

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL NO. 14/97

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

PAUL SMALLHORN
CHARLIE BROWN
LIVINGSTON WHYTE
VS.
THE QUEEN

Delroy Chuck and Christine Hudson for Smallhorn

F. M. G. Phipps, Q.C. and Kathryn Phipps for Brown

Glen Cruickshank for Whyte

Lloyd Hibbert, Q.C., Senior Deputy Director of Public Prosecutions,
for the Crown

April 28, 29 and July 31, 1998

BINGHAM, J.A.:

The appellants were tried and convicted in the Resident Magistrate's Court for the parish of Saint Mary held at Port Maria on 26th March, 1997, before His Honour H. R. Marsh, then Senior Resident Magistrate for the said parish, for:

1. Possession of ganja

2. Dealing in ganja

3. Exporting ganja.

They were sentenced as follows:

"Information 2902/95 -- for possession of ganja -- each fined \$50,000 or six months and in addition imprisonment for two years at hard labour.

Information 2903/95 -- for dealing in ganja -- each fined \$50,000 or six months and in addition imprisonment for two years at hard labour.

Information 2904/95 -- for exporting ganja -- each fined \$50,000 or six months and in addition imprisonment for two years at hard labour."

They subsequently appealed to this court against their convictions and sentences for these offences. After hearing the submissions of counsel, we dismissed the appeals and affirmed the convictions and sentences imposed in the matter. We promised then to reduce our reasons into writing at a later date. This we now do.

The facts

The charges were the result of what is now commonly known and described as a "sting operation" in which the Drug Enforcement Agency of the United States of America Government (the D.E.A.), acting in co-operation with a special undercover task force of the Narcotics Branch of the Jamaica Constabulary and performing the role of drug dealers, established contact with individuals trafficking in drugs. By this means, a consignment of

contraband drugs would be acquired for shipment on the pretext that it would be used in the drug market of the United States of America.

To this end, Thomas Edward Chennault, an American citizen who resided in Miami, Florida, someone with a history of involvement in drug trafficking, was singled out to act as an undercover agent and confidential informer. He is described by the learned resident magistrate in his findings of fact as "a self-confessed drug trafficker with a history of having been involved in a conspiracy to export ganja into the United States."

Given this background, the learned resident magistrate was well aware of the need for him to approach the evidence of Chennault with extreme caution in keeping with the guidelines laid down in *Davies v. D.P.P.* [1954] A.C. 378; [1954] 2 W.L.R. 343; [1954] 1 All E.R. 507; 38 Cr. App. R. 11; *R. v. Prater* [1960] 2 Q.B. 464; [1960] 2 W.L.R. 343; [1960] 1 All E.R. 298; 44 Cr. App. R. 83, and subsequent authorities - he being someone who was a witness with an interest to serve.

On his first visit to Jamaica in connection with this assignment, on 19th January, 1994, Chennault met with the Jamaican undercover police in Port Antonio among who was Detective Constable Levy, someone whose identity was, for all intents and purposes, unknown to the contact persons. Accompanying Chennault on this visit were Edward Donal, Peter Kelting, a Deputy Sheriff of Seminole County, Florida, and Steve Collins. At Port Antonio they checked into the Dragon Bay Hotel at San San. It was at this

location that the initial meeting with Detective Constable Levy took place. This meeting was followed by visits to Kingston where Chennault again met with Detective Constable Levy. Following this, Chennault returned to Florida on 21st January, but not before meeting one Pamela Barlow at the Courtleigh Hotel. As the evidence shows, she was an American who was an intimate friend of the appellant Livingston Whyte, a Corporal of Police, who later on was to provide a safe cover for the shipment of the ganja, and was the contact person for obtaining the ganja. She was cast in the role of the go-between for the supplier and the purchaser of the contraband.

On the next visit to Jamaica by Chennault in early March, 1994, Peter Kelting again accompanied him. He again met with Pamela Barlow. On this occasion the meeting was at the Jamaica Grande Hotel in Ocho Rios. Peter Kelting was present at this meeting. Following the meeting, Chennault and Kelting visited Oracabessa, St. Mary, in search of a suitable location to moor a boat to be used for conveying the shipment of ganja to the United States. It was Detective Constable Levy who drove them in an unmarked police vehicle to Oracabessa. There they met the appellant Charlie Brown, who owned a boat, "The Fishing Machine". He took Chennault and Kelting on a trip to survey the harbour.

