[2010] JMCA Crim 67

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO. 20/2008

BEFORE: THE HON. MR JUSTICE HARRISON, J.A.
THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MRS JUSTICE MCINTOSH, J.A. (Ag)

ALLAN COLE v R

Mrs Tracey Ann Johnson for the Crown

Patrick Atkinson, Q.C. and Robert Fletcher for the appellant

17, 18 May and 8 October 2010

HARRISON, J.A.

Introduction

[1] This is an appeal from the decision of Her Honour Mrs Desiree C. Alleyene, Resident Magistrate for the Corporate Area Court, sitting at Half Way Tree. The appellant was charged with several offences under the Dangerous Drugs Act and was convicted on 2 July 2007, for possession of ganja, storage of ganja on his premises and taking steps preparatory to export ganja. He was sentenced as follows:

(a) possession of ganja - $15,000.00 or 3 months imprisonment at hard labour;

(b) using premises for the storage of ganja - $500,000.00 or 1 year imprisonment at hard labour;

(c) taking steps preparatory to export ganja - $500,000.00 or 18 months imprisonment at hard labour and a mandatory sentence of 18 months imprisonment.

The court further ordered that if the fines were not paid, the sentences were to run concurrently "but consecutive to the mandatory sentence". No verdict was arrived at on the dealing in ganja charge and no order was made in respect of the conspiracy to export ganja, which were the other offences for which he was charged.

The Case for the Prosecution

[2] On 6 February 2002, at about 1:15 in the afternoon, a party of about 12-14 police officers, including Detective Sergeant Uriel Smith and Detective Sergeant Radcliffe Levy of Narcotics Headquarters, 230 Spanish Town Road, Kingston went to premises No 14 Deanery Drive in Vineyard Town, Kingston 3 in search of drugs. On the arrival of the police, the appellant and five other men were seen on the verandah of a house on the premises. Sergeant Levy identified himself to the men, read a search warrant to them and the appellant replied, "Officer mi nah give you no trouble mi just have a little weed inside to show you." He was cautioned by Sergeant Levy and when asked if there were other occupants in the house, he replied that there was only his father who was bed-ridden.

[3] Both Sergeants Levy and Smith were taken into the house by the appellant and he showed them an antique stereo. Sergeant Levy took two plastic bags, the size of

garbage bags, from beneath the stereo. The bags were opened in the presence of the appellant and the five other persons, and vegetable matter resembling ganja was found in them.

[4] The police officers were led by the appellant to a second room which was occupied by his father. They next went to the rear of the house and it was observed that the door for a room was locked. Sergeant Levy asked the men who was in charge of that room and the appellant replied, "I am the person." The appellant then took a key from his pocket which he used to open the door. This room appeared to be a kitchen. The cupboards were searched in the presence of the appellant and the other men and 11 cardboard boxes marked "JAMAICA PRODUCE" were taken from the cupboards. Four additional rectangular compressed packages wrapped in masking tape, were also taken from the cupboards. The boxes and packages were opened by Sergeants Levy and Smith in the presence of the men and they contained vegetable matter resembling ganja. Sergeant Levy pointed out the ganja to the men. When the appellant was cautioned, he said, "One man named Short man come left them yah so, a set them set me up."

[5] The cardboard boxes, the rectangular shaped packages, the two bags that were found beneath the stereo and the men were taken to the Narcotics Headquarters. The packages, boxes and bags were labelled and sealed by Sergeant Levy in the presence of the six men. They were charged with the offences of possession of ganja, dealing in

ganja, taking steps preparatory to export ganja, conspiracy to export ganja and using premises for the storage of ganja.

[6] Five of the defendants were dismissed of the charges at the trial after the Crown offered no evidence against them. The case was proceeded with, however, against the appellant. During the course of the trial in 2007, the court was convened at the Narcotics Headquarters. The exhibits that were seized by the police were examined by the learned Resident Magistrate, the prosecutor and the defence. The packages which contained the ganja as well as the ganja itself had become badly deteriorated. The numbers 453/2002, which were placed on the packages, were still intact. Counsel for the appellant objected to admission into evidence of the deteriorated packages and their contents but the learned Resident Magistrate overruled the objection and admitted the ganja into evidence (exhibit A).

[7] The court resumed its sitting at Half Way Tree and Detective Sergeant Levy was cross-examined. He was asked inter alia, about the number of kitchens that were in the house. It was suggested to him that the premises had two kitchens but he replied that only one kitchen was there when he had gone to the premises in 2002. A photograph of premises was shown to him and he agreed that it looked like the premises in question. The photograph was admitted into evidence as exhibit 1. He agreed that as one enters the house there is a grilled verandah that to the right of the living room there is a corridor that leads to the back of the house. Another photograph was admitted into evidence as exhibit 2. The sergeant agreed that from that corridor to the right there

were four rooms. He also agreed that the ganja was found in a kitchen on the right side. Further cross-examination of Sergeant Levy revealed the following:

"Ques: To the right of that corridor is another kitchen?

Ans. No sir, I did not see another kitchen.

Ques. The house is still in existence?

Ans. I am not sure.

Ques. Further down that corridor on the left past (sic) the bedroom is Mr. Cole's father bedroom

Ans: Not so.

Ques: That house on the left side has 2 bathrooms, 2 bedrooms and a kitchen and on the other side has 2 bathrooms, two bedrooms and a kitchen, it has 2 residences?

Ans: No sir.

Ques: I suggest to you that on the left side of the house was the side occupied by Mr. Cole?

Ans: I cannot speak of that, sir the day in question I was shown various areas occupied by Mr. Cole, three bedrooms, bathroom, kitchen.

Ques: Do you see a bedroom Mr. Cole told you was occupied by him?

Ans: Yes.

Ques: Was that on the left side of the house?

Ans: On the right side."

