JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NOS: 30 & 31/95

BEFORE: THE HON. MR. JUSTICE FORTE J A
THE HON. MR. JUSTICE DOWNER J A
THE HON. MR. JUSTICE WOLFE J A

BRIAN BERNAL
CHRISTOPHER MOORE
V
REGINAM

Richard Small, Stephen Shelton & Norman Davis for Bernal

Ian Ramsay, Mrs. Jacqueline Samuels-Brown & Mrs. Valerie Neita-Robertson for Moore

Miss Paula Llewellyn & Miss Kathy-Ann Pyke for Crown

September 25, 26, 27, 28, October 9, 10, 11, 12, 13 17, 19, 20, 25, 26, 27, 30, 31, November 1, 2, 3, 7, 8, 9, 10, 14, 15, 16, 17, December 15, 1995 & January 26, 1996

FORTE J A

On the 6th April 1994, the appellant Brian Bernal and his brother Darren were departing the island, bound for Washington D. C., U.S.A. intending to travel by American Airlines.. They had with them four boxes, taped up in two packages, two boxes to each package. As a result of observations made by the security personnel of the airlines, after the boxes had been put through the X-ray

machine, the police were called to the Airport departure lounge. Inspector Rhone attended and opened one of the boxes and discovered therein 24 tins all labelled "Grace pineapple juice." On opening one of the tins, however, he discovered a plastic bag, containing vegetable substance, which was later found by the Government Analyst to be ganja. After questioning the appellant Bernal, an area of the evidence which will be dealt with later, he took them into custody. Acting on information received from the appellant Bernal i.e. that it was the appellant Moore, who had asked him to take the boxes to Washington, he subsequently questioned Moore who had been brought to his office by his attorney Mrs. Valerie Neita-Robertson. In that conversation Moore admitted that he in fact, had asked the appellant Bernal to take four boxes of pineapple juice to his sister in Washington. Arising out of this, Inspector Rhone arrested and charged both appellants for the following offences:

1. Possession of ganja
2. Taking steps preparatory to exporting ganja, and
3. Dealing in ganja.

Both appellants were subsequently tried, in a trial which extended over several days, culminating in their convictions on all three informations.

Both were sentenced as follows:

1. Possession of Ganja - $15,000 or 6 months imp. at H.L. in addition - 12 months imprisonment.
2. Taking steps preparatory to exporting ganja - $50,000 or 12 months at H.L.

3. Dealing in ganja - $50,000 or 12 months at H.L.

It is from these convictions they now appeal. Having heard the arguments of counsel for several days, we then reserved our judgment, and I now set out hereunder my opinion and conclusions on those arguments.

Counsel for both appellants firstly argued that their no case submissions advanced before the learned Resident Magistrate should have been accepted, and consequently the appellants should not have been called upon to answer the prosecution's case as the evidence did not disclose a prima facie case against them. It will therefore be necessary to set out the state of the evidence at the end of the prosecution's case, so as to determine whether there is any merit in this ground.

At the time Moore was interviewed by Inspector Rhone in the presence of his attorney, he produced a copy of an invoice indicating that he had purchased four boxes of pineapple juice from Sampars Cash 'n' Carry on Marcus Garvey Drive. In this regard, the prosecution led evidence per Mr. Hugh Parsons which if accepted, could establish by virtue of the records at Sampars, that the appellant Moore bought four boxes of pineapple juice on the 5th April, 1994, the day before the appellant Bernal was found to be carrying the four boxes (Exhibit 6). The evidence for the Crown, also disclosed if accepted, that the ninety-six tins contained in the four boxes of pineapple juice found at the airport, though having genuine Grace labels, were not products which were manufactured by Grace, as the identification code on the tins were flat while on the genuine tins

they were raised and also on the genuine tins the letters were more spaced. From this evidence, a tribunal of fact could draw the inference that the ninety-six tins found at the airport were not the same as were purchased from the shelves of Sampars, an apparently reputable wholesale store. On the Crown's case the boxes were first seen by the witness Franklyn Bernal, the first appellant's grandfather, and with whom he was staying while in Jamaica. The senior Bernal, was at home at Phadrian Avenue on the 5th April, 1994, when he saw both appellants, arrive at his home at about 12.30 p.m. with the four boxes. He thereafter saw Moore taping two of the boxes and it "appeared he wanted to make one package of the two boxes."

He spoke with appellant Bernal in his (the witness') workroom, and asked him what were in the cartons. The appellant told him pineapple juice, and on his asking the appellant who they were going to, the appellant said they were going to Chris Moore's sister who lives in Washington D.C. The witness then remarked that it was a lot of juice going to one person and the appellant retorted "maybe she likes pineapple juice or is in some business". Thereafter the witness told the appellant "Make sure it is pineapple juice."

This witness then related the events of that afternoon. The packages (i.e. the four boxes now in two packages) were taken out and put in the appellant Moore's car for the journey to the airport, as both Darren and Brian Bernal were due to leave the island that afternoon. Darren travelled with the appellant Moore, while the appellant Bernal travelled with the witness in his car, in which

also were the suitcases of both Bernal brothers. They arrived late for the flight, and despite efforts to depart with only hand luggage leaving the boxes and other luggage for grandfather Bernal to ship to them at a later date, they were unable to get onto the flight. On returning to Phadrian Avenue, the boxes were placed in the sitting room where they remained overnight. The witness saw the boxes the following morning in the same place where they had been left the night before. On the 6th April, 1994 (the following morning) Darren and Brian Bernal left the home for the airport taking the four boxes with them. The witness later received a telephone call, and as a result, he went to the airport police station where he saw the Bernal brothers as also the four boxes which were earlier put into his car and which Brian had driven to the Airport.

Inspector Rhone received a report on the same day which took him to the airport where he saw Darren and Brian Bernal standing beside "two brown carton boxes". On asking whose luggage it was Brian said it was theirs. There were "Grace pineapple juice labels" on the boxes. Asked where he had purchased them, Brian said "Grace outlet on Marcus Garvey Drive." It should be noted that the reference to Grace outlet was of no significance as Sampars had in fact been a Grace outlet, but had been taken over by Mr. Parsons and his partner and named "Sampars". Both brothers agreed to Inspector Rhone's opening one of the tins. Before doing so however, Inspector Rhone asked Brian "where was the bill of purchase", and Brian stated that he had none. Inspector Rhone then opened one of the tins and discovered therein a brown package

containing vegetable matter which was later discovered to be ganja. Both brothers when told it was ganja, said nothing. On opening another tin, the same was discovered. The brothers were then taken to the airport police station with the boxes, where they were arrested and charged with the offences. On being cautioned, the appellant Bernal said it was given to him by a friend named Chris to take to the United States. The appellant on being asked, revealed that Moore's business place was on Hagley Park Road. In the four boxes, a total of ninety-six tins were found, each containing ganja. All the boxes were addressed "Bernal" with a Washington address. Both brothers were taken into custody and later to the office of the Narcotics Squad on Spanish Town Road.

On the following morning the appellant Moore with his attorney attended on Inspector Rhone and in an interview, admitted that he had given the boxes to the appellant Bernal to take to his sister. He handed over a bill showing that he had purchased four cases of pineapple juice from Sampars. He was cautioned and asked if he knew ganja was in the tins. He said no, he was absolutely shocked, and he knew nothing about it. On arrest and being cautioned, he remained consistent saying "I am absolutely shocked. I know nothing about it."

There was also evidence from Jennifer Scott, a travel agent who testified that she was requested by the appellant Moore to "work" a fare Washington to Kingston via Miami, so he could send two tickets to Washington for Darren and Brian Bernal to come to Jamaica on the 25th March 1994. She accordingly did

so preparing a miscellaneous charge order (MCO) and crediting the appellant Moore's account.