Having satisfied themselves that a larger boat could be docked in the harbour, Chennault, Kelting and Levy then drove back to Ocho Rios to the Jamaica Grande. There they met and were introduced to the appellant

Whyte. It was Pamela Barlow who introduced them to him. He was referred to by her as "Mr. Biggers", the Police Captain. Before meeting Whyte, Chennault and Kelting had been introduced by Pamela Barlow to the appellant Smallhorn the previous day at a room at the Jamaica Grande in which he, Chennault, was staying. It was Smallhorn, along with Pamela Barlow and her mother, who had visited Chennault at his room. It was following this initial encounter that Chennault met the appellant Brown the following morning in Oracabessa and met Whyte later that day.

At the meeting with Smallhorn at the Jamaica Grande, Chennault was told by him that he had a load of ganja. Arrangements were then made for Chennault and party to inspect the ganja.

On 9th March, 1994, Detective Constable Levy drove an unmarked vehicle to Alexandria, St. Ann. He was accompanied on this journey by the appellant Smallhorn, Peter Kelting and Chennault. It was the appellant Smallhorn, who was seated in the front of the vehicle, who gave directions as to the route to take to get to a house by the side of the road in Alexandria. Arriving at the premises, they went into the house. Smallhorn led the way. Chennault saw several packages in a room. Some were cut open and vegetable matter resembling ganja was seen in them. Smallhorn gave the total weight as being twelve hundred pounds. As the amount required for the shipment was fifteen hundred pounds, Smallhorn undertook to obtain the additional three hundred pounds from another source. A sample of the

vegetable matter was taken from one of the packages by Chennault and handed to Detective Constable Levy. Following the inspection of the ganja, the party along with Smallhorn returned to Ocho Rios. Smallhorn was left at the Ocho Rios Shopping Centre in the town. There was a further meeting with the appellant Whyte later in the day. The following day Chennault left Jamaica for Florida, U.S.A.

On 13th March, 1994, Chennault, accompanied by one Dick Higgins and two crew members, left Florida on a boat for Oracabessa, Jamaica. They arrived here a week later. On arrival, they docked at a pier in Oracabessa. They were met by Detective Constable Levy. They anchored the boat at the same location that had been earmarked from the visit in early March. While in the harbour the appellant Brown and Peter Kelting visited them in a small boat. They brought them refreshments including jerk pork. They then left for shore.

Later that same night the appellant Brown and about five other men came up in Brown's boat to the boat in which Chennault and crew were in the Oracabessa harbour. They brought twenty-five bales of ganja, which was transferred to Chennault's boat. Also on board the boat were Detective Constable Levy and Detective Constable Robert Blake, undercover policemen from the Narcotics Division of the Jamaica Constabulary. Following the loading of the shipment of ganja, they pulled anchor and left Jamaica for Guantanamo Bay, Cuba. Before leaving Jamaica the boat made a

brief stop at the Ocho Rios pier where Detective Constable Levy alighted from the boat. Detective Constable Blake, however, went with the crew and the contraband cargo to the United States Military Base in Cuba where the ganja was offloaded and kept in storage before being transferred to the Drug Enforcement Agency (D.E.A.) warehouse in Florida.

In Florida on 28th June, 1994, Deputy Superintendent Arthur Martin, accompanied by Detective Constable Levy and the Government Analyst, Fitzmore Coates, visited the D.E.A. warehouse and spoke to the custodian, one John Wright. He opened two lockers from which 260 parcels were removed and opened. Samples were taken from each parcel by Mr. Coates and subsequently analysed by him at the Forensic Laboratory, Hope Gardens. The subsequent analysis of all the samples taken from the parcels revealed the substance in each case to be ganja.

Given these facts, it is believed they would have proven the charges to the requisite standard against all three appellants. The offences were committed from 20th March, 1994, that being the date when the ganja was delivered at Oracabessa harbour for shipment out of the country. The trial, however, did not commence until 14th November, 1995. This long period between the date of the offence and the commencement of the hearing led counsel appearing for the appellants to focus their complaints in the matter on the question of the quality of the visual identification of the appellants by Thomas Edward Chennault, Peter Kelting and Detective Constable Levy. It

will be necessary, therefore, to examine the evidence of these witnesses in so far as it relates to each of the appellants. Having done so, it will then be necessary to examine the findings of the learned resident magistrate in considering how he resolved this crucial question in coming to a verdict of guilty against all the appellants.