[8] Detective Sergeant Levy agreed with learned Queen's Counsel Mr. Patrick Atkinson that when the ganja was found the appellant did tell him that he was being "set up". The sergeant disagreed with learned Queen's Counsel that on 6 February 2002, a Mr Carl Mahadeo was living on the premises. He said he was not told that Mahadeo was a tenant. He had seen the appellant's father in the front bedroom which was on the left side of the house. He disagreed that the father had occupied a room to the back of the house. He said that he had gone into all of the rooms in the house and had not seen a kitchen on the left side of the house. He further disagreed with Queen's Counsel that Mahadeo had been living on the left side of the house.

[9] The sergeant was asked about the layout of the house and this is what is recorded:

> "Ques: There are 4 bedrooms - 2 on the right, 2 on the left?
>
> Ans: I saw 3 bedrooms
>
> .
>
> Ques: How many of those bedrooms on the right side of the house?
>
> Ans: Two (2) on the right one to the left.
>
> Ques: I am suggesting, two on the right two on the left?
>
> Ans. I saw 3 bedrooms - two on the right, one on the left.
>
> Ques: There were 2 bathrooms - one on the right one on the left?
>
> Ans: Yes sir."

[10] Detective Sergeant Levy also testified, under cross-examination, that he had found documents pertaining to the appellant in a front bedroom to the right side of the house. He had also seen photographs of the appellant hung on a wall in that room. The appellant's father who was bed-ridden had occupied a front bedroom on the left side.

[11] When Detective Sergeant Levy was asked about the key for the door, he said it was a "yale lock like key" that was used by the appellant to open the door for the kitchen.

[12] During cross-examination of Sergeant Levy, the defence made a request for the court to visit the locus in quo. The record of appeal shows that the prosecutor had raised an objection in relation to the visit. A note which was recorded by the learned Resident Magistrate reads as follows:

> "Any structural change, addition in them in terms of building, were any rooms added – location has to remain the same as the time the incident took place."

[13] The learned Resident Magistrate granted the request and on 27 June 2007, the magistrate, defence counsel, clerk of the courts and the police visited the locus in quo. A further note is recorded at page 39 of the notes of evidence and it states as follows:

> "**JUDICIAL NOTICE AT LOCUS IN QUO**.
>
> Marks seen to explain seal off of other kitchen from living room. The lock seemed like a regular kitchen lock difference in lock not of much importance."

[14] On resumption of the trial at the Half Way Tree court, Detective Sergeant Levy was further cross-examined about the layout of the house. He said that there were two kitchens in the house at the time of the visit. He had seen two bedrooms, a bathroom and a kitchen to the right side of the house. He had also seen a similar layout on the left side of the house and that the living room adjoined the kitchen. He said this was a totally different layout to what he had seen in 2002. When he was asked about the difference he said:

> "What I saw to the right of the house is still intact except for a bed I saw in the kitchen to the right of the house. There was no kitchen adjoining the living room, no bathroom and a bedroom to the back, there was only a bedroom to the front."

[15] Detective Sergeant Levy was also questioned about the kitchen that was located on the right side of the house and the key used to open that door. The following dialogue is recorded:

> "Q: You described the kitchen on the right side of the house?
>
> A: Yes sir.
>
> Q: You saw a key to that door today?
>
> A: Yes sir.
>
> Q: That key was different from the one you described and said you saw on that occasion?
>
> A: Yes.
>
> Q: You said the lock is a different type from the one you saw?

A: Yes sir, that is correct.

Q: You know if the lock you saw that day was a dead bolt lock?

A: Yes sir, a dead bolt."

[16] Detective Sergeant Smith was also cross-examined after the visit to the locus in quo. The following dialogue is recorded at pages 46-41:

"Q: You observed 4 bedrooms, 2 bathrooms, 2 kitchens that day?

A: Yes.

Q: Bedrooms, bathroom, bedroom, kitchen?

A: Yes.

Q: You saw kitchen, sink, counter, closet?

A: Yes.

Q: On the left side, you saw 2 bedrooms, bathroom just behind the living room a kitchen?

A: Yes sir.

Q: Did you observe all of that in 2002?

A: No sir. I only saw one room to the left, there was no access to the kitchen at that time. No other bedroom. I did not observe the other bathroom to the left.

…

Q: Did you see the key to the kitchen?

A: Yes sir. I can't recall if that was the key I saw when I searched the kitchen.

Q: Was the room locked, the kitchen room when you left to take Mr. Cole to the station?

A: No."

[17] Detective Sergeant Smith also testified that the layout of the premises which he saw in 2007 was different to what he had observed in 2002. He said that he did assist Detective Sergeant Levy to search all the rooms in the house. He disagreed with learned Queen's Counsel that the appellant's father had occupied a rear bedroom to the left side of the house.

[18] Ms Marcia Dunbar, government analyst, attached to the forensic science laboratory, Kingston also gave evidence on behalf of the Crown. She holds a BSc Special Chemistry degree from the University of the West Indies (UWI) Mona and an MSc degree in Forensic Chemistry from the University of Strathclyde, Glasgow, Scotland. She testified that she had received 11 cartons, four sealed parcels and two sealed bags which contained the exhibits, from Detective Sergeant Levy on 25 February 2002. Sixty-two samples were removed from each parcel by her and assistants at the laboratory and were placed in a separate plastic bag. Examination and tests were carried out by her and an assistant on the vegetable matter that was removed from each parcel. This examination had revealed parts of the plant cannabis sativa and the resin was not extracted. She concluded that the vegetable matter was ganja. A certificate was prepared which she signed and she affixed numbers 453/2002 to the exhibits.

The Defence

[19] The appellant gave sworn evidence. He testified that he is a sports analyst and part-time football coach and that he had lived at 14 Deanery Drive, Vineyard Town, Kingston, since 1970. His parents had also lived there.