Bernal - No Case Submission

Having summarized the evidence as it stood at the end of the Crown's case, I now turn to an examination of this ground of appeal as filed and argued by counsel for Bernal.

In determining this issue, it will be necessary to deal with each offence separately.

In so far as the offence of possession is concerned, it is my view that the law was settled in the case of **D.P.P. v. Brooks** [1974] 12 JLR 1374. In delivering the opinion of the Board, Lord Diplock stated at page 1375:

> "On the respondent's appeal to the Court of Appeal, that court accepted its own previous decision in **R. v. Livingston** (1952), 6 J.L.R. 95 as correctly laying down the law in Jamaica as to what knowledge the accused must have of the identity of the substance as ganja, in order to amount to 'possession' of it for the purposes of an offence under s. 7(c) of the Dangerous Drugs Law. The court rejected a submission by the prosecution that what was said in **R. v. Livingston** as respects knowledge should be treated as having been in part overruled by the decision of the House of Lords in **Warner v. Metropolitan Police Commissioner** (1968) 2 All E.R. 356. This submission has not been pursued before their Lordships' Board. The question of what are the mental elements required to constitute a criminal offence of having in one's

> possession a prohibited substance is a finely balanced one, as **Warner's** case (supra) itself shows. It turns on a consideration not only of the particular provision creating the offence but also of the policy of the Act disclosed by its provisions taken as a whole. The Jamaican legislation is not the same as that which was under consideration by the House of Lords in **Warner's** case (supra). Since **R. v. Livingston** (supra) was decided more than twenty years ago, it has been treated as authoritative on the extent of the knowledge of the accused needed to constitute the offence under the Jamaican legislation, and has been frequently followed in Jamaican courts. Their Lordships would not think it right to disturb it as authority for what it did decide as to the mental element required to constitute the offence under s. 7(c) of the Dangerous Drugs Law of having in one's possession a dangerous drug."

Their Lordships then examined the decision in **R. v. Livingston** (supra) referring to the four questions which the Court of Appeal had formulated for determination. The following two questions are of relevance -

> "(ii) Does "possession" in Section 7(c) of the Dangerous Drugs Law require that a defendant before he can be convicted, must be shown to have had knowledge that he had the thing in question?
>
> (iii) If so, must a defendant, before he can be convicted, be further shown to have had knowledge that the thing he had was ganja?"

Lord Diplock then continued:

> "These two questions are not special to the facts of **Livingston's** case (supra) but deal with principles of law of general application as to the extent of the two different requirements of knowledge on the part of a defendant needed to constitute the mental element in the criminal offence of having in one's possession a dangerous drug.
> All four questions were answered in the affirmative. Their Lordships need not deal further with the answers to the general questions (ii) and (iii). They accept the affirmative answers as correctly stating the law applicable to this offence in Jamaica."

The law in Jamaica therefore is that before a defendant can be convicted for an offence of possession under section 7(c) of the Dangerous Drugs Act it must be proven that he had knowledge not only that he had the thing in question but also that he knew that the thing which he had was ganja.

In **R v Nicholson** [1971] 12 JLR 568, this Court once again approved of the **Livingston** case (supra) per Luckhoo J A and laid down what is in my view the proper formula for adjudicating on these matters. He said at page 571 -

> "Mr. Ramsay, however, contended that it was a circular argument to urge that the 'fact of possession' could supply the ingredient of mens rea when the establishment of that fact itself (possession) required proof of a mental element in addition to a physical element. We are in agreement with the view taken by the Court of Appeal in **R. v. Cyrus Livingston** (1952) 6 JLR 95 that mens rea is a necessary ingredient in proof of a charge of possession of ganja. Once the prosecution adduces evidence in proof (i) of the 'fact of

> possession', that is that the accused person had the thing in question in his charge and control and knew that he had it and (ii) that the thing is ganja, it may be inferred that he knew that the thing he had was ganja. This inference if drawn is in the nature of a rebuttable or provisional presumption arising from the fact of possession of a substance the possession of which is prohibited and may be displaced by any fact or circumstance inconsistent therewith whether such fact or circumstance arises on the case for the prosecution or for the defence. If displaced by reason of any fact or circumstance inconsistent therewith on the case for the prosecution then a prima facie case is not made out. Where a prima face case is made out, the evidential burden shifts to the defence to displace the inference of knowledge in the accused person even though the legal burden of proof remains throughout on the prosecution."

Mr. Small for the appellant Bernal developed his argument on this ground of appeal on the basis of the dicta of Luckhoo J A referred to above, which he maintained and with which I agree, is consistent with the later decision of the Privy Council in **D.P.P. v. Brooks** (supra). In doing so, he correctly identified the main issue in the case against Bernal, as the question of his (Bernal's) state of mind. He conceded that the evidence was clear that Bernal was in custody and control of the four boxes, but argued that any inference of knowledge that ganja was contained in the boxes, had been rebutted by the evidence in the prosecution's case of Bernal's conduct both before and after he was found with the four boxes.

He developed this argument, by contending that the question of the appellant's state of mind, could only be determined on the basis of circumstantial evidence. The real issue, he submitted, depended on inferences that could be drawn from the primary facts and whether those primary facts could prove each of the ingredient of possession by Bernal, not of the four cases which were labelled pineapple juice but of the ganja which was concealed within the tins. In those circumstances, he contended, Bernal's character and behaviour are important pieces of circumstantial evidence which it was essential for the learned Resident Magistrate to consider.

Given the inference of guilty knowledge which may be drawn from the evidence of Bernal being in custody and control of the boxes, Mr. Small contended that in the Crown's case, there was sufficient evidence, of the appellant's good character and behaviour which rebutted the inference or put another way, the evidence of good character and behaviour were primary facts from which an inference, of innocent state of mind could be drawn.

At the end of the Crown's case what was the evidence against Bernal?

> (1) He was seen to arrive in the company of Moore with four boxes at Phadrian Avenue, the home of Franklyn Bernal.
>
> (2) On being questioned, he stated that he had been asked to take the boxes to Washington by Moore. That the boxes contained pineapple juice. He was guided to be cautious by making sure it was in fact pineapple juice in the boxes.

> (3) On the 5th April, 1994 he intended to travel with the boxes to Washington, but because he was unable to get on the flight did not do so.
>
> (4) The boxes were returned to Phadrian Avenue where they remained until the next morning (6/4/94) when both Bernal brothers left with them for the Airport intending to travel with them to Washington. Boxes were labelled 'Bernal' with a Washington address.
>
> (5) On the 6th April, 1994 Inspector Rhone was called to Airport where he saw the Bernal brothers. The appellant Bernal admitted that the boxes were part of his luggage. A tin from one box which was unsealed was opened by Inspector Rhone and found to contain ganja. In all, the boxes contained ninety-six tins all of which contained ganja. Bernal stated that he was asked by a friend Christopher Moore who had offices on Hagley Park Road, to take the boxes of "pineapple juice" to his sister in Washington. The cases of pineapple juice had been purchased at Sampars. There was also evidence that the appellant readily agreed to the opening of the tins.

On this evidence, as was conceded by Mr. Small, the appellant would have had to be found to be in custody and control of the four boxes with the ninety-six tins which in turn each contained ganja. The question therefore was whether on the Crown's case the inference of knowledge that the thing (i.e. the ganja) was contained in the boxes had been rebutted. Mr. Small contended that the evidence of the appellant's conduct throughout rebutted that inference or to put it another way it was evidence from which it could be inferred that the appellant had an honest belief that what he had was pineapple juice.