1. Chennault's Account
(a) Paul Smallhorn

The witness met Smallhorn on 9th March, 1994, when he was introduced to Smallhorn by Pamela Barlow at the Jamaica Grande Hotel in Ocho Rios. Barlow, apart from being an intimate friend of the appellant Livingston Whyte, was the contact person as between Chennault, the undercover agent Kelting and Smallhorn who was the Jamaican supplier of the contraband. On the evidence, it was Smallhorn who had a quantity of ganja ready for shipment abroad and who arranged for the visit to Alexandria, St. Ann, by Chennault, Kelting and Detective Constable Levy, to inspect the ganja. Chennault, although seeing Smallhorn for the first time at the Jamaica Grande, had more than ample opportunity to identify him from the meeting at the Jamaica Grande and on the journey in the vehicle to and from Alexandria that same day.

(b) Livingston Whyte

Chennault's account indicates that he would have had less opportunity to identify this appellant. This would be limited to seeing him

once before identifying him in court at the hearing. On this occasion the witness was introduced to Whyte by Pamela Barlow at the Jamaica Grande Hotel following an earlier meeting that day with the appellant Charlie Brown in Oracabessa. On this occasion, Chennault was in the company of Livingston Whyte, along with Pamela Barlow and her mother, by the pool bar on the beach at the hotel. They were together for approximately forty-five minutes to an hour. He was then introduced by Mrs. Barlow as "Mr. Biggers", the Police Captain in charge of the port at Oracabessa, and Whyte said that "he had control of the harbour as far as the Police were concerned. ...He would not see us when we come in. They would be looking the other way."

(c) Charlie Brown

The witnesses Chennault, Kelting and Detective Constable Levy first met Brown on 10th March, 1994, at the marina in Oracabessa, St. Mary. Detective Constable Levy who drove from Ocho Rios arrived there about 7:00 a.m. It was Brown who approached the vehicle in which they were and introduced himself. Chennault and Kelting went into a small boat along with Brown and another man. The purpose of that trip was to inspect the channel in the harbour to see if it was wide enough to accommodate the boat which Chennault intended to use to transport the shipment of ganja. The boat ride which took in an inspection of the harbour lasted for about thirty to forty-five minutes. Chennault and Kelting expressed their concerns to

Brown about the size of the boat they intended using being able to negotiate safely through the channel. It was agreed that it would be best for the boat to be anchored in the basin with its front facing the beach and the rear to the ocean away from the beach during loading. Following the boat trip Chennault, Kelting and Levy then drove back to the Jamaica Grande Hotel.

These same persons again saw the appellant Brown on 20th March, 1994, at the time the undercover boat anchored in the basin of the Oracabessa harbour and was being loaded with the ganja. On this occasion Chennault, Kelting and Levy were aboard the undercover boat. At about 9:00 p.m. the appellant Brown, in his boat "Fishing Machine", came alongside the undercover boat and delivered refreshments to Chennault and party. The boat then left for shore returning one hour later with the contraband shipment. Although it was night the witnesses were able to recognise Brown from the glow of the moonlight.

Although learned counsel for the appellant Brown submitted that the circumstances of the subsequent identification by the witnesses Chennault, Kelting and Levy amounted to a dock identification, this is untenable as there were several opportunities available to these witnesses to observe Brown in order to be able to point him out in court at the trial. Dock identifications, as such, are situations arising where the accused was not known to the identifying witness before the date of the offences which, in this case, was 20th March, 1994, when the ganja was taken by Brown in his

boat "The Fishing Machine" to the undercover boat. Before this, there had been the meeting of Chennault, Kelting and Levy with Brown at the marina in Oracabessa on 10th March, 1994, on which occasion the witnesses Chennault and Kelting were in his company on the boat "The Fishing Machine" for a period close to one hour in broad daylight. All the witnesses would have had ample opportunity to make out Brown so as to be able to recognise him on the day of the shipment of contraband.