[20] He said that on 6 February 2002, at about 1:15 pm, he was at home with five other persons when the police arrived there. Detective Sergeant Levy identified himself to them and read a warrant to him. Detective Sergeant Levy told him that he would like to search the house and he told him that he was free to do so because he only had a "spliff" for his personal use. He said that the police led him to the right side of the house and that they went directly to the back section of the house. Detective Sergeant Levy then went over to a ledge, removed a key and used it to open a kitchen door. He told the police that it was Mr Mahadeo Williams who had used that kitchen and that he had rented that part of the house to him. This section, he said, was made up of two bedrooms, a kitchen and a bathroom. He also testified that the last room on the left of the house was occupied by a Mr Frederick Power, a paraplegic and that he had told the police during a question and answer session about both Mr Power and Mr Williams.

[21] The appellant said that Detective Sergeant Levy entered the kitchen, opened the kitchen cupboards and found the marijuana. He said he told the police that "Indian set me up". His room was searched by the police and thereafter he was taken into the yard. The contraband he said, was removed from the back of the house and nothing was taken from the living room. He and the other men were taken to the Narcotics

Headquarters where they were charged. He denied that the "narcotics" belonged to him.

[22] The appellant also testified that no structural changes had been made to his house since 1970. He said that when the police visited the premises on 6 February 2002 it was in the same condition as it was on 27 June 2007.

[23] The appellant was cross-examined quite extensively but he denied that he was caught "red-handed" by the police. It was also suggested to him that there was no tenant by the name of Williams but he said that was the truth.

[24] The appellant called Mr Michael Vernon, traffic manager for Jamaica Urban Transport Company (JUTC) as a witness on his behalf. Mr Vernon said he had known the appellant for 38 years and that during that time he had the opportunity to observe and assess his character. He said he would accept his word. He also said that the appellant was always concerned about others and wanted to see if there was anything that he could do to improve their "standard". Mr Vernon said that when he became aware of the arrest of the appellant he was surprised "tremendously" because this behaviour was not consistent with the person that he knew. He further testified that they had attended Kingston College, played football together and were quite close. He would also visit the appellant's home quite often and at times they played a game of dominoes. He also told the court that he never expected to hear that the police had found that quantity of ganja at the appellant's house.

Findings of Fact

[25] The following findings of fact were made by the learned Resident Magistrate:

> "When the Court visited the premises and observed the lock on the door, it was a lock opened with a traditional long key. Det. Sgt. Levy said that was not the lock on the door which he saw at the relevant date. However the Court could not make a determination as to when that lock was placed on the door, but there was no evidence that a yale like lock was there. In any event if the officer had taken the key and opened the door as counsel said he did, and the traditional long key lock was there, he would have been more prone to remember the lock. The lock issue would be determined in favour of the prosecution, as if the officer was mistaken, this is more consistent with Mr. Allan Cole himself, taking the key from his short jeans pocket and opening the door to the kitchen, as stated by Det. Sgt. Levy." (page 64)
>
> "Counsel for the defence, Mr. Patrick Atkinson, in his submissions argued that the fact that both officers said the house contained three bedrooms — two on the right and one on the left — a bathroom, a kitchen and a living room when a visit to the locus showed that the house had four bedrooms — two on the left, two on the right — and two bathrooms, one on the left, one on the right, two kitchens showed the prosecution's case cannot stand, if the house was in the same condition it was in 2002 at the time the ganja was found." (pages 64-65)
>
> "In the Court's opinion, these discrepancies did not go to root of the prosecution's case. In any event, the holes along the top and sides of the two openings separating the living room from the second kitchen and the back of the house which includes the second bedroom, causes the Court to infer that there was something placed in these openings which could have caused the officers not to notice the rest of the house." (page 65)
>
> "The Court recognizes that Mr. Cole does not have to prove anything, it is the prosecution who has to prove its case beyond a reasonable doubt, however it has to consider his testimony. The Court finds that Mr. Cole is not a witness of truth. That the ganja did not belong to any Mr. Williams, the

Court doubts that there was a tenant in the house named Mr. Williams who occupied the right side of the house. The Court takes judicial notice that the hole marks which the Court saw at the openings separating the second kitchen from the living room are too near apart (about an inch or two apart) to hang pictures on each hole. This observation causes the Court to further view the testimony of Mr. Cole as not believable. Further, the Court finds that he did tell the officers that "Shortman" left them there. However, in his evidence he said the kitchen was under the control of the tenant Mahadeo Williams." (pages 66-67)

"The Court finds it instructive that he did not deny that the cartons of ganja were found in the kitchen of his home and that they were labelled and sealed in his presence. His defence is that it all belonged to a tenant. The officers (sic) evidence which the Court accepts, are:

- that when they showed the warrant to Mr. Cole he said, "officer me nah give you no trouble me just have a little weed inside to show you," that he said only himself and his bedridden father were the occupants of the house;

- that they entered the accused (sic) house, found two bags of ganja in the living room, the right front bedroom had photographs and clothes which identified it as the accused room;

- that he admitted that it was his;

- that he admitted that the bedroom with the horse paraphernalia was his;

- that the only room locked was the kitchen to the right;

- on the request of Det. Sgt. Levy the accused took the key from the pocket of his jeans shorts and opened the kitchen door." (page 67)

> "In the cupboard of that kitchen the cartons of ganja were found." (page 68)
>
> "The Court finds that the prosecution had proved its case beyond a reasonable doubt, Mr. Allan Cole was thereupon found guilty of the offences as charged and sentenced accordingly." (page 68)

Notice and Grounds of Appeal

[26] The appellant gave verbal notice of appeal on 2 July 2007 and was granted bail pending hearing of the appeal. A single ground of appeal was filed on 27 July 2007, but it was not pursued by the appellant at the hearing of the appeal. Mr Patrick Atkinson Q.C., for the appellant, sought and obtained leave to argue the following supplementary grounds of appeal:

> "1. The Learned Resident Magistrate erred in Law when she failed to properly consider the important issue of whether the Ganja was found in the residence of the Appellant or that of a tenant, and treated the issues arising therefrom as discrepancies.
>
> 2. The Learned Resident Magistrate erred in Law when she failed to adequately address the discrepancies in the Crown's case.
>
> 3. The Learned Resident Magistrate was in fundamental error when she resolved a doubt in the evidence on the central and critical issue in the case in favour of the prosecution.
>
> 4. The Learned Resident Magistrate erred in Law when she found the Appellant guilty of "taking steps Preparatory to Export Ganja" when there was no evidence adduced to support that charge.