On the Crown's case however, the only evidence in relation to the good conduct of the appellant was his co-operation with Inspector Rhone i.e. in the opening of the tins, and the information which he gave in respect of where the cases of pineapple juice were bought and who asked him to take them to Washington, both pieces of information proving to be correct. If the case had ended at the close of the Crown's case, the mere fact that the appellant had co-operated having been found with a prohibited substance, could not, in our view, remove the inference of guilty knowledge. Consequently, I would hold that in so far as Bernal was concerned, the Crown at the end of its case had made out a prima facie case in respect of the charge of possession which called for an answer from the appellant.

MOORE - NO CASE SUBMISSION

At the end of the Crown's case, the evidence revealed that Moore had bought four cases of pineapple juice on the 5th April, 1994 and later that day arrived at Phadrian Avenue with Brian Bernal with four cases which bore the Grace Label. He was seen to be making one parcel of two of the boxes by taping them with "brown tape". He helped to transport the boxes to the airport on that afternoon, and assisted in returning them to the home, when it was not possible for the Bernals to leave on the scheduled flight. He admitted that he had asked Bernal to take the boxes of "pineapple juice" to his sister in

Washington for him. That evidence was in my view sufficient to establish a prima facie case that he was acting together with the appellant Bernal, and that both had joint possession of those boxes. There was also sufficient evidence upon which it could be found, if accepted, that the same boxes he brought to Phadrian Avenue and later took to the Airport, and subsequently returned to Phadrian Avenue, were in fact the same boxes that were subsequently (6/4/94) found to contain ganja. In those circumstances, his admission that he had asked Bernal to take four boxes of pineapple juice to his sister in Washington would suggest that possession also resided with him, as he could at any time up to Bernal's departure, have reclaimed custody and control of the boxes.

I would therefore conclude on the basis of the above that the learned Resident Magistrate was correct in ruling that there was a prima facie case made out against the appellant Moore in relation to the charge of possession.

I turn now to a consideration of whether the Crown had established a prima facie case in relation to the other two offences.

1. Unlawfully taking steps preparatory to Exporting Ganja.

Whether a prima facie case had been made out by the prosecution is clearly answered by the provision of Section 7(4)(2) of the Dangerous Drugs Act which reads:

> "Where there is evidence
>
> (a) that the ganja for which an accused person has been charged under this section is packaged in such a way as to make it reasonably suitable for exporting; or

> (b) that the ganja for which a person is charged was found to be in or at any prescribed post or place,
>
> that evidence shall be a prima facie evidence of steps being taken preparatory to the exporting of the ganja by the person charged."

On the evidence at the end of the Crown's case, a prima facie case was made out on either ground. The boxes were not only packaged "in such a way as to make it reasonably suitable for exporting" but there was evidence that they were found at a port and that it was intended that they would be taken out of the island to Washington D.C. U.S.A. In Bernal's case, there could be no argument that the evidence clearly revealed that his action in placing the boxes through the X-ray machine at the American Airlines counter and his reservation to leave for Washington was strong evidence that he was taking steps to export those boxes.

In Moore's case, given the evidence that he along with Bernal, was in possession of the boxes in which the ganja was subsequently discovered, and was seen actually taping together two of the boxes for conveniently sending them to Washington with Bernal, and also assisting in taking them to the airport on the 5th April 1994, it was clear that a prima facie case was also made out against him on this charge.

2. Unlawfully dealing in ganja

In relation to this charge, whether the no case submission ought to have been allowed, cannot be determined without reference to Section 22(7)(e) of the Dangerous Drugs Act which reads:

> "A person, other than a person lawfully authorized, found in possession of more than
> ...
> (e) eight ounces of ganja,
>
> is deemed to have such drug for the purpose of selling or otherwise dealing therein, unless the contrary is proved by him."

The evidence in this case reveals that the total weight of the ganja found in the four boxes amounted to 43.2 kgs. (95 lbs 4oz,) and therefore applying the same conclusions arrived at in relation to possession in both appellants, a prima facie case would therefore have been made out. Having been found in possession of ganja in excess of 8 ozs, by virtue of this section the burden shifts to the appellants to prove that they did not have it "for the purpose of selling or otherwise dealing therein".

Totality of Evidence

I now turn to the question of whether on the totality of the evidence, the learned Resident Magistrate was correct in his conclusion, having regard to the contention that the Crown relied on circumstantial evidence in proof of its case

i.e. to establish that the appellant Bernal knew that the content of the four boxes was ganja.

Before considering this question however, it is necessary to refer to the evidence of the defence.

Bernal's Defence

In his defence, the appellant Bernal in his sworn testimony firstly denied that he knew that ganja was in the tins, and averred that he did not intend to export ganja from Jamaica nor was he involved in anyway in dealing with ganja. He came to know the appellant Moore, through a mutual friend, at a time when he was in high school. He was at the relevant time a student of architecture at Howard University in Washington, and had planned to go to Florida for the spring break of 1994. However after having several conversations with his brother Darren between the 22nd and 23rd March 1994, he received a telephone call on the 24th March 1995 from the appellant Moore. He was asked by Moore about the cost of the trip to Florida and he informed him that it was US$170. Moore then told him that that was more expensive than the discounted ticket to Jamaica. Nevertheless Bernal refused it, as he could not get out of his trip to Florida, because he would have to pay a penalty. Moore then told him he had already booked the tickets for Darren and himself and that they were non-transferable and non-refundable. He had hoped that Moore would have charged the ticket to his room-mate and told him so. Moore also told him that the ticket was only good for the date it was booked, and that he would have to

pay a penalty of US $70 if he did not take the ticket. He was also told by Moore that even if he had to pay his friends going to Florida some money, it was still a better deal, as the ticket to Jamaica cost US $149. He spoke to his friends who were going to Florida, and then decided to come to Jamaica with his brother Darren. His father gave him the money to pay for the tickets and so on the 25th March 1994, he and Darren were taken to the airport by their mother. There he discovered to his surprise when the tickets were handed to him that each read US $517, when in fact Moore had told him they were US$149 each. They came to Jamaica, and it was his evidence that he repaid Moore US$298 a full refund for the tickets. When asked about the discrepancy in relation to the price on the ticket, he was told by Moore that it was a quota ticket. On the 4th April, 1994 the appellant Moore, for the first time, asked him if he would take "some pineapple juice to his sister in Washington." He agreed to do so - he knew that Moore's sister had a booth in Jamfest, a trade fair held for Jamaican Independence, as he sometimes worked there with his mother, who is the organiser. On the 5th April, 1994, Moore and himself left his grandfather's home at Phadrian Avenue, where he was staying, in Moore's car. They first went to visit his (Bernal's) aunt and then went to Sampars on Marcus Garvey Drive where Moore said he would purchase the pineapple juice. While he remained in the car, Moore went into Sampars, and returned about fifteen minutes later pushing a trolley with four boxes. On seeing this, he was surprised as he had thought that Moore wanted him to take about a dozen tins. He protested and in an effort to get out of

carrying so many, told Moore that he could not take four boxes with him as he and Darren already had two to three, pieces of luggage. Moore, however suggested that he could tape the boxes together so that they would have less pieces. Then he complained about the overweight charge and Moore said he would pay it. He indicated that his grandfather's car was small and could not carry all that luggage. In response, Moore offered to assist in transporting the luggage to the airport. They left Sampars, and when nearing Moore's gas station in Half-way-tree, Moore suggested stopping there to get two larger boxes in which to put the four cases of pineapple juice. Moore stopped at the gas station and invited him into the office to meet his sister. They both went in, and after Moore had done the introduction, he left him with the sister, and said he would soon come back, as he was going to find the two boxes. About 2-4 minutes after, Moore returned, said he had found two boxes, and was ready to go. On reaching the car, he saw two large boxes on the ground behind the car. Moore put the boxes inside the car. On entering the car, he noticed a roll of masking tape which he had not seen there before. Their route from the gas station first took them to the Frame Centre Gallery, where he went inside leaving Moore in the car. Then to Sovereign Centre where they bought three rotis. Thereafter they went home to Phadrian Avenue. He went inside to get dressed, leaving Moore to bring the boxes inside. He later saw Moore in the living room taping two boxes together with the masking tape. On his grandfather's (Franklyn Bernal) query, he told him that the boxes contained pineapple juice

and "Chris" had asked him to carry it to his sister in Washington. Franklyn Bernal said it was a lot of pineapple juice and he responded that Moore's sister is in promoting Jamaican products and maybe she liked pineapple juice. His grandfather then said "Make sure it is pineapple juice."

