

IN THE PRIVY COUNCIL

Nos. 47 and 48 of 1975

ON APPEAL  
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N                      No. 47 of 1975

- 1. BERNARD PIANKA and
- 2. TERRY H. HYLTON                      Appellants

- and -

THE QUEEN                                      Respondent

AND B E T W E E N                      No. 48 of 1975

10                      THE DIRECTOR OF PUBLIC PROSECUTIONS                      Appellant

- and -

- 1. TERRY HYLTON and
- 2. BERNARD PIANKA                                      Respondents

(CONSOLIDATED APPEALS)

CASE FOR THE APPELLANTS IN APPEAL NO. 47 of 1975

AND FOR THE RESPONDENTS IN APPEAL NO. 48 of 1975

RECORD

- 20 1. These are consolidated appeals from decisions of the Court of Appeal of Jamaica. In both appeals, leave to appeal to the Privy Council was granted by the Court of Appeal on the 31st day of July, 1975. Upon granting leave to appeal, the Court of Appeal certified a number of questions as to the nature, extent and exercise of jurisdiction by the Courts of Jamaica respecting summary offences committed by a foreigner on board a foreign ship within the territorial sea, and as to exercise of the power of forfeiture under section 23A(2) of the Dangerous Drugs Act, as being raised respectively by the first and second appeals. Final leave to appeal was granted in each appeal by the Court of Appeal on the 19th day of November, 1975.
- p.46  
p.47  
p.48  
pps.49-50

RECORD

- p.1 2. The two Appellants in the first appeal were jointly charged, in May, 1974, with (1) unlawfully having ganga in their possession, contrary to section 7(c) of the Dangerous Drugs Law, Cap.90; and (2) unlawfully using a motor boat named the "Star Baby" to convey ganga, contrary to section 22(1)(e) of the Dangerous Drugs Law, Cap.90, as inserted by section 3 of the Dangerous Drugs Law (Amendment) Act, 1944 (No.10). They were summarily tried, on various days in September and October, 1974, by the Resident Magistrate in the parish of Saint Mary in the Resident Magistrate's Court for that psrish. 10
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- p.13 Both Appellants were convicted on both charges, and on the 17th day of October, 1974, were each sentenced to imprisonment for a term of two years at hard labour, and, in addition, ordered to pay a fine of \$1000 and in default 12 months at hard labour in respect of the charge for possession of ganga, and were each sentenced to a term of imprisonment for 12 months at hard labour in respect of the charge for using a conveyance for carrying ganga, both sentences to run concurrently. A third charge - for exporting ganga - was not pursued to conviction. Both Appellants appealed to the Court of Appeal (Luckhoo, P.(Ag.), Hercules, J.A., and Zacca, J.A.(Ag.)) against conviction, and their appeals were heard together in February and May, 1975. On the 12th June, 1975, the Court of Appeal dismissed the appeals. 20
- p.14-16
- pp.27-42 30
- pp.13; 16 3. Upon the convictions aforesaid, and after sentence had been pronounced, application was made by the prosecution for forfeiture of the yacht allegedly used for conveying the ganga in respect of which the Appellants-Respondents in the second appeal - had been convicted, pursuant to section 23A(2) of the Dangerous Drugs Law as amended and inserted by section 4 of the Dangerous Drugs (Amendment) Act, 1974 (No.16). Hearing of the application for forfeiture was, upon the application of counsel for the Respondents in the second Appeal, adjourned to December 5th, 1974, when submissions were made by both sides, and, at the instance of counsel for the Respondents in the second Appeal, a witness was called and was cross-examined by counsel for the prosecution. Various exhibits were put in evidence and, after hearing further addresses, the Resident Magistrate made an order for forfeiture of the yacht. The Respondents in the second appeal, appealed to the Court of Appeal (Graham Perkins and Hercules J.J.A. and Watkins J.A.(Ag.)). On the 2nd July, 1975, the appeal was heard and allowed and the order for forfeiture set aside. 40
- pp.16-17
- pp.18-21
- pp.43-46 50