5. The Learned Resident Magistrate erred in Law in finding that the vegetable matter was Ganja as defined by law when there was no competent evidence that it was the Cannabis Sativa and no sufficient evidence that it contained Cannabis resin.

6. The Learned Resident Magistrate erred in Law in failing to acknowledge or to address her mind to the Appellant's good character.

7. The Appellant was denied a fair trial when it was delayed for more than five (5) years resulting in memory loss of witnesses in critical areas of the evidence, and the raising of prejudicial issues concerning the state of the premises and deterioration of the exhibits.

8. The inordinate delay between conviction and the hearing of the appeal was largely due to the lapse of over one year four months and two weeks between Notice of Appeal and the Record of the case being available to this Honourable Court of Appeal,(sic) is a breach of the Appellant's rights and contrary to the interests of Justice.

9. The Learned Trial Judge erred in law when she sentenced the Appellant to eighteen (18) months "mandatory" imprisonment, when there is no provision in Law for any such mandatory imprisonment."

Submissions and Analyses

Grounds 1, 2 and 3

[27] These three grounds were argued together by Mr Atkinson, Q.C. They raise issues concerning (a) the layout of the premises; (b) inferences drawn by the Resident Magistrate from observations made by her at the locus in quo, (c) the type of key that

was used to open the door for the kitchen; and (d) doubt whether a tenant had occupied a section of the house.

[28] Learned Queen's Counsel argued that the fundamental question for determination at the trial was whether the ganja that was found in the house was taken from a section of the building which was occupied by the appellant. He submitted that there were fundamental discrepancies on the prosecution's case. The evidence, he said, revealed that there were two distinct sections in the building which comprised two bedrooms, one bathroom, and one kitchen on either side of the house.

[29] Mr Atkinson Q.C. also submitted that issue was joined between the prosecution and the appellant over how the officers gained possession of the key and how the lock to the kitchen was opened. He further submitted that Detective Sergeant Levy had given a specific description of the key and the lock and that this was inconsistent with what was observed at the locus in quo.

[30] Learned Queen's Counsel was further critical of the manner in which the Resident Magistrate had resolved an issue of doubt. At pages 66-67 the Resident Magistrate stated:

> "The Court recognizes that Mr. Cole does not have to prove anything, it is the prosecution who has to prove its case beyond a reasonable doubt, however it has to consider his testimony. The Court finds that Mr. Cole is not a witness of truth. That the ganja did not belong to any Mr. Williams, the Court doubts that there was a tenant in the house named Mr. Williams who occupied the right side of the house."

[31] Mr Atkinson Q.C. submitted that the learned Resident Magistrate made a fundamental error which ran contrary to a well-established principle of law which states that once doubts arise in the case they should be resolved in favour of the accused.

[32] Mrs Johnson, for the Crown, submitted that the learned Resident Magistrate was entitled to: (1) weigh the evidence with regards to the existence of a second kitchen in light of the observations which she made at the locus in quo; and (ii) determine whether there were discrepancies and if so, whether they were material or insignificant and if they could be resolved. Mrs Johnson submitted that important to that determination was an assessment of whether there were any changes to - 'the locus in quo" - between the time of the incident and the time of the trial. She argued that the learned Resident Magistrate clearly took into consideration Detective Sergeant Levy's evidence regarding what he said had obtained in 2002 when he went to the premises, and juxtaposed this with the evidence of Detective Sergeant Smith.

[33] With regards to the word "doubts" used by the Resident Magistrate, Mrs Johnson submitted that it should not be viewed in isolation and should be looked at in the context within which she made her findings. She submitted that the Resident Magistrate had rejected the appellant's defence and definitively stated that she did not find that the ganja belonged to any Mr Williams. She further submitted that what the magistrate was saying was that, it was highly unlikely that any tenant named Mr Williams existed but that even if he did she found that the ganja did not belong to him.

[34] I turn first to the visit of the locus in quo. It is beyond dispute that the magistrate's discretion to visit the scene cannot be interfered with so long as it has been judicially exercised - see **R v Herman Williams** (1971) 17 WIR 369. It is also abundantly clear that a visit to the locus is only undertaken in circumstances where in the opinion of the court it would serve to clarify the evidence given, for the benefit of the tribunal of fact. Of course, there is a pre-condition to the decision to visit and that is, there ought to be evidence that the locality has remained unchanged since the commission of the alleged offence - see **R v Kirk Manning** SCCA No. 43/99 delivered 20 March 2000.

[35] It is observed from the record of appeal that the prosecution had objected to the visit of the locus in quo. There was concern it would seem whether or not the locality had remained unchanged since 2002. For my part, looking at the record, I would agree with counsel at the trial, that a sufficient foundation was not laid in order for the magistrate to have exercised her discretion in favour of the visit. It ought to be remembered that evidence obtained at the scene is of extreme importance since in relation to the facts, it is the magistrate's duty under section 291 of the Judicature (Resident Magistrates) Act to find facts in the case so as "to provide an intelligible narrative to connect those facts together" (per Sir Brian Neill in **Bernal and Moore v Regina** (1997) 51 WIR 241).

