Constitution.

Equally an example cited from the European Commission of Human Rights shows how the Commission has read implications in the convention so as to limit the generality of the presumption of innocence to protect the public interest. At page 496 of **Oakes** the following passage appears:

> "Although the Commission has endorsed the general importance of the requirement that the prosecution prove the accused's guilt beyond a reasonable doubt, it has acknowledged the permissibility of certain exceptions to this principle. For example, the Commission upheld a statutory reverse onus provision in which a man living with or habitually in the company of a prostitute is presumed to be knowingly living on the earnings of prostitution unless he proves otherwise: **X against the United Kingdom,** Appl'n. No. 5124/71, Collection of Decisions, ECHR 135. The Commission noted the importance of examining the substance and effect of a statutory reverse onus. It concluded, however, at p. 135:
>
> 'The statutory presumption in the present case is restrictively worded . . . The presumption is neither irrebuttable nor unreasonable. To oblige the prosecution to obtain direct evidence of living on 'immoral earnings' would in most cases make its task impossible'."

It is clear that if the presumption in Section 22 (7) of the Act is rebuttable and the reverse onus reasonable having regard to the obligation of the Crown to prove possession of 8 or more ounces before the deeming provision can be relied on the principles applicable to an accused charged with living on the earnings of prostitution apply equally to a presumed dealer found with a large quantity of ganja. The incidence of drug trafficking is of international concern and reliance on the proviso to Section 20(5) was justified in the present case. If the accused had presented a credible story that they had prohibited substance for their own use then the Crown would have to be satisfied with a conviction of possession simpliciter.

The framers of our Constitution took into account the common law and statutory provisions relating to statutory presumptions before the appointed day and in Section 20(5) of the Constitution enshrined the presumption of innocence to ensure that the protection of law was afforded to the person charged in Jamaica during the course of a criminal trial. The framers also recognised that in exceptional cases it was incumbent on the person charged to raise the particular facts pertaining to his innocence and in some instances the burden may be placed on him to disprove a statutory presumption on a balance of probabilities. In **Attorney General of Hong Kong** case (supra) the legislative provisions imposing a reverse onus were found to be valid, despite the fact that there was no proviso as in the Jamaican Constitution. The opinion of The Board illustrates the importance of necessary implications in constitutional law to ensure the balance between fundamental freedoms and order in a well governed society. In this regard the statement of principle by Lord Diplock in **Hinds v The Queen** [1975] 13 J.L.R. 262 at page 268 is instructive:

> "The new constitutions, particularly in the case of unitary states, were evolutionary not revolutionary. They provided for continuity of government through

> successor institutions, legislative, executive and judicial, of which the members were to be selected in a different way, but each institution was to exercise powers which, although enlarged, remained of a similar character to those that had been exercised by the corresponding institution that it had replaced.
>
> Because of this a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a Legislature, an Executive and a Judicature."

Lord Woolf in the **Attorney General of Hong Kong** case also stated the necessity to recognise implied limitations in constitutional law to ensure reasonable decisions. These implications are necessary to ensure that the protection of law accorded to the person charged does not result in absurd decisions which would injure society. Here is how it was stated at page 339:

> "In his case the first-named of the second defendants draws attention to the fact that article 11 (1) is not subject to any express limitation. Reference is also made to the comments by the United Nations Human Rights Committee at its twenty-first session on article 14 of the International Covenant which include the statement that:
>
> > 'The burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond all reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore a duty for all public authorities to refrain from prejudging the outcome of a trial.'
>
> However, it should not be assumed from the statement that the comparable article in the International Covenant to article 14 (1) does not permit the degree of flexibility which is normally assumed to be implicit in any provision of general application which is of the same nature as article 11

> (1) of the Hong Kong Bill. Placing to one side for the moment the decisions in Canada all of the many decisions in different jurisdictions to which their Lordships were referred recognise that provisions similar to article 11 (1) are always subject to implied limitations so that contravention of the provisions does not automatically follow as a consequence of a burden on some issues being placed on a defendant at a criminal trial."

These principles are even more pertinent to Chapter III provisions of The Jamaican Constitution where the framers recognised the importance of setting out the limitations to the presumption of innocence in the proviso to Section 20(5).

Conclusion

The result as was announced at the conclusion of the hearing was that the convictions and sentences in respect of the informations charging possession of ganja and taking steps preparatory to exporting ganja were affirmed in respect of both appellants. However the conviction and sentence in respect of both appellants with regard to dealing in ganja was reserved. Further it was brought to the attention of the Court on July 10th by letter to the Registrar from Mr. Ramsay that:

> "As the matter was not then completed we did not make any observations on the question as to the time from which the sentences should run and/or to request that time spent in custody be taken into account. In Mr. Senior's case this amounted to a whole year before he was granted bail by the Court and in Mr. Outar's case it was some 6 months. This delay whilst the men were in custody was due to the failure of the Resident Magistrate's Court to get out the papers and transmit them to the Court of Appeal.
>
> Accordingly I would ask that you notify me when the Court intends to hand down the final part of the judgment so that Counsel may be present in order to bring the above circumstances to the Court's attention."

In the light of the above correspondence the Order of the Court is as follows: Convictions affirmed. Sentences in relation to possession of ganja and taking steps preparatory to export ganja affirmed. Sentences imposed as alternative if fines not paid to be consecutive to additional sentence imposed. Sentences in relation to offence of dealing in ganja varied, removing the sentence of 18 months imposed. Sentence to commence on the 25th June, 1998.

Outar to be credited with four (4) months he was in custody while awaiting hearing of appeal.

Senior to be credited with nine (9) months he was in custody while awaiting hearing of appeal.