

ON APPEAL
FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :-

BERNARD PIANKA
TERRY HYLTON

Appellants

- and -

THE QUEEN

Respondent

A N D BETWEEN:

10 THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

- and -

TERRY HYLTON
BERNARD PIANKA
(Consolidated Appeals)

Respondents

CASE FOR THE RESPONDENT IN THE FIRST
APPEAL, APPELLANT IN THE SECOND APPEAL

Record

20 1. The first appeal is from a decision of the Court of Appeal (Luckhoo Ag. P., Hercules, J.A., Zacca, Ag.J.A.), given the 12th June, 1975 upholding the convictions of the Appellants, on the 7th October 1974, by the Resident Magistrate for the Parish of Saint Mary, on charges on information, (i) of unlawfully having ganja in their possession on the 10th August 1974 (contrary to the Dangerous Drugs Law, Section 7(c)), and (ii) unlawfully using on the same date a conveyance to convey ganja (contrary to the Dangerous Drugs Law, Section 22(i)(e)). The learned Resident Magistrate

30 sentenced each Appellant to two years' imprisonment with hard labour plus a fine of \$1,000 (or twelve months hard labour in default of payment) on the first charge, and to twelve months imprisonment (to run concurrently) on the second count. The Court of Appeal affirmed the sentences, save

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p. 13,17
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Record

that they ruled that the Resident Magistrate had no power to order twelve months hard labour in default of payment of the fine, and substituted and order for six months hard labour in default. Final leave to appeal against the decision of the Court of Appeal was given by that Court on the 19th November 1975.

p.42 1.9

p.49

2. The second appeal is from a decision of the Court of Appeal (Graham-Perkins and Hercules, JJ.A., and Watkins, Ag.J.A.) given the 2nd July 1975, reversing an order made the 5th December 1974, by the Resident Magistrate for the Parish of St. Mary, forfeiting the motor yacht "Star Baby". The "Star Baby" was the "conveyance" referred to in the charge under the Dangerous Drugs Law, Section 22(1)(e). Upon the convictions referred to in paragraph 1 above, the prosecution applied for an order for forfeiture of the Conveyance. The learned magistrate adjourned the application to the 5th December, 1974.

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p.21 1.44

p.13, 1.27

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p.3 1.28

p.5 1.10

p.4 1.28

p.6 1.23

p.7 1.11

p.10 1.15

p.12, 1.23

3. Evidence was adduced by the prosecution to establish that on the 8th August 1974, the "Star Baby" (a vessel registered in Miami, and with a draft of about two to three feet), was anchored in Port Antonio harbour. The two Appellants were on board, Hilton being the captain. There was room to move about on the yacht and bags were not evidence. On the 9th August the vessel was given coastwise clearance to Montego Bay. Soon after midnight of the 9th/10th August the vessel was intercepted some 3.8 miles from Rio Neuvo Bay. She was travelling North-east and was without navigation lights. The two Appellants were on board and there was little room to move, the space being taken up by 60 bags of ganja. Hilton said: "We got caught". The vessel had been seen in Jamaica some three or four months earlier

4. The Appellants did not give evidence. Their cause was that the Court lacked jurisdiction.

5. On the adjourned hearing on the 5th December the learned magistrate heard evidence from one Mosley, who said he was the owner of the "Star Baby". He said he bought the vessel for pleasure. He had a small vessel at the time but wanted a larger boat he could sleep in. Approximately two weeks after he got the boat he hired it to Pianka and Hilton, whom he had known since November, 1973. A six months' time charter, commencing the 15th April 1974, was put in as Exhibit 5.

pp.17-21

p.19 1.1

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p.21 1.14

6. The learned magistrate ordered forfeiture without, so it would appear from the Record, stating reasons. On the appeal against forfeiture

the Appellants filed three affidavits, by persons present in Court when the learned magistrate ordered forfeiture. The affidavits declared that the magistrate stated that forfeiture would be ordered because Exhibit 5 proved that Moseley: "had given permission to both accused to use the yacht for the purpose for which they in fact used it."

pp23-26

10 7. The relevant statutory authorities are set out in the Appendix to this cause.