Learned Queen's Counsel for Brown submitted that of the witnesses who testified three of them purported to have met Brown before. The identification of Brown at the time of the loading of the ganja from the boat "The Fishing Machine" to the undercover boat was made in difficult circumstances and was, therefore, unreliable. He submitted that the learned resident magistrate ought not to have called upon the appellant for his defence. He further submitted that the purported identification by Detective Constable Levy of Brown was made at night. Even though there was evidence of a "moonshine", there was no evidence as to the stage the moon had reached. Moreover, the appellant, although taken into custody by Detective Constable Levy, was not arrested until several months later. Counsel argued that if Levy had seen Brown why then did he wait so long before arresting him?

Learned counsel cited in support the following authorities:

1. *Kenneth Evans v. The Queen* [1991] 39 W.I.R. 290 at 292(F), 293(D-F)

2. *R. v. Bryan Davis* S.C.C.A. 93/96
(unreported) delivered on 12th May, 1997.

Learned counsel for Smallhorn, in adopting generally the submissions made by learned Queen's Counsel for Brown and while conceding that he could not take issue with the identification by the witnesses Chennault, Kelting and Levy of the appellant Smallhorn at Alexandria, he submitted nevertheless that the identification by Kelting and Chennault of Smallhorn on the night of the shipment of the contraband at Oracabessa was made in difficult circumstances.

Learned counsel for Whyte, while conceding that he could not find any plausible ground of complaint in relation to Whyte, submitted that, as Whyte was without legal representation at the hearing below, the learned resident magistrate was under a duty to render some assistance to him in putting forward his defence. This would include a duty on the resident magistrate to inform the appellant Whyte of the evidential effect of a failure on his part to challenge, by way of cross-examination, the testimony of the Crown witnesses in relation to material issues arising on the evidence in the case, e.g., the identification of the appellant, statements made by the appellant indicating the role played by him in the shipment of the ganja.

We were of the view that this contention by counsel, unrelated as it was to any ground of complaint canvassed on behalf of the appellant, was, in the circumstances, untenable. In any event, a perusal of the record of appeal

revealed that the appellant refused the request made to him to cross-examine the witnesses on the material issues arising in the case on the ground that he was not counsel, thus was not competent to undertake such a task. He also declined an offer made by the learned resident magistrate to assist him in formulating the questions to be put to the witnesses, as disclosed in the record, viz.:

"At this time, Accused indicates, having been given the opportunity to cross examine Witness, that he does not think he can cross-examine Witness as he is not prepared and not versed.

Accused Whyte having been offered the Court's assistance in helping him with Cross-examination refuses the assistance offered."

In light of these observations, the argument advanced by learned counsel is totally lacking in merit and was rejected.

Learned Queen's Counsel for the Crown, in responding to the points raised in argument, submitted that, although from the evidence adduced at the hearing below there was what may have appeared to be a dock identification of the appellants by the witnesses Chennault and Kelting, the learned resident magistrate in his findings of fact placed more reliance on the account given by Detective Constable Levy. It was Levy who was the driver of the unmarked police vehicle who chauffeured Chennault and Kelting on their visits to Ocho Rios, Oracabessa and Alexandria. The visit to Alexandria was for the purpose of inspecting the ganja weighing twelve hundred pounds. The visit to Ocho Rios at the Jamaica Grande Hotel was to

meetings arranged by Pamela Barlow involving Smallhorn and Whyte. Chennault and Kelting were also present at these meetings. Detective Constable Levy, although not involved in these meetings, was nevertheless present. Apart from this, Chennault and Kelting, accompanied by Levy, met the appellant Brown in Oracabessa on two occasions prior to the shipment of the ganja on 20th March, 1994.

The authorities relied on by learned Queen's Counsel for Brown were cases decided by the Board of the Privy Council (*Kenneth Evans*) and this court (*Bryan Davis*) on their own particular facts. Considered in that light, they clearly supported the proposition advanced by him.