Bernal then testified

> "I had no reason to think it was not pineapple juice. Chris had come out of Sampars with it."

Moore asked him to tip over one of the boxes on its side so that he could tape it, and he did so. He also wrote "Bernal" and his parents' Washington address on the boxes with a marker he borrowed from his grandfather. They then left for the airport, travelling in the manner described by Franklyn Bernal - the boxes in Moore's car with Moore and Darren, and the other luggage in Franklyn's car with the appellant Bernal and Franklyn. On reaching the airport, they were late for the flight - the flight had been closed 15 minutes before. In an effort to get on the flight, he suggested to the American Airlines attendant that they be allowed to take the flight with hand-luggage only, but he was told that that was impossible because the flight was closed. Having failed to transfer the tickets to Air Jamaica, they went back to Phadrian Avenue with the luggage including the four boxes which were left there overnight. Having taken the boxes and Darren back home, Moore left and returned later that night to return a cassette. On the following morning 6th April 1994, Darren and the appellant Bernal left in their grandfather's car for the airport with the four boxes and of course, their other luggage. When the boxes were put on the conveyor belt of

the X-ray machine, the American Airlines agent requested that one of the boxes be put through again. That having been done, the agent requested that some of the cans be X-rayed. He assisted in the opening of one of the boxes by lending one of the security guards his swiss-knife with which the box was opened. Two of the cans were put through the X-ray machine. Subsequently, an agent of the airline expressed a wish to open some of the cans and he agreed. The boxes and the luggage were taken to the baggage area. He was then told to "hold on." Asked what they were waiting on, the American Airlines agent told him they were waiting on the police. About 15 minutes later, Inspector Rhone and Sgt. Savage arrived. Both police officers inspected the cans in the open box by shaking them; and Inspector Rhone asked him if he had a bill. He answered 'No' Inspector Rhone then asked if any one had a knife and he offered him his Swiss army knife and asked if Inspector Rhone wanted him to open it. Having got a positive response, he used the knife to puncture one of the cans whereupon juice which had a ' funny smell' sprayed out of the can. The Inspector then took the knife and opened the other cans. He then showed him plastic bags in the can and said "Yu see this?. This is compressed ganja." The appellant was stunned but said nothing. After a few moments, the appellant told the inspector that he was asked to take the boxes by 'someone' to his sister in Washington. On being asked who is the person, the appellant said "Chris Moore". Both the appellant and his brother, and the boxes were taken to a jeep and on the way to the police station, the appellant volunteered that he had a telephone number. for

Chris Moore. At the station, more of the cans were opened by Sergeant Savage, and the contents were shown to the appellant. Shortly afterwards Inspector Rhone questioned him, and he answered all the questions. He asked him who was the person he said he was carrying the juice for and he told him again 'Chris Moore' and gave him telephone numbers. He asked who I was carrying the 'stuff' to and I told him "Dianna Moore, the name Chris Moore told me" and gave him a telephone number for her also. Both brothers were then taken from the airport police station by Sergeant Savage to the Narcotic Squad's office on Marcus Garvey Drive. On the way and while they were on Marcus Garvey Drive, the appellant while passing Sampars told the officer "This is where Chris Moore bought the boxes of pineapple juice."

I have outlined in detail the evidence of the appellant Bernal, because of the contention that from his evidence and that of the Crown's an inference of innocence can be drawn, that is to say that he did not possess the necessary state of mind to establish that he was in possession of the prohibited drug found in the four cases.

At a later stage those submissions will be addressed. However, so that the contentions of both appellants can be adequately dealt with I set out hereunder the defence of the appellant Moore.

Moore's Defence

His defence was based simply on his assertions that he had asked the appellant Bernal to take four boxes of pineapple juice to his sister in

Washington, In pursuance of this, he purchased four cases of pineapple juice at Sampars. He knew nothing of switching either contents or boxes, for boxes containing the prohibited drug. He agreed with the appellant Bernal; as to the stops they made in his car en route from Sampars to Phadrian Avenue but disagreed that at the gas station after he had introduced Bernal to his sister, that he had left them together and returned some time after. He maintained that at the gas station he had remained in the company of Bernal throughout and in particular did not make any 'switch' of boxes or contents on that occasion. He agreed that he had taped two of the boxes together, that he had transported the boxes to the airport, on the 5th April 1994, and that he returned with them to Phadrian Avenue, where he left them that afternoon. After leaving them there, he had nothing to do with the boxes. As far as he was concerned, it was pineapple juice that he bought and pineapple juice was in the boxes when he left them at Phadrian Avenue. Accompanied by his attorney, on the 6th April, 1994, he went to the Narcotics Squad where he was interviewed by Inspector Rhone. He was shocked to discover that the boxes were found to contain the prohibited drug.

Bernal's Appeal

Mr. Small for the appellant, Bernal submitted inter alia that the learned Resident Magistrate failed to make a determination of the "essential primary facts", and having so failed, could not properly apply the **Hodge/Bailey** rule. The learned Resident Magistrate, he contended, made findings of fact which ignored

important circumstantial material which ought to have been considered and thereby was of necessity in breach of the **Hodge/Bailey** rule.

In order to determine the merit of the above argument it is necessary to look at the law as it relates to circumstantial evidence, and consequently what exactly is the "**Hodge/Bailey**" rule, as described by counsel. A good starting point would obviously be the case of **Regina v. Bailey** [1975] 13 JLR 46 where this Court per Edun J A stated:

> "However, the trial judge did not direct the jury along the lines of the time-honoured formula used in reference to circumstantial evidence, that is:
> 'They (the jury) must decide, not whether these facts are consistent with the prisoner's guilt, but whether they are inconsistent with any other rational conclusion, for it is only on this last hypothesis that they can safely convict the accused ..."

The learned Judge of Appeal then cited the following: Taylor on Evidence (11th Ed.) 1920 Vol 1 page 174 following the "rule" in **Hodge's** case (1838) 2 Lew cc227). Then, after examining several cases including **R v Elliott** [1952] 6 JLR 173, **R v Murray** [1952] 6 JLR 256, and **McGreevy v. DPP** [1973] 1 All ER 503 he continued thus:

> "It cannot be disputed that in Jamaica the rule in **Hodge's** case [1838], 2 Lew, C.C. 227 has become settled that such a special direction as to the way in which purely circumstantial evidence is to be viewed should be given to the jury. But whether the failure of a trial judge to assist the jury in giving such direction as to purely circumstantial evidence

> would of necessity result in the conviction being quashed is not free from doubt. What, if in the case of **R. v. Elliott** [1952], 6 JLR 173 the judge had failed to give the proper direction according to the rule but there was sufficient evidence on which an impartial jury, despite lack of assistance, could reasonably have arrived at a verdict of guilty? In such circumstances we are of the view that though the point raised in the appeal might be decided in favour of the appellant, no miscarriage of justice would occur in dismissing the appeal. We are also of the view that the rule in **Hodge's** case (supra) has, in Jamaica, become a settled rule of practice and it is incumbent upon a trial judge to assist the jury in their proper line of approach having regard to the facts and circumstances of the particular case. But a judge's failure to do so may not necessarily in every case result in the quashing of a conviction."