4. The issues arising on these appeals are :
- (a) Whether or not, in virtue of section 4(1) of the Territorial Sea Act, 1971, the Courts of Jamaica, and specifically the Resident Magistrate's Court, have jurisdiction to try summary offences committed by a foreigner on a foreign ship
    - (i) within the territorial sea;
    - (ii) passing through the territorial sea.
  - 10 (b) If the Resident Magistrate's Court has jurisdiction, whether or not in the instant case, that jurisdiction was properly exercisable, having regard to the provisions of section 4(5) of the Territorial Sea Act, 1971, and Article 19(1) of the 1958 Convention on the Territorial Sea and the Contiguous Zone.
  - 20 (c) If jurisdiction was properly exercisable, whether or not, on the facts and in the circumstances of this case, and in particular the findings of the Resident Magistrate, that jurisdiction was properly exercised and the Appellants properly arrested and convicted, having regard to the provisions of section 4(5) of the Territorial Sea Act, 1971, and Article 19(5) of the 1958 Convention.
  - (d) Whether or not an order for forfeiture under section 23A(2) of the Dangerous Drugs Act is invalid, if made on a date subsequent to the imposition of sentence on the ground that the Resident Magistrate was functus officio.
  - 30 (e) Whether or not a Resident Magistrate, in pursuance of an application for forfeiture under section 23A(2) of the Dangerous Drugs Act, may, during that aspect of the proceedings, properly hear and consider further evidence.
  - (f) If the Resident Magistrate can properly hear evidence in section 23A(2) proceedings, whether,
    - (i) the circumstances of the instant case justified the making of an order for forfeiture of the yacht "Star Baby";
    - 40 (ii) her findings as complained of in Ground 2 of the original Grounds of Appeal and set out in the Affidavits of Keith Jarrett, Roy L. Taylor and Norman Samuels, to wit:

"that the document Exhibit 5 proved that Mr. Moseley, the owner of the yacht "Star Baby, had given permission to both accused to use the said yacht for the purpose for which they in fact used it", was sound in law and/or was reasonable.

The Grounds of Appeal in the second appeal, as originally filed, alleged as Grounds of Appeal that

- (i) the finding of the Resident Magistrate that the document Exhibit 5 proved that the Appellants used the yacht for conveying ganga with the permission of the owner was wrong in law, and 10
- (ii) the judgment and order of the Resident Magistrate was unreasonable and not supported by the evidence.

Those Grounds of Appeal were not argued before the Court of Appeal, the Court being of the view that the Original Ground 1(a) and the Supplementary Ground of Appeal were unanswerable. 20

5. Luckhoo, Ag.P., delivered the written unanimous judgment of the Court of Appeal dismissing the first appeal. The judgment first enumerated the charges of which the Appellants were convicted and the sentences imposed upon them, then went on to state that the ground of complaint was that in virtue of the provisions of section 4(1) of the Territorial Sea Act, 1971 (No.14 of 1971) the Resident Magistrate had no jurisdiction to try the Appellants on the charges laid against them, those charges not being matters "punishable on indictment". Section 4(1) of the Territorial Sea Act 1971, provides as follows : 30

"An act -

- (a) committed by a person, whether he is or is not a citizen of Jamaica, on or in the territorial sea; and
- (b) being of such a description as would, if committed on land within a parish in Jamaica, be punishable on indictment according to the law of Jamaica for the time being in force, 40

is an offence punishable on indictment in

like manner, notwithstanding that it may have been committed on board or by means of a vessel the nationality of which, is not Jamaican; and the person who is reasonably suspected of having committed such offence may, subject to the provisions, of sub-section (5), be arrested, and may be tried and otherwise dealt with in reference to any charge against him in connection with that offence, accordingly."