8. The decision of the Court of Appeal in the first appeal was given by Luckhoo, Ag.P. After outlining the facts the Lordship said the Appellants' case was as it had been before the magistrate, namely, that jurisdiction over

pp.27-42

20 offences committed within territorial waters derived from statute, not from the common law, and although geographical jurisdiction extended for twelve miles from low water line (by reason of the Territorial Sea Act, 1971) it covered only offences triable summarily. Alternatively,

p.30 l.22

30 it was submitted, if there was a common law jurisdiction to try offences committed on foreign ships within three miles of the shore, then, by reason of Article 19 of the 1958 Convention on the Territorial Sea, there was no jurisdiction in the present case. This was because the "Star Baby" was merely passing through Jamaica territorial seas. By the Territorial Seas Act, 1971, Section 4(5), Article 19 was supreme in the event of there being any conflict between its provisions and any other provisions of the law of Jamaica.

p.32 l.2

40 9. Their Lordships could not accept these contentions. Section 267 of the Judicature (Resident Magistrates) Law, as it stood when the law was passed in 1891, gave to resident magistrates courts jurisdiction to try summary conviction offences committed at sea within three miles of the coast line of each parish

p.39 l.31

50 Section 267 was amended by the Territorial Sea Act, 1971, Second Schedule, paragraph 8, so as to extend this jurisdiction to twelve miles from the parish coastline. Further, Article 19 of the 1958 Convention was not offended because the "Star Baby" was not upon innocent passage, and because what was done disturbed the good order of the territorial sea, as well as the good order of Jamaica itself. It followed that the appeals against conviction must be dismissed.

p.40 l.31

p.41 l.34

p.41 l.48

10. There were also appeals against sentences. The sentences were not unduly harsh, severe or

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- p.42 l.10 excessive, but the maximum period of imprisonment that could be awarded by a resident magistrate for default in payment of a fine was, by Section 195(1) of the Judicature (Resident Magistrates) Law, six months. The award of twelve months' imprisonment in default of payment was therefore reduced to six months.
- pp43-46 11. The decision of the Court of Appeal in the second appeal was given by Watkins, Ag.J.A. His Lordship said that the power to order forfeiture derived solely from statute. Therefore any order for forfeiture which did not comply with statutory requirements was bad. His Lordship then referred to the provisions set out in Section 4 of the Dangerous Drugs (Amendment) Act, 1974, and to the provisions which this section replaced. Among other changes the new law laid down, for the first term, criteria to be satisfied before forfeiture could be ordered. The evidence satisfying these criteria must be adduced in the course of the proceedings leading to a conviction, not in a hearing subsequent thereto. In the present case there had been an adjournment when, on conviction, forfeiture was sought. The resumed hearing was not confined to submissions on the evidence already adduced; new evidence was admitted. No statutory authority existed for such a procedure, and the appeal therefore must be allowed. 10 20 30
- p45, l.35
- p.46 l.20
12. It is respectfully submitted, as to the first appeal, that the Court of Appeal were right in upholding the convictions but varying the sentence, for the reasons given. The Respondents would add that a further reason for holding that Article 19 of the Convention on the Territorial Sea did not exclude jurisdiction lies in the fact that in this case the exercise of criminal jurisdiction was necessary for the suppression of illicit traffic in narcotic drugs. In the alternative the Respondents submit that Article 19 has no relevance in the circumstances of this case. The Article applies where a crime is committed on board a ship during its passage through the territorial seas. Then offences charged were both continuing offences, and the evidence adduced points irresistably, it is submitted, to the conclusion that the Appellants had come to Jamaica on illicit business and while within the territorial jurisdiction of the Resident Magistrates Court committed the offences for which they were charged and accordingly at the material time the ship was not an innocent passage through the territorial sea. 40 50
13. As to the Second Appeal, it is respectfully