This Court returned to the same point in **Regina v. Lloyd Barrett** SCCA 151/82 dated 4th November, 1983 (unreported) in which Carey J.A. referring, in part to the above dicta of Edun J A in the **Bailey** case (supra) stated thus:

> "This Court in that case considered **McGreevy v. D.P.P.** (supra) where it was held by the House of Lords that there was no rule, that where the prosecution case is based on circumstantial evidence, the judge must, as a matter of law, give a further direction that the jury must not convict unless they are satisfied that the facts proved are not only consistent with the guilt of the accused, but also such as to be inconsistent with any other reasonable conclusion.

> The weight of authority beginning with **R. v. Clarice Elliott** 6 J.L.R. 173; **R. v. Elijah Murray** 6 J.L.R. 256; **R v. Burnsand Holgate** 11 W.I.R. 110 and **R.v. Cecil Bailey** (supra) is that where the case for the prosecution depends on circumstantial evidence, the judge should make it clear to the jury that not only must the evidence point in one direction and one direction only, and that being guilt, it must be inconsistent with any other conclusion. The approach in this country is not the same as in England."

Then in **George Edwards v R** S.C.C.A. 32/83 dated 16th December, 1983 (unreported) in delivering the judgment of this Court, Kerr JA having cited in part the above dicta of Carey JA in the Barrett case, continued:

> "The approach in this country is not the same as in England. Speaking for myself it would seem that if the circumstantial evidence must point indubitably to the guilt of the accused then impliedly if it points to any other reasonable conclusion it would not meet the test; nor do I think that to tell a jury of laymen that it must be "inconsistent with any other rational hypothesis" is clarifying or edifying. Be that as it may, the rule is Hodges' case is so firmly established here that trial judges are well advised to adhere to the formula, thereby obviating the risk of the directions on this question being made grounds of appeal."

The above cited cases clearly established that it is settled practice in Jamaica for the directions as given in the Hodge's case to be given to the jury. This is not so in England, as the **McGreevy** case shows. But even though there is a

difference in the manner in which the jury is directed to approach this type of evidence there is really no difference, in the manner in which a conclusion of guilt may be drawn from circumstantial evidence.

In **Teper v The Queen** (1952) A.C. 480 at Page 489 Lord Norman in delivering the reasons of the Board stated:

> "Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined. if only because evidence of this kind may be fabricated to cast suspicion on another ... It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

In the **McGreevy** case (supra) Lord Morris in his speech, though laying down that there is no necessity to give the direction, nonetheless, recognized that a jury in determining the issues based on circumstantial evidence could not if they are to find that the case has been proven beyond reasonable doubt, find an accused guilty if the evidence was also consistent with innocence because in such a case, the requisite standard of proof would not have been reached. This is, inter alia what he said (page 510):

> "It requires no more than ordinary common sense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless

> they wholly rejected and excluded the latter suggestion. Furthermore a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact which they accept is inconsistent with guilt or may be so they could not say that they were satisfied of guilt beyond all reasonable doubt."

In our own jurisdiction, Fox J A in **R v Connel** [1971] 12 JLR 578 at 581 in considering the judgment of O'Connor CJ in **R v Cyrus Livingston** (supra) stated:

> "The function of the Court was to weigh all the facts and arrive at a decision in accordance with the incidents of the burden and of the degree of proof in circumstantial cases."

In the instant case, there was of course no lay jury, the Resident Magistrate exercising the functions of judge not only in applying the law, but in finding of the facts upon which to found his verdict. There was no necessity therefore for the specific express directions, and one has only to look at his findings to determine whether in coming to his conclusions he demonstrated by what he said that he applied the principles in relation to circumstantial evidence. Mr. Small's initial contention is that the learned Resident Magistrate did not make findings of primary facts particularly in relation to the evidence which was undisputed and unchallenged, and consequently ought to have found in favour

of the appellant. Had this been done, Mr. Small argued, there would have been evidence which would have been consistent with lack of knowledge in the appellant, and consequently applying the **Hodge/Bailey** rule a verdict of acquittal ought to have been entered because the learned Resident Magistrate where there was evidence equally consistent with innocence would have been required to acquit.

It will be convenient to examine the evidence that the appellant Bernal relies on for this submission. The majority of the evidence so relied on relates to the conduct of the appellant, and specifically his co-operation with the authorities throughout. Mr. Small listed as the agreed evidence, the following:

> (i) The appellant readily agreed to the opening of the tins in the presence of the police and his normal behaviour throughout;
>
> (ii) he provided information concerning the person who asked him to take the boxes to Washington, to whom they were to be delivered and the place for which he believed the boxes were obtained;
>
> (iii) all the information he gave to the police was true;
>
> (iv) the appellant's willingness to leave the boxes behind if he could get on the flight on the 5th April 1994.

As undisputed evidence, Mr. Small referred to the appellant's evidence as to what occurred when he went through the American Airlines security check, that

is to say, his co-operation in opening the box, and his response to their requests and his frank answers to enquiries made of him.

As to the uncontradicted evidence, Mr. Small listed the following:

> (i) The appellant offered his knife to open the tins and offered to open them himself.
>
> (ii) The appellant reacted to the opening of the first tin by saying that the juice smelt spoilt.
>
> (iii) He told the police that he had telephone numbers for the appellant Moore.

The unchallenged evidence was:

> (I) The appellant punctured the first tin himself, and
>
> (ii) he gave the name and telephone number of the appellant Moore's sister to Inspector Rhone.

Before examining the findings of the learned Resident Magistrate to determine the merit of this contention it is necessary to look at his duty in this respect. This is set out in Section 291 of the Judicature (ResidentMagistrates) Act which in so far as is relevant states:

> " Where any person charged before a Court with any offence specified by the Minister, by order, to be an offence to which this paragraph shall apply, is found guilty of such an offence, the Magistrate shall record or cause to be recorded in the notes of evidence, a statement in summary form of his findings of fact on which the verdict of guilty is founded."

This Court in **R v Lloyd Chuck** RMCA 23/91 dated 31st July 1991 explained the section per Carey J A at page 19, as follows:

> "Our firm conclusion is that a Resident Magistrate satisfies the provisions of Section 291 by recording in a summary form, findings of fact which go to prove the guilt of the accused. Where there is conflicting evidence between Crown witnesses, he should state whose evidence he accepts and whose he rejects. In that case, it is expected that some reason or explanation for the choice, will be shortly stated. If a conclusion is derived from inferences then the primary facts from which the inference or inferences are drawn should be stated. Findings in a summary form is not a licence for laconic statements, and we would think that clarity in expression is an advantage. The language therefore in which the findings are couched should demonstrate an awareness of the legal principles which are involved in the case. If he must warn himself, the findings should show he has done so."