10 6. Next, the evidence adduced at the trial is reviewed. The Appellants, Americans both, were, pp.28-29  
 on August 8th 1974 seen aboard the yacht "Star Baby", a motor boat of United States registry, then lying at anchor in the Port Antonio harbour. There was no sign of any bag on board the boat. On August 9th, a customs officer gave the Appellant Hylton, who was captain of the boat, a coastwise clearance to Montego Bay. At about 11.47 p.m. that night the  
 20 "Star Baby" was picked up on the radar screen of a coast-guard boat approximately three miles north of the outer edge of Rio Nuevo Bay, heading north-easterly out to sea. The "Star Baby" which was displaying no navigational lights, was intercepted by the coast-guard boat three point eight (3.8) miles from Rio Nuevo Bay within the limits of the territorial waters of Jamaica. The "Star Baby" was taken to Ocho Rios in the parish of Saint Mary, where it was found laden with sixty bags of vegetable matter which weighed 3,277 lbs. and on analysis was found to  
 30 contain ganga. When cautioned the Appellant Hilton said "We got caught," At the subsequent trial the Appellants relied exclusively upon submissions made in their behalf to the effect that the Resident Magistrate was without jurisdiction to try them.

7. The judgment went on to deal with the submissions made in behalf of the Appellants and those made in behalf of the Crown. Section 4(1) of the Territorial Sea Act 1971 said their Lordships, does not fully define the  
 40 criminal jurisdiction exercisable by the courts of Jamaica in respect of acts committed on the territorial sea of Jamaica, since any pre-existing criminal jurisdiction conferred by any Act having effect after the 1971 Act is expressly preserved by section 4(4)(b) of the 1971 Act. Any jurisdiction so preserved is, however, not exercisable if a breach of Article 19 of the 1958 Convention would be occasioned thereby (S.4(5)). pp.29-33 p.35

8. Their Lordships, having determined to discover if there was contained in any law in force immediately before the commencement of the 1971 Act and having  
 50 effect thereafter as part of the laws of Jamaica criminal jurisdiction in relation to an act triable solely as a

p.36 summary conviction offence where that act was committed by a foreigner on board a foreign vessel on or in the territorial sea of Jamaica" made reference to (1) the Admiralty Offences (Colonial) Act, 1849 (12 and 13 Vict. C.96), sections 1, 2 and 3, dealing with the jurisdiction of colonial courts to try and to

p.37 punish various offences (2) The Admiralty Offences (Colonial) Act, 1860, which empowered colonial legislatures to provide for the trial of persons who had, in a colony, inflicted injury resulting in death outside that colony (3) R v Keyn (1876-77) 2 Exch. D.63, where it was held that the jurisdiction of the courts of England did not extend to the commission of an offence by a foreigner on board a foreign ship on the territorial sea (4) the Territorial Waters Jurisdiction Act, 1878, which invested the Admiralty with jurisdiction to try indictable offences committed within one marine league of the coasts of England and applied mutatis mutandis to the colonies (5) The Colonial Courts of Admiralty Act, 1890, which established Colonial Courts of Admiralty to supersede Vice Admiralty Courts in British possessions and conferring jurisdiction on those courts co-terminus with the then existing Admiralty jurisdiction of the High Court of England, subject to any limitations imposed by the Colonial legislature concerned, but specifically providing (section 2(3)(c)) that "A Colonial Court of Admiralty shall not have jurisdiction under this Act to try or punish a person for an offence which according to the law of England is punishable on indictment."

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9. The position, their lordships concluded, was that after the enactment of the Colonial Courts of Admiralty Act, 1890, the Admiral (and therefore the courts of Jamaica) had jurisdiction in relation to offences committed within the territorial sea, but only such offences as were triable on indictment if committed within the body of a county in England. Parliament had not empowered any court, or the Admiral (whose jurisdiction had been transferred to the High Court in England and to the Central Criminal Court) to try as offences and to punish acts committed within the territorial sea which, if committed within the body of the realm would have been cognizable as summary offences only.

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10. Their lordships then cited "section 7" of "the Resident Magistrates Law" (sic) 1891 which 50

"enacted by the legislature of Jamaica" provided as follows".