[36] When the learned Resident Magistrate visited the locus in quo in the instant case, she made certain observations and drew inferences which led her to make some

findings of fact. The record does not disclose if any questions were asked by the Resident Magistrate at the scene or in court concerning what she had observed. At page 63 of the record of appeal she stated:

> "On the left of that living room was a bedroom to the front (the room which the officers said Mr. Cole Snr. occupied at the time they visited the premises), a bathroom and another bedroom. In the middle of the house straight ahead from the living room was another kitchen. **However, there were two large openings which led from the said living room to that kitchen. There were fairly small holes at the top of one of the openings which holes ran along both sides of that opening**. **This suggests that something was attached to that opening which could have blocked the view of that second kitchen from the living room. The other large opening was one which a door could fit in**. There were fairly small holes at the top of that opening also." (emphasis supplied)

At page 65 she concluded:

> "In the Court's opinion, these discrepancies did not go to (sic) root of the prosecution's case. In any event, the holes along the top and sides of the two openings separating the living room from the second kitchen and the back of the house which includes the second bedroom, causes the Court to infer that there was something placed in these openings which could have caused the officers not to notice the rest of the house."

[37] Quite remarkably, the Resident Magistrate stated at page 67:

> "…The Court takes **judicial notice** that the hole marks which the Court saw at the openings separating the second kitchen from the living room are too near apart (about an inch or two apart) to hang pictures on each hole." (emphasis supplied)

Then she concluded:

> "This observation causes the Court to further view the testimony of Mr. Cole as not believable ..."

[38] I turn next to look at the concept of judicial notice. In Cross on Evidence, 6th Edition (1985) Chapter 11 which is entitled 'Matters not requiring proof and judicial findings as evidence', the author commences his approach thus:

> "The general rule is that all of the facts in issue or relevant to the issue in a given case must be proved by evidence testimony, hearsay statements, documents and things…
>
> There are a number of exceptions to this general rule. In some cases the judge, or trier of fact, is entitled to find a fact of his own motion, he may take judicial notice of it. In others a party may make a formal admission of relevant matters…"

He continues:

> "When a court takes judicial notice of a fact, as it may in civil and criminal cases alike, it declares that it will find that the fact exists, or direct a jury to do so, although the existence of the fact has not been established by evidence…"

[39] In a later section Professor Cross discusses the question of "Personal Knowledge" and observes that, "The general rule is that neither a judge nor a juror may act on his personal knowledge of facts." He observes that this rule has reference to particular facts, and further on "that the basic essential is that the fact judicially noticed should be of a class that is so generally known as to give rise to the presumption that all persons are aware of it".

[40] Phipson on Evidence (1982) 13th Edition is to like effect. At paragraph 2-06 it states:

> "Courts will take judicial notice of the various matters enumerated below, these being so notorious or clearly established or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary …"

At paragraph 2 - 08:

> "Judge or jury as witnesses: Although, however, judges and juries may, in arriving at decisions, use their general information and that knowledge of the common affairs of life which men of ordinary intelligence possess, they may not, as might juries formerly, act on their own private knowledge or belief regarding the facts of the particular case …"

[41] In Halsbury's, 4th Edition (1976) Vol. 17 at paragraph 108 the following appears:

> "Notorious Facts: The court takes judicial notice of matters with which men of ordinary intelligence are acquainted, whether in human affairs, including the way in which business is carried on, or human nature or in relation to natural phenomena."

[42] The passages cited above indicate some of the factors that are relevant to this case. In my judgment, there was no justification in law for the Resident Magistrate to have taken judicial notice of holes and openings seen by her at the locus in quo. The conclusions which she drew from these observations were highly speculative and ought not to have been used as evidence in the case. Furthermore, she had used these observations to conclude that the testimony of the appellant was not "believable". This was patently wrong.

[43] I now turn to the issue concerning the key. Detective Sergeant Levy said, both in chief and in cross-examination, that it was a "yale lock like key" he had seen on his

visit in 2002. He disagreed with the suggestion put to him in cross-examination that the key was a "long traditional key".

[44] In my judgment, the learned Resident Magistrate clearly accepted the evidence of Detective Sergeant Levy that it was a "yale lock like key" that the appellant himself took from his jeans shorts pocket and opened the door to the kitchen.

[45] I do agree with the submissions of Mrs Johnson on the issue concerning the use of the word "doubts" by the Resident Magistrate. The magistrate had quite properly held that the burden of proof rested squarely on the shoulders of the prosecution and that the Crown had to prove its case "beyond a reasonable doubt". She found that the appellant was not a witness of truth and definitively stated that she did not find that the ganja belonged to any Mr Williams. In my view, when the magistrate stated that "the court doubts that there was a tenant in the house named Mr Williams who occupied the right side of the house", she was simply saying that even if Mr Williams existed, she nevertheless found that the ganja did not belong to him. What cannot be ignored is that the police did not only find ganja in that kitchen but two bags containing ganja were also found in the living room.

[46] How then should grounds 1, 2 and 3 be resolved? A vital part of the case for the defence was that there was a second kitchen in the house at Deanery Drive at the time of the commission of the offences. Indeed, a second kitchen was seen on the visit to the locus in quo in June 2007. There was really no legal basis upon which the learned

Resident Magistrate could have used her observations to arrive at her conclusions recorded at pages 63 and 65 (supra) of the record.

[47] What is left now to consider is the evidence of both police officers and the appellant. Both police officers maintained that on their visit to the premises in 2002, there was only one kitchen in existence. The appellant on the other hand, testified that no structural changes were made to the building since 2002. Detective Sergeant Levy could not recall if from a bedroom on the left side of the house, there was a corridor leading to the back of the house. He could also not recall if there was another kitchen to the right of that corridor. It was however, the prosecution's case that the ganja was found in the living room and in a kitchen on the right side of the house. There was also evidence which the magistrate accepted that the appellant had occupied a bedroom on the right side. She also accepted the evidence that items of clothing and photographs of the appellant were found in the right front bedroom. She found that the only room which was locked was the kitchen, which was on the right side of the house. The Resident Magistrate had the advantage of seeing and hearing the witnesses and was in an extremely advantageous position to assess their demeanour and credit-worthiness. It is always open to a judge to not only disbelieve a witness on a particular point, but also to reject his evidence in its entirety if there are discrepancies that are serious and go to the foundation of the Crown's case. In my judgment, the Crown had presented a strong case against the appellant. Grounds 1, 2 and 3 should therefore fail.