In *Kenneth Evans* (supra), the identification evidence amounted to a fleeting glance by the sole eyewitness made in difficult circumstances which, given the guidelines laid down in *Turnbull* [1977] 1 Q.B. 224 and reviewed in *Junior Reid* [1990] 1 A.C. 363 and subsequent authorities by the Board, ought to have led the learned trial judge to direct the jury to enter a verdict of acquittal at the close of the prosecution's case. *Bryan Davis* on the other hand, although a matter in which the opportunity for identification was for a longer period, the circumstances in which the sole identifying witness viewed the incident of a stabbing in a poorly lit and "jam-packed" dancehall made the purported identification of the appellant difficult. This provided the lever for this court to allow the appeal and to set aside the conviction.

On the facts in this case, the identifications of Smallhorn, Brown and Whyte by the witnesses Chennault, Kelting and Levy were for much longer periods and in circumstances which could be regarded as ideal, being close encounters in broad daylight.

Although this matter did not proceed to trial until almost two years after the incident on the 20th March, 1994, which formed the basis of the charges laid against the appellants, this was not sufficient to weaken the identification evidence as:

1. There was more than sufficient opportunity available to the witnesses to properly identify all three appellants.
2. Detective Constable Levy was in the company of the D.E.A. agents Chennault and Kelting throughout the entire operation. He was responsible for detaining Brown in May, 1995, and subsequently pointed out all three appellants to Deputy Superintendent Martin who arrested them.
3. Even assuming that the identification of the appellants by the witnesses Chennault and Kelting at the hearing could be regarded as being in the nature of dock identifications, their accounts were corroborated by the identification evidence of Detective Constable Levy. It was the evidence of this witness on which the learned resident magistrate relied in dealing with this critical issue of visual identification.

The learned resident magistrate was fully aware of the duty placed on him in dealing with the issue of visual identification of the appellants. In

approaching this matter, in his findings of fact, he expressed himself in the following manner:

"IDENTIFICATION:

2. I found that no identification parade was held for any of the three Accused and that all the Witnesses, except Constable Radcliffe Levy of the Jamaica Constabulary Force, did so for the first time in open Court. I am aware that as a rule the Court should refuse to allow an Accused to be identified by a Witness for the first time when he is in the dock. However, Constable Levy's evidence connected the Accused with the offence and he had, prior to trial identified each of the Accused to the Arresting Officer. He had not known two of the Accused before but the Accused Livingston Whyte was well known to Constable Levy for two years prior to 10/3/94.

3. There were several occasions, during the surveillance of the Accused by Constable Levy when he was in the company of the Witnesses who purported to have identified the Accused in the dock.

I am aware of the dangers inherent in convicting on evidence of disputed identification (visual) and therefore the need for great caution: that a Witness or Witnesses though honestly mistaken, may be a convincing Witness. A careful examination of the circumstances in which identification of the Accused came to be made, is of critical importance." [Emphasis supplied]

Conclusion

On the facts as presented by the prosecution, there was ample evidence which revealed an active participation by all three appellants in the shipment of twenty-five bags of ganja weighing fifteen hundred pounds. On

20th March, 1994, Paul Smallhorn's role was that of procurer of the contraband. Charlie Brown's role, by the use of his boat "The Fishing Machine", was the conveyor. Livingston Whyte, by virtue of his own testimony as related to Chennault and Kelting, was to provide the necessary security cover to enable the shipment of ganja to be successfully effected.

On this evidence, the learned resident magistrate, correctly applying the law and carefully following the guidelines laid down by the authorities, came to a verdict adverse to all the appellants on the material which he had before him. We were of the firm view that the verdict arrived at was fully justified on the evidence in the case.

Sentence

The appellants, on what was a strong case against them, elected to put the Crown to proving the charges laid in the matter. Having been convicted, they now sought to urge on the court that leniency be afforded them by way of the reduction of their sentences.

It is clear from the evidence that each of the appellants played a major role in carrying into effect what was a shipment of a large quantity of ganja out of Jamaica.

The sentences imposed by the learned resident magistrate indicate that he sought to place all the appellants on an equal footing and to deal with them accordingly. The sentences reflect the seriousness with which

offenders who, despite the harshness of the penalties for offences involving dangerous drugs, still continue to flout the laws of this country.

Taking into consideration the maximum penalties which may be imposed for these offences, there is nothing urged on us by counsel to show that either the fines imposed or the terms of imprisonment added by way of a deterrent were manifestly excessive. We found no valid basis, therefore, to interfere with the sentences passed.

The sentences will, however, commence as from 13th May, 1997.