10. "For the purposes of the criminal law, the jurisdiction of every Court shall extend to the parish for which the court is appointed, and one mile beyond the boundary line of the said parish. Provided always, that the boundaries of every parish shall be deemed to extend to such part of the sea as lies within three miles of the coastline of such parish; the decision of the Magistrate as to any distance for the purpose of deciding any question as to jurisdiction under this section shall be final."

20 Having stated that Her Majesty had not exercised the power of disallowance in relation thereto, their lordships concluded that by that provision a Resident Magistrate was given jurisdiction to try all summary conviction offences committed not only within the limits of the parish for which the Court was appointed but extended (sic) seaward beyond for a distance of three miles of the coast line of that parish. The word "deemed" in the proviso created a statutory fiction whereby a parish extended beyond its coast line for a distance of three miles to seaward. Just as a foreigner committing an offence on land within the coast line of a parish was amenable to the jurisdiction of the Resident Magistrate so he was too where he committed an offence beyond its coast line and within a distance of three miles therefrom.

30 Contrasting therewith the provisions of section 30 of the Judicature (Supreme Court) Law, Cap.180, 1880, defining the extent of the jurisdiction of a Circuit Court held in any parish, their lordships expressed the view that the jurisdiction of a Circuit Court, unlike that of a Resident Magistrate's Court, was, in respect of crimes committed by foreigners on foreign ships within three miles of the shore of a parish, subject to prescribed conditions and confined to offences triable on indictment, in virtue of the Territorial Waters Jurisdiction Act, 1878; that the purpose of section 4(1)(a) of the Territorial Sea Act, 1971, was to preserve to the Circuit Court the jurisdiction to try such offences, which jurisdiction, in virtue of section 4(1)(sic) would otherwise be lost. (Their lordships clearly meant section 4(3), which repealed the 1878 Act in so far as it applied to Jamaica).

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50 11. After drawing attention to the enlargement of the geographical extent of the Resident Magistrate's Courts and the Circuit Courts jurisdiction effected by p.40

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section 8 of the Second Schedule of the 1971 Act - "to such part of the sea as lies within 12 miles of the coast of such parish" - their lordships concluded that by reason of section 7 of the Resident Magistrates Law, 1891, the criminal jurisdiction of the Resident Magistrates of Jamaica included the trial and punishment of summary conviction offences committed by a foreigner on a foreign ship within the territorial sea, and that this jurisdiction is preserved by section 4(4)(b) of the Territorial Sea Act, 1971. Section 4(4)(b) provided as follows:

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"Nothing in this section shall abrogate or abridge any criminal jurisdiction conferred on any court by virtue of any provisions contained as aforesaid".

The provisions referred to in section 4(4)(b) are (section (4)(a))

"provisions contained immediately before the commencement of this Act in any law having effect thereafter as part of the law of Jamaica."

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12. Their lordships next considered whether exercise of jurisdiction in the instant case constituted a breach of Article 19 of the 1958 Convention. The facts, their lordships felt, gave rise to the clear inference that the bags containing ganga were loaded onto the "Star Baby" either at Port Antonio or when she was still within the territorial sea of Jamaica. The "Star Baby", though making for the high seas, was not in right of innocent passage through the territorial sea, the Appellants having received into their possession, while within Jamaica's territorial waters, a drug possession and conveyance of which infringed the laws and were prejudicial to the good order of Jamaica. The consequences of the crime, their lordships held "therefore extended to Jamaica and additionally was such as to disturb the good order of the territorial sea." That being so, there had been no breach of Article 19 of the 1958 Convention. The Resident Magistrate had, and had properly exercised, jurisdiction to try and to punish the Appellants, and the Appeals would accordingly be dismissed.

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13. The judgment in the second appeal was delivered by Watkins, J.A.(Ag.). After a concise summary of the facts and circumstances culminating in the making of the order for forfeiture, the judgment makes the point that the

power of a Resident Magistrate to order forfeiture is statutorily derived from (Section 23A(2) Dangerous Drugs (Amendment Act) and its exercise statutorily regulated, so that any purported exercise of that power which does violence to the relevant statutory provisions must, ex-necessitate, be without authority.