Applying the above principles, how did the learned Resident Magistrate deal with the issues which formed the basis for Mr. Small's complaints, given the evidence of his good character as also the fact that almost all of the evidence relied on, relate to the behaviour of the applicant throughout, that is to say, before as well as after he was found with the ganja. It is clear, that in the following passage he dealt with the issue of the appellant's good behaviour and applied it in determining the issue of guilt. He said:

> "In assessing the evidence of Bernal I took note of the submission of his counsel that the conduct of the accused when the illegal substance was found, his immediate co-operation with the Police and his assistance would have gone a far way in showing that he lacked the necessary knowledge of the contents of the tins.
> Inspector Rhone's evidence differed very little from that of Bernal, although some things suggested to him was that he could not recall.
>
> Admittedly one's conduct when confronted with an illegal substance can assist a court in determining whether or not that person had knowledge of the substance. However, after careful assessment and examination of the evidence I found that the accused Bernal knew that ganja was in those boxes he was carrying. He had diplomatic privileges. Had those boxes passed scrutiny at this end he would not have been subjected to search at the other end overseas.
>
> He was the means of getting the cargo safely to its destination."

There can really be no question that the learned Resident Magistrate in that passage expressly stated that he had taken into consideration, the appellant's conduct after the illegal substance was found, including of course, his co-operation with the police thereafter. Also, implicit in that passage is the fact that he applied the evidence of the appellant as to what occurred during, as well as after the illegal substance was discovered.

This finding however, ought not to be taken out of context because before explaining that he had taken these matters into consideration the learned Resident Magistrate had already analysed the evidence, and came to a finding which effectively excluded any other reasonable inference being drawn from the evidence, other than what he found in coming to his conclusion.

Before his excursion into an analysis of the evidence, the learned Resident Magistrate identified the real issue in the case, given the defences that were offered by the appellants. Here is what he stated:

> "In reviewing the evidence the court examined the evidence against each accused separately.
>
> The evidence reveals that both accused are (were) good friends. They partied and socialised and went places together, the question is, was that friendship betrayed? Did Moore knowingly give Bernal ganja in tins to take to Washington? Did Bernal honestly think he was carrying pineapple juice?"

The complaints made on behalf of the appellant Bernal, make it necessary to set out in detail the findings of the learned Resident Magistrate which expressly indicate how he arrived at his conclusion.

Having analysed the evidence, in relation to how the genuine canners of "Grace pineapple juice" produced their product, and the evidence as to the system at Sampars where the pineapple juice was purchased the learned Resident Magistrate came to the conclusion, stating it as a finding of fact that

"the four cases of pineapple juice bought at Sampars by the accused Moore was (sic) genuine pineapple juice." He thereafter stated:

> "Having found that Grace did not can the exhibits and that what Sampars sold to Moore was genuine pineapple juice one had to look at the sequence of events after that.
>
> Both Bernal and Moore agreed that he Bernal would take the juice to Moore's sister in Washington.
>
> I have looked at the evidence of both accused carefully and separately as both flatly denied knowledge of ganja in the tins.
>
> The court had to determine whether, having purchased pineapple juice, Moore switched or caused to be switched at some point the juice, in the absence of Bernal thereby tricking him into believing that he was taking genuine juice abroad, or secondly, whether or not there was a common design by both accused to substitute ganja instead.
>
> The evidence shows that Bernal and Moore went to Sampars together. While Moore went to purchase the pineapple juice Bernal remained in the car. Moore returned with the four cases in a trolley and which was put in the back of the car. They both went to Moore's gas station on Half Way Tree Road. The evidence on this aspect of the sequence of events after the purchase of the pineapple juice is crucial. At the gas station I find as a

fact that Moore did lock the car and both went inside to meet Andrea Moore (Moore's sister). Bernal said he was there for 2 - 4 minutes speaking to Andrea Moore while Moore left the room. Moore said at no time he left the room.

I was impressed with the demeanour of Andrea Moore who gave evidence on behalf of the accused Moore. I found her to be an impartial witness who spoke the truth. I accept her evidence that Moore remained in the room at all times while Bernal was there and that they left together.

I found as a fact that there was no 'switching' of boxes at the gas station while Bernal was there. The two boxes which Moore had asked an attendant to get were left behind in the car when both accused came back to the car, which was locked.

The sequence of events that follows from the gas station reveals that both accused were together at all times up to the point when they got to Bernal's home. The four boxes were taken out of the car and into Bernal's home.

The evidence of Franklyn Bernal I considered very important. He made enquiries of his grandson about the four boxes. His curiosity was aroused. He told the accused Bernal 'make sure it is pineapple juice'. He saw both accused bring the boxes to his home. Both accused taped the four boxes to make two boxes.

It is the finding of the court that when Bernal and Moore left the gas station, at some point before reaching Bernal's

> home a switch was made and the tins of ganja substituted for the pineapple juice. This was done with the knowledge of both accused. They both knew that the tins contained ganja. I find as a fact that the four boxes that were taken to Bernal's home were the boxes with the ninety-six tins of ganja. Both accused had knowledge of, possession, custody and control of it. I find as a fact that there was a common design by both accused to take ganja out of the island . They both knew that ganja was in those boxes when they taped them together.
>
> I also find that the same boxes taken to the airport the day before were the same boxes that were discovered to have ganja the next morning at the airport. I also took into account the lapse of over 12 hours while the boxes were in possession of Bernal overnight."

In this passage, the learned Resident Magistrate gave what must be considered a detailed examination of the evidence, and having resolved the conflict in the defence evidence, as to the occurrence at the gas station, in favour of the appellant Moore, he was left with evidence which showed that Moore having purchased genuine pineapple juice at Sampars, both appellants thereafter were always in the company of each other until their arrival at Phadrian Avenue. His additional finding that the boxes, which were taken to Phadrian Avenue, by both appellants were the same in which the illegal substance was subsequently found at the airport, formed the basis of his finding that the ganja was in the boxes on their arrival at Phadrian Avenue.

Given those findings, the only inference that a tribunal of fact could draw, was as the learned Resident Magistrate found, that during their journey between Sampars and Phadrian Avenue the ganja was substituted for the pineapple juice and that since they were together at all times during that period, no "switching' could have occurred without the knowledge of both appellants. Once he had arrived at that conclusion, the evidence of the co-operation of the appellant Bernal with the police, on the discovery of the ganja, could not in any way rebut that inference and could only, as the learned Resident Magistrate found demonstrate that his behaviour was nothing more than a part of the plan in an attempt to deceive a Court into thinking that that was evidence from which an innocent intent must be deemed.

This is what the learned Resident Magistrate stated:

> "In assessing Moore's evidence I do not believe him when he said he did not know the tins contained ganja. This was a well planned and orchestrated attempt by both accused to export ganja out of the island. When caught, Bernal behaved normal, when Moore is confronted he has a genuine receipt for four boxes of pineapple juice. All in the plan."

In my view, the learned Resident Magistrate demonstrated in those findings and reasoning, a proper appreciation of the issues and the principles of law applicable, and in a detailed analysis of the evidence, applied those principles in coming to his conclusion, and certainly on this ground no reason has been advanced which calls for disturbing his conclusion.

Before leaving this aspect of the appeal in so far as the appellant Bernal is concerned, consideration should be given to Mr. Small's contention that the learned Resident Magistrate did not resolve conflicts in the evidence of the appellants i.e. issues which were joined between one appellant as opposed to the other. One such related to the evidence in respect to the stop at Moore's gas-station as to whether Moore remained with Bernal throughout that visit which would have, if they had parted company as Bernal testified, given Moore an opportunity to switch the pineapple juice for the cases of ganja. As earlier stated, that conflict was resolved by the learned Resident Magistrate, on the basis of his acceptance of the evidence of Andrea Moore, and no credible challenge to that finding, in my opinion, has been made in this appeal.