submitted that the order for forfeiture is part of the sentencing process of the Court and in general is obliged to hear evidence in order to pass the appropriate sentence; a fortiori when as in the instant case a special or additional punishment or sanction depends on the finding of some particular fact or state of mind (See Section 4 of The Dangerous Drugs Act, 1974, now section 24(2)(2) of the Dangerous Drugs Act (Revised Edition) the evidence is admissible for or against the imposition of such punishment or sanction. It is further submitted that when the sanction involves forfeiture of the property of a person other than a convicted accused such person has a right to be heard - audi alteram partem. In that regard it is submitted that the proper time for the tendering of such evidence is after conviction because:

- (1) The question of forfeiture only arises after conviction;
- (2) The evidence in relation to this question may be either:
 - (a) irrelevant to the issue of guilt or innocence; or
 - (b) if relevant its prejudicial effect may considerably outweigh its probative value.

14. It is respectfully submitted that the Court of Appeal erred in holding that at an adjourned hearing only submissions in law could be entertained because the general powers of adjournment conferred by Section 169 of the Judicature (Resident Magistrate Act), are not subject to any such limitations. Further, as the adjournment was granted on the application of and for the benefit of the defence, a complaint on this ground ought not to have been entertained. (R.v. Herby McDonald [1972] 18 West Indian Reports page 89 at page 93). It is respectfully submitted that evidence tendered after conviction at a hearing adjourned for the purpose was necessary to the determination of the vital question - whether or not the owner permitted the ships to be used in the commission of the offence - and this was in accord with the law and accepted practice and procedure.

15. It is respectfully submitted that in all the circumstances of the case the Resident Magistrate acted correctly in making an order for forfeiture of the ships upon the application of the prosecution.

R E A S O N S

- (1) BECAUSE, in the first appeal, the Resident

Record

Magistrate had jurisdiction to hear and dispose of the charges.

- (2) BECAUSE, in the first appeal, the judgment of the Court of Appeal was right and ought to be affirmed.
- (3) BECAUSE, in the second appeal, the Court of Appeal erred.
- (4) BECAUSE, in the second appeal, the Resident Magistrate acted judicially in ordering forfeiture.

10

J. S. KERR

GERALD DAVIES

A P P E N D I X

Jamaica Statutes

Dangerous Drugs Law

Section 7(c) "Every person who
.....
has in his possession any prepared opium or ganja;
.....
shall be guilty of an offence against the Law."

Section 22(1) "Every person who

(e) uses any conveyance for carrying ganja or for the purpose of selling or otherwise dealing in ganja or being the or person in charge of any conveyance, permits it to be so used."

(This subsection was introduced by the Dangerous Drugs (Amendment) Act No.10 of 1964, save that the word 'vehicle' was used instead of 'conveyance'. Conveyance' was substituted for 'vehicle' by Section 3(e) of the Dangerous Drugs (Amendment) Act No. 16 of 1974).

Section 23A

(2) On the conviction of any person for an offence against this Law, the Court shall, upon the application of the prosecution, order the forfeiture of any conveyance used in the commission of the offence, and seized pursuant to this section, if the Court is satisfied that:

(a) such person owns the conveyance, or the owner thereof permitted it to be so used; or

(b) the circumstances are otherwise such that it is just so to order;

(3) If, upon the application of any person prejudiced by an order made by the Court under subsection (2), the Court is satisfied that it is just to revoke such order, the Court may, upon such terms and conditions (if any) as it deems meet, revoke that order.

(4)

(Introduced by Section 4 of the Dangerous Drugs (Amendment) Law No. 16 of 1974).

Section 23B.

"In this Part "conveyance" included any vehicle, ship,

aircraft or other means of transport."

(Introduced by section 5 of the Dangerous Drugs (Amendment) Act, No.16 of 1974).

Judicature

The (Resident Magistrates) Law (as it stood prior to the coming into force of the Territorial Sea Act 1971).

Section 267

"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."