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14. Their lordships having observed that the power of forfeiture as it stood prior to the amending statute was in some respects rather wide and in other respects too narrow, observed that section 23A(2) of the amending statute introduced three innovations, namely

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- (i) it laid down criteria for the exercise of the power of forfeiture; both substantive and procedural;
- (ii) it provided for review of an order made thereunder at the instance of either the convicted party against whom it was made or any person aggrieved thereby;
- (iii) it enlarged the category of forfeitable property to include seagoing conveyances.

Noting that in (an unreported case) R v Marvin Germany (R.M.C.A.13/74) the Court of Appeal had struck down an order for forfeiture which had been made some considerable time subsequent to the conviction of the Appellant on the ground that the Resident Magistrate had been functus officio when she made the order, their lordships observed that the circumstances of the instant case were somewhat different. Application for forfeiture in the instant case was made on the day on which the conviction was recorded and consideration of the application adjourned to a subsequent date. At the adjourned hearing new evidence was adduced and adjudicated upon, whereas section 23A contemplates the relevant evidence as being the evidence adduced during the hearing prior to conviction. There being no statutory authority for the procedure followed at the adjourned hearing, the order ought not to stand; the appeal was therefore allowed and the order for forfeiture set aside.

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15. It is respectfully submitted that the Court of Appeal correctly held that prior to 1891 the Admiral - and therefore the Courts of Jamaica - had no jurisdiction in respect of "summary offences" committed on board foreign ships within the territorial sea, but that the Court was wrong in holding that by section 7 "The Resident Magistrates Law", (sic) 1891 "a Resident Magistrate was given

jurisdiction to try all summary conviction offences committed not only within the limits of the parish for which the court was appointed but extended seaward beyond for a distance of three miles of the coast-line of that parish." The provision referred to, it is submitted, was concerned with delimiting distances for the purpose of determining and establishing the venue of trial for offences cognizable by Resident Magistrates in the Island of Jamaica, not with the nature of the jurisdiction to be exercised, and therefore did not conflict with the provisions of the Territorial Waters Jurisdiction Act, 1878, or with any other Imperial Act, so as to attract exercise of the power of disallowance. Further, if there was conflict, then

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(a) Section 2 of the Colonial Laws Validity Act,  
and

(b) Section 3 of the Colonial Courts of Admiralty Act, 1890, rendered exercise of the power of disallowance unnecessary. Section 2 of the Colonial Laws Validity Act, 1865, provides: 20

"Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative." 30

Section 3 of the Colonial Courts of Admiralty Act 1890, provides :

"The legislature of a British possession may by any Colonial Law

- (a) .....
- (b) confer upon any inferior or subordinate court in that possession such partial or limited Admiralty jurisdiction under such regulations and with such appeal (if any) as may seem fit. 40

Provided that any such Colonial law shall not confer any jurisdiction which is not by this Act

conferred upon a Colonial Court of Admiralty."

The passage cited in the judgment as section 7 of the Resident Magistrate's Law, 1891, is really section 266 of the Resident Magistrate's Law 1904-law 28 of 1904 - which consolidates the provisions of both section 7 of the Resident Magistrates Amendment Law, 1891 - Law 16 of 1891 - and section 246 of the Resident Magistrates law, 1887 - law 43 of 1887.

10 16. It is further submitted that the argument in the first appeal, which seeks to distinguish between the jurisdictions of a Circuit Court and a Resident Magistrate's Court in respect of offences committed within the territorial sea adjacent to a parish, is erroneous in virtue of the fact that the jurisdictions of both Courts were subject to the provisions of the Territorial Waters Jurisdiction Act, 1878 (Sections 2 and 7) and the Colonial Courts of Admiralty Act, 1890 (Section 3) the one, in respect of territorial waters, limiting the Admiral's jurisdiction to indictable offences, and the  
20 other providing that colonial legislatures could not confer upon an inferior or subordinate court any jurisdiction not by that Act conferred upon a Colonial Court of Admiralty.