Grounds 4 and 9

[48] These two grounds can be conveniently dealt with together. They state as follows:

> "4. The Learned Resident Magistrate erred in Law when she found the Appellant guilty of "taking steps Preparatory to Export Ganja" when there was no evidence adduced to support that charge.
>
> 9. The learned trial judge erred in law when she sentenced the Appellant to eighteen (18) months "mandatory" imprisonment, when there is no provision in Law for any such mandatory imprisonment."

[49] The Crown conceded that the charge for "taking steps preparatory to export ganja" was not proved, so the appellant succeeds on ground 4.

[50] Ground 9 which relates to the charge of taking steps preparatory to export ganja should also succeed since the Crown conceded that the conviction for this offence was bad. The learned Resident Magistrate had imposed a "mandatory" sentence of imprisonment of 18 years in respect of the charge but there is no "mandatory" term of imprisonment under section 7A (1) of the Dangerous Drugs Act. Section 7A (1)(b) provides that for any person convicted of this offence the penalty shall be as follows:

> "(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

(ii) to imprisonment for a term not exceeding three years; or
(iii) to both such fine and imprisonment."

Ground 5

[51] This ground states as follows:

> "5. The Learned Resident Magistrate erred in Law in finding that the vegetable matter was Ganja as defined by law when there was no competent evidence that it was the Cannabis Sativa and no sufficient evidence that it contained Cannabis resin."

[52] The ground can be disposed of quite briefly. There was sufficient evidence from which the learned Resident Magistrate could have and did find that the substance in question was ganja. Evidence in proof came from Ms Marcia Dunbar, who at page 29 of the notes of evidence stated:

> "Samples were removed from each parcel by me and assistants. Examination and tests were performed on the vegetable matter that was removed from each parcel revealed parts of the plant cannibis sativa and the resin was not extracted. Concluded that the vegetable matter contained the ganja. I performed the test with the assistance of a Forensic Officer."

Ground 5 therefore fails.

Ground 6

[53] Ground 6 deals with the good character of the appellant and states as follows:

> "6. The Learned Resident Magistrate erred in Law in failing to acknowledge or to address her mind to the Appellant's good character."

[54] Mr. Atkinson Q.C. submitted that the learned Resident Magistrate had failed to properly apply the principles relating to good character evidence when considering the appellant's credibility. The following is the passage from the Resident Magistrate's judgment of which he complains:

> "The Court noted Michael Vernon's evidence of good character on behalf of the accused, when considering the accused (sic) credibility. The Court took into consideration the achievements of the accused, and did ask itself the question, would a person of such estimable worth be likely to commit the offence charged?
>
> Michael Vernon however does not know if he smokes ganja, although he knows him for 38 years. The accused did admit that he told the officers that he had a spliff in his home for his personal use."

[55] Learned Queen's Counsel contended that this approach to the evidence of good character was incorrect as the Resident Magistrate ought to have addressed her mind to the relevance of such evidence to the credibility of the appellant as well as the likelihood of him having committed the offences charged. He argued that the appellant's evidence created an evidential "deadlock" with the police witnesses so the magistrate should have done a "weighing up" of the appellant's credibility as a witness in light of the evidence of his character witness.

[56] Mrs Johnson submitted however, that it was clear from the passage referred to above, that the learned Resident Magistrate had addressed her mind to both limbs of

the directions required in **R v Vye and Others** [1993] 1 WLR 471, [1993] 3 All ER 241. She submitted that the magistrate could have expressed herself more fully, but, having regard to the transcript, it was her view that she had taken the character evidence into account and that on the facts of the case, she was justified in concluding that Mr Vernon's evidence did not assist her.

[57] Mrs Johnson further submitted that the lack of a proper good character direction will not avail the appellant where the court is satisfied that the jury would in any event have convicted - see **Bhola v The State** (2006) 68 WIR 449, **Gilbert v Regina** [2006] 1 WLR 2108 and **Simmons and Green v Regina** (2006) 68 WIR 37. She submitted that the prosecution in the instant case had mounted a formidable case against the appellant and as such there was sufficient evidence upon which the learned Resident Magistrate was justified in finding against the appellant as she did. She therefore submitted that this ground was without merit and should fail.

[58] In **Regina v Aziz** [1995] 3 WLR 53 at page 60, Lord Steyn reiterated the principles set out by Lord Taylor of Gosforth CJ in **Regina v Vye.** They state inter alia, as follows:

> "(1) A direction as to the relevance of his good character to a defendant's credibility is to be given where he has testified or made pre-trial answers or statements.
>
> (2) A direction as to the relevance of his good character to the likelihood of his having committed the offence charged is to be given, whether or not he has testified, or made pre-trial answers or statements.

(3) ….”

[59] One should note that these principles relate directly to instructions that a trial judge sitting with a jury ought to give to that jury when dealing with evidence of the good character of a defendant. The necessity for giving the directions at 1 and 2 (supra) would of course be to bring to the jury’s attention that the evidence of the appellant ought to be considered in determining whether he, being of such good character, would have committed the offence and would have had the propensity to commit the crime, and ultimately whether that being so, in the circumstances of the particular case, the jury could feel sure that the accused did in fact commit the particular offence. Lord Steyn however recognized that a residual discretion resides in the trial judge to decline to give such directions depending upon the circumstances of the case. He stated thus:

> "Prima facie the directions must be given. And the judge will often be able to place a fair and balanced picture before the jury by giving directions in accordance with **Vye** (supra) and then adding words of qualification concerning other proved or possible criminal conduct of the defendant which emerged during the trial. On the other hand, if it would make no sense to give character directions in accordance with **Vye**, the judge may in his discretion dispense with them.”

[60] The question is how do these principles apply in the instant case? The appellant was found in possession of 11 cardboard boxes, four packages and two bags containing ganja. The issue therefore which the Resident Magistrate had to determine was, given

the evidence of the appellant's good character, would it be unlikely that he would commit the offences for which he was charged?