A major conflict, in the opinion of the appellant Bernal's counsel, related to the question of the circumstances under which Bernal came to Jamaica as also the circumstances relating to the purchase and price of his ticket. In my view, this is not a matter which should seriously affect the issues in the case. There was an attempt on behalf of Bernal to establish that Moore, in order to encourage him to come to Jamaica, deceived him into thinking that he would only have to pay a fare of US$149 return for his trip home. As Mr. Small, relied heavily on this aspect of the case, in his attempt to demonstrate that the evidence showed that Bernal had no knowledge of the true content of the cans with which he was found, as this was a part of Moore's plan to deceive him into carrying ganja in the belief that it was pineapple juice, an examination of the

learned Resident Magistrate's finding in this regard is necessary. Mr. Small contended that there was a finding by the learned Resident Magistrate in this aspect, in favour of the appellant Bernal, and contended that although so finding, the learned Resident Magistrate did not apply that finding in favour of Bernal.

Though not specifically dealing with the appeal of Moore at this stage, it is appropriate to refer to the contention of Mr. Ramsay, counsel for Moore, that the finding of the learned Resident Magistrate was in favour of the appellant Moore, and that being so, no adverse finding in respect of Moore, could be made in respect of this evidence.

What did the learned Resident Magistrate find? Here is what he said:

> "The Court looked at the evidence of Jennifer Scott of Stuart's Travel Agency. There is nothing in the evidence to suggest that what Moore had was not a normal credit facility with the Travel Agency. Jennifer Scott told the court that the accused Moore asked her to work a fare and a routing for the Bernal brothers to come to Jamaica on the 29th March 1994.
>
> The evidence is that the initial discussion about the trip to Jamaica was with Darren Bernal and not Brian. It was also with the encouragement of Franklyn Bernal that the accused Brian decided to forego his Florida trip and came to Jamaica.
>
> Much has been said about the cost of the tickets as to whether it was US$149 each or US$517. This area of the evidence goes to the credit of both

> accused. Could one really get a ticket for US$149 from Washington to Kingston return? The answer surely must be no. That price must be ridiculously low. Where did that figure of US$149 come from? Did Brian Bernal pluck that figure out of the air? I believe that was the figure Moore told him on the telephone. When Bernal goes to the airport in Washington he discovers the real price of the ticket is US$517. Why did Moore quote that figure? Bernal ought to have known he could not get a ticket for that price.
>
> I found as a fact that Bernal did pay Moore US$300 for the tickets. I was assisted in coming to this conclusion by the notes taken by Mrs. Valerie Robertson when under caution by Inspector Rhone, Moore admitted that he was refunded for the tickets, yet he says, in evidence that he is still owed money by Bernal for the tickets."

Mr. Ramsay's argument, simply was that the finding that US$300 was paid by Bernal to Moore was in conflict with Bernal's evidence that he had repaid Moore US$298, and that being so, the finding must be interpreted to mean that the US$300 was only a part refund of the total of US$1034.00.

In my view the learned Resident Magistrate made it quite clear that on this issue he could not treat either appellant as credible.

In respect of Bernal, he expressly stated that Bernal ought to have known that he could not get a ticket for that price, which amounted to a finding that Bernal could not have been deceived in relation to the price of the ticket. In any event, his earlier finding that it was also on the encouragement of Franklyn

Bernal that the appellant came to Jamaica, a finding supported by the evidence, really weakens any real relevance that this issue could have had on the issues in the case.

In respect of Moore, the only explanation for the learned Resident Magistrate finding that Bernal had paid over US$300 to Moore, must be that he made an error, and meant to refer to the payment of US$298.

His statement, however amounted to a finding that Moore had admitted to Inspector Rhone that he had been refunded, and this was in conflict with his testimony.

The only conclusion to be drawn from the learned Resident Magistrate's finding is that in respect of this issue, neither of the appellants was credible, and this is supported by the fact that he went on to determine guilt based on the other issues raised in the case.

In the event, in spite of the thorough arguments of Mr. Small, which revealed a great degree of industry and indepth research into the evidence and the principles of law involved, we are unable to agree with his submissions on this ground, and accordingly find that it cannot succeed.

Case against Moore

I turn now to a determination as to the merits of the appellant Moore's ground of appeal which relates to whether on the totality of the evidence, his conviction can be supported.

In spite of the detailed arguments of Mr. Ramsay, the case against the appellant Moore was quite simple. The learned Resident Magistrate found on the basis of common-design that both appellants were in possession of the ganja, that both had taken steps to export the four cases of ganja out of the island and were dealing in ganja. Mr. Ramsay's arguments covered the following:

(i) There was no evidence of common design;

and

(ii) The case against him if considered separately ought to have led to an acquittal.

(i) Common Design

As I understood, Mr. Ramsay contended that in determining this issue the learned Resident Magistrate set himself a question which related to the case against Bernal (and not Moore) and whether or not there was a common-design between both. Though already referred to, the question is set out again hereunder for convenience:

> "The court had to determine whether, having purchased pineapple juice, Moore switched or caused to be switched at some point the juice, in the absence of Bernal thereby tricking him into believing that he was taking genuine juice abroad, or secondly, whether or not there was a common design by both accused to substitute ganja instead."

The learned Resident Magistrate obviously approached the case, on the basis of common-design, and given the defences advanced by the appellant was bound to determine the question he posed himself. This must be considered on the background of the issue he had identified earlier i.e.

> "Did Moore knowingly give Bernal ganja in tins to take to Washington? Did Bernal honestly think he was carrying pineapple juice?

What really was the defence of Moore?

Simply, it was that he had purchased four cases of pineapple juice which he had asked Bernal to take to his sister in Washington. He left the cases with Bernal in the afternoon of the 5th April 1994, after which he had no connection with the boxes again. He was shocked to discover that ganja was found in the boxes.

In those circumstances, the learned Resident Magistrate would have to determine whether he was speaking the truth when he alleged that he did not know that ganja was contained in the boxes, an allegation which must be inferred from his assertion that he was shocked to discover that that was so. In coming to his conclusion in that regard, the learned Resident Magistrate, having found that he purchased pineapple juice, would have to determine whether some switch was made by him in the absence of Bernal, or whether both were involved in the transformation which took place subsequently to the purchase or indeed whether Bernal alone was responsible.

Mr. Ramsay's contention that the question set by the learned Resident Magistrate referred only to a consideration of the case against Bernal, and not as against Moore is without merit.

He however contended that the learned Resident Magistrate was not entitled to reject the evidence of Bernal and Moore as to the period between the gas station and the Bernal home as there were no primary facts in that period from which he could attach adverse significance.

This argument is also without merit. The learned Resident Magistrate found the following primary facts, some of which although outside of the period addressed by Mr. Ramsay, were relevant to a determination as to what occurred during that period:

> (i) that it was pineapple juice that was purchased by Moore at Sampars
>
> (ii) that until the appellants arrived at Phadrian Avenue, both were always in the company of each other.
>
> (iii) that both appellants brought 4 boxes to Phadrian Avenue, that they were both concerned in the taping of the boxes at Phadrian Avenue
>
> (iv) that ganja was found in the boxes at the Airport on the 6th April 1994 - the day after Moore left them at the Bernal's home.
>
> (v) that the boxes in which the ganja was found were the same boxes which Moore and Bernal had taken to Phadrian Avenue and which had been transported to the airport on that day 5th April 1994

> (vi) that the twelve hour lapse between Moore leaving the boxes at the home on the 5th April, 1994 and the discovery of the ganja on the 6th April 1994, did not affect the inference which he drew from the findings at (i) to (v) - a finding which will be addressed later.

In my view, as earlier stated, these are primary facts on which the learned Resident Magistrate could have concluded that there was a common design between the appellants not only to possess the illegal drugs but also for the purpose of exporting and dealing.

(ii) Case against Moore Separately

This question really does not call for further consideration except in respect of one issue only.