By the Second Schedule to the Territorial Sea Act, No.14 of 1971, the following was substituted for the above proviso:

"Provided that 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, and to the part of the sea within such distance beyond the inner limit of the territorial waters adjacent to 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, but nothing in the foregoing provisions of this section shall be taken to confer jurisdiction extending beyond the outer limits of the territorial sea, whether as extending one mile beyond any such boundary as aforesaid or otherwise; and 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."

The Territorial Sea Act, 1971

Section 3(1)

"The Territorial sea shall comprise the waters of so much of the sea adjacent to the coast of Jamaica, and shall have such limits, as may be in keeping with the provisions of this Act, and with any regulations made under Section 6, in all respects so provided for or prescribed for the time being and, in other respects, with the Convention."

(2) "The territorial sea shall be twelve miles in breadth or shall have such other breadth as may be prescribed."

(3) "The waters, within the limits, which are mentioned in subsection (1) shall be territorial waters of Jamaica and such references to territorial waters of the Island as were expressed (in whatever terms) or implied immediately before the date of commencement of this Act in any laws, being laws continuing in force or brought into operation in Jamaica on or after that date, shall, in relation to any period commencing thereon or thereafter, be construed accordingly except where the context is such that it is inappropriate."

.....

Section 4(1) "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 of Jamaica, be punishable on indictment according to the law of Jamaica for the time being in force,

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 subsection (5) be arrested, and may be tried and otherwise dealt with in reference to any charge made against him in connection with that offence, accordingly

.....

(3) "At the commencement of this Act, the Territorial Water Jurisdiction Act 1878, in so far as it forms part of the law of Jamaica, shall cease to have effect."

(4) "Nothing in this section shall

.....

- (b) abrogate or abridge any criminal jurisdiction conferred on any court by virtue of any provisions contained as aforesaid" (i.e. "contained immediately before the commencement of this Act in any law having effect thereafter as part of the law of Jamaica").

.....

and references in this section to provisions contained in any law immediately before the commencement of this Act include references to provisions as construed or having effect under section 3 which were so contained."

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

FIRST SCHEDULE

Text of Articles of Convention on the Territorial
Sea and Contiguous Zone

PART I

Territorial Sea

Section 1 - General

Article 1

1. "The sovereignty of a State extends beyond its land territory and its internal waters to a belt of sea adjacent to its coast described as its territorial sea."
2. "This sovereignty is exercised subject to the provisions of these articles and to other rules of international law."

Section III - Right of Innocent Passage

Sub-section A. - Rules applicable to all Ships

Article 14

1. Subject to the provisions of these articles, ships of all States, whether coastal or not, shall enjoy the right of innocent passage through the territorial sea.
2. 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.

.....

4. 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.

.....

Article 16

1. The coastal State may take the necessary steps in the territorial sea to prevent passage which is not innocent.

Article 19

1. "The criminal jurisdiction of the coastal State should not

be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connexion with any crime committed on board the ship during its passage, save only in the following cases:

- (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 of 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.

2. The above provisions do not affect the right of the coastal State to take any steps authorised by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.

3. In the cases provided for in paragraphs 1 and 2 of this article, the coastal State shall, if the captain so requests, advise the consular authority of the flag State before taking any steps, and shall facilitate contact between such authority and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.

4. In considering whether or how an arrest should be made, the local authorities shall pay due regard to the interests of navigation.

5. 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 investigation in connexion 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."

Nos. 47 and 48 of 1975

IN THE PRIVY COUNCIL

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FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N:

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TERRY HYLTON Appellants

- and -

THE QUEEN Respondent

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- and -

TERRY HYLTON
BERNARD PIANKA
(Consolidated Appeals) Respondents

CASE FOR ~~RESPONDENTS~~ *THE QUEEN and THE*
DIRECTOR OF PUBLIC PROSECUTIONS

CHARLES RUSSELL & CO.,
Hale Court,
Lincoln's Inn,
London, WC2A 3UL.

Agents for the Respondents