[61] Now, learned Queen's Counsel submitted that there was an evidential "deadlock" between the evidence given by the appellant and that of the police witnesses, so the magistrate ought to have carried out a "weighing up" of the appellant's credibility, as a witness, in light of the evidence of his character witness. The Resident Magistrate, after her review of the evidence, made several findings of fact some of which were impermissible, and on the basis of these findings, decided that the appellant was guilty of the charges. In her findings she stated inter alia, that the appellant did tell the police officers that a man called "Shortman" had left the ganja in the house. However, in his evidence he had said that the kitchen where the ganja was found was under the control of the tenant Mahadeo Williams. The magistrate said she found it "instructive" that the appellant did not deny that ganja was found in his house. The magistrate accepted the evidence of Detective Sergeant Levy that when the appellant was shown the warrant and it was read to him he said, "Officer me nah give you no trouble me just have a little weed to show you." She had also accepted the evidence that the only locked room in that house was the kitchen and that it was the appellant who, upon the request of Detective Sergeant Levy to open the door, had taken a key from his jeans shorts pocket and opened the kitchen door. She also found that two bags of ganja were found in the living room and boxes and packages of ganja were taken from a cupboard in the kitchen. She rejected the defence. In effect, what the Resident Magistrate said was that

after considering all the evidence, the Crown had satisfied her that the appellant was guilty as charged.

[62] I have already set out the duties of a Resident Magistrate in fulfilling the requirements of section 291 of the Judicature (Resident Magistrates) Act as to findings of fact and will not repeat them. I pose the rhetorical question – what value could the evidence of the appellant's good character have on the plain inference to be drawn from the fact of the appellant's implication in the crimes charged? According to Carey P. (Ag) in **R v Lloyd Chuck** (1991) 28 JLR 422, "It is not ordained either by law or by practice that a Resident Magistrate must direct herself or himself on the effect of the evidence of an accused's good character." It is my view however that the appellant having stressed his good character, it behoved the Resident Magistrate to deal with it in considering the totality of the evidence presented in the case. It is not expected that the magistrate will give long and detailed directions to himself on the issue but he or she is expected to use language which demonstrates his or her knowledge of the law. It must be shown that the magistrate is aware of the law and has applied it to the evidence in the case.

[63] In my judgment, I can find no fault with the manner in which the Resident Magistrate expressed herself with regard to the character evidence of the appellant in the instant case. She was quite aware that both limbs enunciated in **Regina v Vye** (supra) had to be considered and she did just that. It might not have been elegantly

stated as learned Queen's Counsel would have wished but she did consider them. Ground 6 therefore fails.

Grounds 7 and 8

[64] I now turn to grounds 7 and 8 which were argued together. They read as follows:

> "7. The Appellant was denied a fair trial when it was delayed for more than five (5) years resulting in memory loss of witnesses in critical areas of the evidence, and the raising of prejudicial issues concerning the state of the premises and deterioration of the exhibits.
>
> 8. The inordinate delay between conviction and the hearing of the appeal was largely due to the lapse of over one year four months and two weeks between Notice of Appeal and the Record of the case being available to this Honourable Court of Appeal, is a breach of the Appellant's rights and contrary to the interests of Justice."

[65] Mr Atkinson Q.C. submitted that the trial had commenced some five years after the appellant was arrested, and that his material witness, who could speak to the circumstances in relation to the house and tenancies at the relevant time, had died. I must say however, that I have not seen any evidence of this fact in the printed record. He also argued that the appearance of the drugs had been seriously compromised. These factors, Mr Atkinson submitted, would have deprived the appellant of his constitutional right to a fair trial within a reasonable time. He further submitted that having regards to the lapse of time between conviction and the hearing of the appeal,

this was also in breach of the appellant's constitutional rights and was contrary to the interests of justice.

[66] Mrs Johnson has provided the court with a very useful summary of the chronology of events during the relevant period. This summary was extracted mainly from the court sheets for the Corporate Area Court at Half Way Tree. She conceded that there was delay in the trial of the matter but submitted that the court needed to consider the reasons for the delay. She submitted that there were eight trial dates prior to the actual start of the trial on 15 July 2003. She argued that the delay had resulted from factors such as attempting to agree trial dates, non-attendance of defence attorneys, applications for adjournments by the defence as well as the absence of some of the prosecution's witnesses. Mr Atkinson Q.C. argued however, that on many of the occasions when adjournments were granted, this was due to the fact that applications were made by other defendants who really should not have been before the court. He further argued that on those occasions when the appellant was absent, medical certificates were produced.

[67] Mrs Johnson submitted that in the circumstances, the appellant could not properly complain of delay of which he was the author or at the very least, was a significant contributor. She further submitted that in the circumstances, the delay could not have caused the trial to be unfair and that although there was delay, this did not warrant the quashing of the convictions.

[68] The right of a person charged with a criminal offence to have a fair hearing within a reasonable time is enshrined in section 20(1) of the Constitution which states:

> "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."

This subsection has three elements namely (1) a right to a fair hearing; (2) within a reasonable time; and (3) by an independent and impartial court established by law.

[69] The record of appeal has revealed that it took some five years from the date of arrest to conviction. There would be no doubt in one's mind that this period would constitute inordinate delay in the trial of the matter.

[70] In the case of **Prakash Boolell v The State** Privy Council Appeal No. 39 of 2005 delivered 16 October 2006, the appellant appealed against conviction solely on the issue of delay. The Board had to consider whether there had been a breach of section 10 (1) of the Constitution of Mauritius, which is relatively identical to section 20 (1) of the Constitution of Jamaica. The Board examined a number of recent authorities which considered the issue of delay resulting in a breach of the constitutional guarantee. These cases range from **Bell v The Director of Public Prosecutions** [1985] AC 937, **Darmalingum v The State** [2000] 1WLR 2303**, Flowers v The Queen** [2000] 1WLR 2396, **Dyer v Watson** [2004] 1AC 379 and **Attorney General's Reference** (No 2 of 2001) [2004] 2AC 72. At paragraph 32 of their Lordships' judgment in **Boolell** (supra) the court stated inter alia:

"Their Lordships accordingly consider that the following propositions should be regarded as correct…:

(i) If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10 (1) of the Constitution, whether or not the defendant has been prejudiced by the delay.