17. It is further submitted that the following considerations inveigh against the correctness and the validity of the Court of Appeal's conclusion that in 1891 Resident Magistrates in Jamaica were given jurisdiction to try summary offences committed by  
30 foreigners on board foreign ships within the territorial sea. If the finding of the Court of Appeal is correct, then

- (a) between 1891 and 1971 (when the Territorial Sea Act was passed) there were two conflicting statutes in Jamaica, one (the Territorial Waters Jurisdiction Act 1878) limiting jurisdiction to indictable offences only, the other (the Resident Magistrate's (Amendment) Law 1891) conferring jurisdiction to try, as well, summary offences;
- 40 (b) after 1891, a Resident Magistrate's Court in the colony of Jamaica exercised a greater or wider jurisdiction over the territorial waters of Jamaica (i) than the Supreme Court in Jamaica exercised or exercises today (ii) than the High Court in England exercised in respect of the territorial waters of England

(c) Section 4 of the Territorial Sea Act, 1971, is otiose, pleonastic and nugatory, since, with repeal of the Territorial Waters Jurisdiction Act, 1878 (by the 1971 Act), the Circuit Court within a parish, in virtue of the amendments made (by section 8(1) of the Act of 1971 (aforesaid) to the Judicature (Resident Magistrates) Law, section 267 and to the Judicature (Supreme Court) Law, section 30, has and enjoys like jurisdiction as the Resident Magistrate's Court within that parish; so that, if the Court of Appeal is correct, no special provisions would be required to confer jurisdiction upon the Circuit Court to try indictable offences committed within the limits of the territorial sea, and section 4(1) would be at odds with section 4(4)(b) in limiting the Circuit Court's jurisdiction within the territorial sea to indictable offences. The relevant portions of the said amendments are in the following terms:

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"..... the boundaries of every parish shall be deemed to extend to such part, if any, of the sea as is constituted by law internal waters of which the shore or any part thereof is at the coast of that Parish (including the portion of it taken to comprise the internal waters aforesaid, if any) as comprises the breadth of the territorial sea, without prejudice to the conferment of any concurrent jurisdiction by virtue of any other parish's boundaries being deemed to extend in manner aforesaid."

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18. It is respectfully submitted that the Court of Appeal was wrong in holding that : "the word "deemed" in the proviso created a statutory fiction whereby a parish extended beyond its coast line for a distance of three miles to seaward. Just as a foreigner committing an offence on land within the coast line of a parish was amenable to the jurisdiction of the Resident Magistrate so he was too where he committed an offence beyond its coast line and within a distance of three miles therefrom." A foreigner on board a foreign ship cannot be equated with a foreigner on land within the realm, so that the fiction in regarding three

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miles of sea as being within the parish does not solve the difficulty that the foreigner would still be on board a ship of foreign registry (on alien soil) which had not submitted to the domestic laws of the coastal state and was therefore, in the absence of specific legislation, or agreement pertinent thereto, subject only to the law of its flag. Section 4(1) of the Act of 1971 was aimed at offences committed on a foreign ship and declares that such offences are within the jurisdiction of the courts of Jamaica if they are committed within territorial waters and would be indictable if committed within the body of the realm.

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19. It is further respectfully submitted that the Territorial Waters Jurisdiction Act 1878

(a) extended the sovereignty of England - and therefore the jurisdiction of its courts or the area of application of its laws - to a distance of 3 miles beyond the shoreline of England;

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(b) declared to be offences a certain class of acts or omissions done or omitted to be done within that 3 miles area of sea, and

(c) conferred upon the Admiral or invested him with the exercise of jurisdiction respecting the said offences.

Extension of sovereignty does not necessarily carry with it all the laws of the sovereign state, the question of the laws applicable being usually a matter for legislation, whether sovereignty results from discovery, conquest or legislation. The only acts and omissions which the Territorial Waters Jurisdiction Act, 1878, declared to be offences if done within the limits of territorial waters were those which, if committed within the body of a county in England would "be punishable on indictment according to the Law of England for the time being in force". (Section 7).