(ii) An appropriate remedy should be afforded for such breach, but the hearing should not be stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all."

[71] In **Dyer** the Board stated at paragraph 54 as follows:

"The second matter to which the court has routinely paid regard is the conduct of the defendant. In almost any fair and developed legal system it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges, changing legal advisers, absenting himself, exploiting procedural technicalities, and so on. A defendant cannot properly complain of delay of which he is the author. But procedural time-wasting on his part does not entitle the prosecuting authorities themselves to waste time unnecessarily and excessively. The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. it is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states so to organize their legal systems as to ensure that the reasonable time requirement is honoured. But nothing in the Convention jurisprudence requires courts to shut their eves as to the practical realities of litigious life even in a reasonably well-organised legal system. Thus it is not objectionable for a prosecutor to deal with cases according to what he reasonably regards as their priority, so as to achieve an orderly dispatch of business. It must be accepted that a prosecutor cannot ordinarily devote his whole time and attention to a single case. Courts are entitled to draw up their lists of cases for trial some time in advance. It may be necessary to await the availability of a judge

> possessing a special expertise or the availability of a courthouse with special facilities or security. Plans may be disrupted by unexpected illness. The pressure on a court may be increased by a sudden and unforeseen surge of business. There is no general obligation on a prosecutor…to show that he has acted `with all due diligence and expedition.' But a marked lack of expedition, if unjustified, will point towards a breach of the reasonable time requirement, and the authorities make clear that while, for purposes of the reasonable time requirement, time runs from the date when the defendant is charged, the passage of any considerable period of time before charge may call for greater than normal expedition thereafter."

[72] In determining whether delay in bringing an accused to trial constitutes a breach of his right to a fair trial within a reasonable time under section 20(1) of the Constitution, the court should therefore have regard to the length of the delay, the reasons alleged to justify it, the responsibility of the accused for asserting his rights, and any prejudice to the accused. These principles are equally relevant to post-trial delays, inclusive of the appellate stage - see **Darmalingum v. The State** [2000] Cr. App. R. 445 and **R v Eric Bell** SCCA No. 16/98 delivered 29 September 2003. For my part, I do not think that the facts as outlined at paragraph 66 (supra) could constitute a breach of the appellant's right to a fair trial.

[73] The purpose of the "reasonable time" guarantee in respect of the appellate proceedings is to avoid a person convicted remaining too long in a state of uncertainty about his fate. See paragraph 54 of **Kenneth Mills v Her Majesty's Advocate and Another**, Privy Council DRA No. 1 of 2002 delivered 22 July 2002 and **Stögmüller v Austria** (1969) 1 EHRR 155, 191, para 5. The sole issue which the former case raised

relates to the remedy which may be given to an appellant for a breach of his right to a hearing within a reasonable time under article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, where there was a delay in the hearing of his appeal which was due to an act of the prosecutor. In **Taito v the Queen** Privy Council Appeals Nos. 50 and 59 of 2001 delivered 19 March 2002, the Board stated that the proposition in **Darmalingnum** that the normal remedy is to quash the conviction, went too far. **Darmalingum** was a case where the defendant "had the shadow of the proceedings hanging over him for about 15 years". It was a wholly exceptional case.

[74] The record of appeal indicates that the certified copy of the notes of evidence taken by the magistrate was received in the Registry of this court on 21 May 2009. This would be almost two years after the appellant's conviction. Section 299 of the Judicature (Resident Magistrates) Act provides:

> "299. The Clerk of the Courts shall not later than fourteen days after the receipt of the notice of appeal, forward to the Registrar of the Court of Appeal the record of the case together with the notes of evidence or a copy of the same certified as herein mentioned and all documents which have been received as evidence or copies of the same certified as herein mentioned."

[75] The question is whether a post conviction delay of almost two years is inordinate in the light of section 299. In my judgment, such delay without more constitutes a breach of the appellant's constitutional right to a hearing of his appeal within reasonable time.

Conclusion

[76] Eight years have elapsed since the offences were committed but fortunately the appellant was on bail during the trial and was granted bail by the Resident Magistrate after he had given verbal notice of appeal. In my judgment, the conviction of the appellant in respect of taking steps preparatory to export ganja cannot stand. I would however, dismiss the appeal and affirm the convictions in respect of possession of ganja and using the premises for the storage of ganja. Having regard to both the pre-trial and post-conviction delays, the proper remedy, in my view, would be to reduce the fine in respect of the charge for the storage of ganja. Accordingly, I would make the following orders:

(a) Possession of ganja - $15,000.00 or 3 months imprisonment at hard labour.

(b) Using premises for the storage of ganja - $300,000.00 or 1 year imprisonment at hard labour.

(c) Conviction for taking steps preparatory to export ganja quashed and the sentence of $500,000.00 or 18 months imprisonment at hard labour and sentence of 18 months imprisonment set aside.

HARRIS, J.A.

I have read in draft the judgment of my brother Harrison, J.A. and agree that this appeal should be dismissed. There is nothing further that I wish to add.

MCINTOSH, J.A.

I too have read the judgment of my brother Harrison, J.A. and agree that this appeal should be dismissed.

HARRISON, J.A.

ORDER

Appeal dismissed. Convictions in respect of possession of ganja and using the premises for the storage of ganja affirmed with the following sentences:

(a) Possession of ganja - $15,000.00 or 3 months imprisonment at hard labour.

(b) Using premises for the storage of ganja - $300,000.00 or 1 year imprisonment at hard labour.

Conviction for taking steps preparatory to export ganja quashed and the sentence of $500,000.00 or 18 months imprisonment at hard labour and sentence of 18 months imprisonment set aside.