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The Court of Appeal was therefore wrong in holding that since the Resident Magistrate's (Amendment) Law 1891 deemed a parish to extend beyond its coast line for a distance of 3 miles seaward, a foreigner committing an offence on board a foreign ship, within 3 miles of the coast line of a parish was necessarily (irrespective of the type or class of offence) amenable to the jurisdiction of the Resident Magistrate for that parish.

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20. It is respectfully submitted that the provision cited by the Court of Appeal as Section 7 of the Resident Magistrate's Law, 1891, was concerned only with venue. That provision, as well as the corresponding provisions which replaced it, merely stipulated that for the purposes of the trial of such offences as a

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Resident Magistrate was competent to try, those offences committed within a particular parish - whose boundaries were specifically defined - should be tried by the Resident Magistrate exercising jurisdiction in that parish. The offences which a Resident Magistrate had power to try were set out in section 19 of the Resident Magistrate's Law 1887 (which the 1891 Act amended).

21. It is further respectfully submitted that Section 4(1) of the Territorial Sea Act, 1971, recreated offences, and that the Second Schedule of that Act provided the venue of trial of those offences. It is also submitted that no act or default done or omitted to be done on board a foreign ship passing through the territorial sea of Jamaica, which does not fall within the terms of the said Section 4(1), is an offence cognizable by the courts of Jamaica, and that the offences charged against the Appellants do not fall within the terms of section 4(1), they not being offences "punishable on indictment".

22. It is respectfully submitted that at all events the Court of Appeal was wrong in holding that there was no contravention of Article 19 of the 1958 Convention "in seeking to invoke the criminal jurisdiction of the court". In stating its reasons for so holding the Court said : "in the circumstances of this case, even if the Star Baby .....was making for the high seas this was not in right of innocent passage through the territorial sea for the Appellants had received into their possession while on the territorial sea a dangerous drug the possession and conveyance of which were prohibited under the criminal law in the territory of Jamaica and its receipt and conveyance by the Appellants in that event was prejudiced to the good order of Jamaica. The consequences of the crime therefore extended to Jamaica and additionally was such as to disturb the good order of the territorial sea. That being so, and these being within the exceptions contained in Article 19 there was no contravention of Article 19....." It is submitted that (a) the finding as to receipt of the Drug "while on the territorial sea was not justifiable on the proved facts, as the transfer might well have been made outside

the 12 mile limit; (b) the receipt and conveyance of the ganga by the Appellants was in no way "prejudicial to the good order of Jamaica", since the ganga was obviously being conveyed away from Jamaica; (c) the "consequences of the crime" did not extend to Jamaica, as obviously the ganga would not have been used in Jamaica; (d) for the reason stated at (c) the consequences of the crime were not such as to disturb the good order of the territorial sea! If, therefore, the Resident Magistrate in the instant case was seized of jurisdiction, its exercise in all the circumstances was clearly in breach of Article 19 of the Convention and therefore of section 4(5) of the Territorial Sea Act, 1971. Article 19 aforesaid reads as follows:

1 "....."

(a) If the consequences of the crime extend to the coastal State; or

(b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;

or

(c) If the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies; or

(d) If it is necessary for the suppression of illicit traffic in narcotic drugs.

Section 4(5) of the Territorial Sea Act, 1971 reads:

"No exercise of power or authority in any manner described in paragraph (a) of sub-section (4) shall be such as to constitute a breach of Article 19 of the Convention.

23. It is further respectfully submitted that the findings of fact of the learned Resident Magistrate were insufficient to warrant conviction of the Appellants. It seems clear that the Resident Magistrate approached the case as if the offences charged had been committed on land and without regard to the provisions of either Articles 19(1), 19(5), 14(2) and 14(4) of the Convention. Article 19(5) reads as follows:

"The coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any

RECORD

investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters."

Article 14(2) reads as follows :

"Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters." 10

Article 14(4) reads as follows :

"Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law". 20

It is also submitted that the Court of Appeal erred in failing to consider whether the facts found by the Resident Magistrate were sufficient to justify exercise of jurisdiction in the instant case.

24. On the question as to validity of an order for forfeiture made on a date subsequent to the imposition of sentence, it is respectfully submitted that, provided the application for such order is made before the court rises, that is to say, before termination of the particular sitting of the court during which sentence was imposed, the making of an order in pursuance of such application, though on a day subsequent thereto, would not for that reason be invalid. Where such an application is made post the rising of the court, the Resident Magistrate would be functus officio and not competent to hear such application or make any order in relation thereto. 30 40

25. As to whether a Resident Magistrate, in proceedings under section 23A(2) of the Dangerous Drugs Act, may hear and consider evidence not adduced before conviction, it is submitted that the Court of Appeal was right in holding

- (a) that no statutory authority exists for such procedure and
- (b) the evidence on which an order for forfeiture must be based must be evidence adduced during the course of the hearing leading to conviction.

If the Court of Appeal was wrong in so holding, then it it submitted that

- 10. (c) in view of the uncontroverted evidence given by Robert Moseley as to the circumstances and terms of the charter of the "Star Baby", the order for forfeiture made by the Resident Magistrate was not justified;
  - (d) the finding of the Resident Magistrate that the document Exhibit 5 proved that Mr. Moseley, owner of the "Star Baby", had given permission for the yacht to be used as it had been used was unreasonable and unsupported having regard to the terms of the document of charter, the terms of Exhibit 5 and the evidence of Robert Moseley.
- 20 26. It is respectfully submitted that the Court of of Appeal in the first appeal erred in holding, that the Resident Magistrate had jurisdiction to try the Appellants for the offences with which they were charged, that jurisdiction was properly exercised and the Appellants properly convicted and sentenced, and that these findings should be rejected and the appeals in respect thereof allowed, and that the Court of Appeal in the second appeal was right in holding that the order for forfeiture of the yacht "Star Baby" was invalid and
- 30 ought not to stand, and that these findings ought to be approved and the appeal therein dismissed, for the following, among

#### REASONS

- 40 1. BECAUSE Section 4(1) of the Territorial Sea Act, 1971, limits the jurisdiction of the Courts of Jamaica to try offences committed in the territorial waters of Jamaica by foreigners on board foreign vessels to such offences as are punishable on indictment according to the law of Jamaica, and the offences for which the Appellants were tried and convicted were not offences "punishable on indictment".
- 2. BECAUSE the Appellants were arrested, tried, convicted and sentenced in breach of section 4(5) of the Territorial Sea Act, 1971, and of Article 19 of the 1958 Convention.

18.

3. BECAUSE neither the evidence adduced by the prosecution nor (alternatively) the findings of the Resident Magistrate justified conviction of the Appellants.
4. BECAUSE the Court of Appeal in the first appeal was wrong in upholding the conviction of the Appellants.
5. BECAUSE the Court of Appeal in the second appeal was correct in setting aside the order for forfeiture of the yacht "Star Baby." 10

ROY L.TAYLOR

NOS.47 and 48 of 1975

IN THE PRIVY COUNCIL

ON APPEAL  
FROM THE COURT OF APPEAL OF  
JAMAICA

B E T W E E N :

Appeal No.47 of 1975

1. BERNARD PIANKA
2. TERRY HYLTON Appellants

- and -

THE QUEEN Respondent

AND B E T W E E N

Appeal No.48 of 1975

THE DIRECTOR OF  
PUBLIC PROSECUTIONS Appellant

- and -

1. TERRY HYLTON
2. BERNARD PIANKA Respondents

(CONSOLIDATED APPEALS)

CASE FOR THE APPELLANTS  
IN APPEAL NO. 47 OF 1975 AND THE  
RESPONDENTS IN APPEAL NO. 48 OF  
1975

PHILIP CONWAY THOMAS & CO.,  
61 Catherine Place,  
London, SW1E 6HB