Mr. Ramsay contended that Moore having left the Bernal's house after their return from the airport, had no other connection with the four boxes, as they remained with the Bernals from that time until the ganja was discovered at the airport on the following day. He estimated that period as twelve hours, and contended that in those twelve hours, the pineapple juice could have been replaced by the illegal substance. In summary, he argued that there was no specific finding of the learned Resident Magistrate in relation to that probability. He contended, that there was really no evidence as to when the switch could have been made, that is to say whether it took place before the boxes arrived at Phadrian Avenue or during those twelve hours, when Moore had no connection with the boxes. Relying on the case of **R v Abbott** [1955] 2 All E R 899, he

submitted, that where the evidence is such, that it cannot be proven to the relevant standard, which of two accused committed a crime, then both ought to be acquitted. He relied on the following passage in the judgment of Lord Goddard CJ at page 901:

> "I think what possibly led the learned judge to act as he did when he was of opinion that there was no evidence against this appellant was that he had got into his mind that the jury could not say in this particular case: 'We find a verdict of not guilty against both because we are not satisfied which was guilty, if one of them was.' With great respect to the learned judge, that is not the law. If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If, in those circumstances, it were left to the defendants to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty."

In support he also cited **Collins and Fox v Chief Constable of Merseyside** [1988] Crim. L R 247, which restated the principle set out in **R v Abbott** (supra). [See also **R v Lane** [1986] 82 Cr. App. R 5]. Because of its

relevance to this complaint, the following passage from the learned Resident Magistrate's judgment is again set down:

> "I also find that the same boxes taken to the airport the day before, were the same boxes that were discovered to have ganja the next morning at the airport. I also took into account the lapse of over 12 hours while the boxes were in possession of Bernal overnight."

This passage reveals that the learned Resident Magistrate was aware of the implications that arose as a result of the twelve hour period, and addressed his mind to it in coming to his conclusion. The transcript reveals also that Mr. Ramsay who appeared for this appellant at the trial, relied on this submission in his closing arguments. He submitted the following:

> "Cases must be proved. It must be established there was opportunity to change the tins and boxes.
>
> In relation to Moore no such evidence came from the crown.
>
> There is a period of 12 hours in Bernal's possession 2 - 3 minutes in Moore's.
>
> We don't know that ganja was at house when they got there.
>
> Can court say that when boxes got to house it had ganja in it?
>
> Principle that 4 cases of pineapple juice were bought at Sampars.
>
> On Friday morning tins contained ganja. Can court say if it was switched when it was switched.

> No evidence that these are not the same boxes bought at Sampars."

There is really no doubt therefore that the learned Resident Magistrate applied his mind to the contentions of the appellant Moore, and found facts which if supported by the evidence would justify his conclusion of guilt.

What was the evidence upon which the learned Resident Magistrate relied to determine that the boxes taken to Phadrian Avenue were indeed the same boxes in which the ganja was subsequently found?

The evidence of Franklyn Bernal speaks to this fact. This is what he stated in relation to what occurred after leaving the airport on the 5th April, 1994:

> "I was not able to get Darren or Brian on the flight. Brian told me they booked him for the next morning. I left airport with Brian. Darren went back with Chris Moore. We went back to my house.
>
> The boxes were taken out and put in the sitting room. They remained in my house overnight.
>
> I saw the boxes next morning same place they were left before.
>
> Boxes were put into my car by either Brian or Darren. They left my house with the boxes in my car. ... I told Darren to leave key in car and lock it up.
>
> I remained at the house after they left. Later I received a telephone call. I went to the Norman Manley Airport to the Police Station. I saw both Brian and Darren. I saw the boxes which were put in my car that morning." [Emphasis added]

In cross-examination by Mr. Ramsay he testified as follows:

> "We all went back to my house with suitcases. Moore and Darren also came back to my house.
>
> Suitcases and boxes remained there until next day. Moore left the house after he dropped back Darren. This was about 3:30 p.m. Moore left about that time. He did not come back to my house again.
>
> I never saw him next morning. During all that suitcase and boxes were at my house.
>
> When I went to airport I did not see Moore. I saw the packages and luggage. Those were the same ones carried back to my house." [Emphasis added]

And in re-examination:

> "The condition of the boxes were the same to me when they were left."

There was ample evidence, given the testimony, which supports the learned Resident Magistrate's conclusion that the boxes left at the house were in fact the same ones in which the ganja was subsequently discovered.

Mr. Ramsay, however, contended that since the ganja was discovered in the cases, there was a probability that during the 12 hours the switch could have been made of the cans, which would not reflect any change in the appearance of the boxes. Ironically the evidence of Morton Hamilton an expert called by the defence contradicts this contention as his testimony suggested that a much

longer time would be required to effect an exchange of the pineapple juice for the illegal substance. The following extracts from his testimony confirms this:

> "At all times when tape is removed it comes off with parts of the cardboard.
>
> If a new piece of tape is put over box one can still detect where it was torn."

There was then apparently a demonstration, after which the court noted "Mark clearly seen". Again he stated:

> "In my opinion I am of the view that they were not opened and resealed. They would have been in that condition when anyone came into possession of them.
>
> If these were packaged and sealed with a manual seamer. If cans were bought at 11:30 p.m. and in possession of both accused until 2:30 p.m. it would not be possible to remove the contents and put in something else and reseal them. There would not have been enough time. It would take much longer.
>
> This would take several hours in a manual operation. Looking at the tins it was done manually.
>
> It would take about 24 hours.
>
> Of all the cans I looked at I saw no evidence of bloating. There is no strain on the seam of the cans.
>
> Even if one of the accused had these in his possession for 12 hours it would still not be possible to reseal them in that period."

This was evidence upon which the learned Resident Magistrate could correctly find that the possibility of the appellant Bernal making the switch would be negligible, if at all possible. Though there was some conflict as to the date when the appellant Bernal was asked by Moore to take pineapple juice to his sister in Washington, there was no evidence as to any information in respect of the amount being told him, until the 5th April 1994 when the appellant Moore purchased the four cases. Given the evidence of the expert Mr. Hamilton, it would indeed have been impossible for him at that stage to set in motion the detailed operation that would have been necessary to achieve the substitution.

In my view, the evidence was sufficiently cogent to establish to the required standard that the exchange had already taken place when the boxes arrived at Phadrian Avenue. In this regard I am guided by the dicta of Lord Denning in **Miller v Minister of Pensions** [1947] 2 All E R 372 as was re-stated in our own case of **R. v. Miller and Wright** 12 J L R 1263 at page 1267 by Fox J A in delivering the judgment:

> " 'That degree', (of cogency) is well settled. 'It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable,' the case is proved beyond

> reasonable doubt, but nothing short of that will suffice'."

The following statement by Ottalliran J A in the British Columbia Court of Appeal in **Rex v. Pressley** 74 Can. C C 29 is also of relevance to this issue. He stated: "The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances of a particular case."

In my view, the contention that the switch could have been during the stated twelve hours falls into the realm of "fanciful possibilities" as envisaged by Lord Denning, and consequently find that the learned Resident Magistrate was indeed supported by the evidence in his finding of guilt in respect of the appellant Moore.

Character Evidence

Both appellants contended that the learned Resident Magistrate applied wrong principles in his consideration of the evidence of good character tendered by both of them. The following is the passage from the learned Resident Magistrate's judgment of which they complain:

> "Character evidence was given for both accused, the Court took that into consideration. However exemplory one's life and conduct may be it is not possible to give evidence about the state of mind of another person and what his intentions are."

Both counsel contended that this approach to the evidence of good character was incorrect, as the learned Resident Magistrate ought to have addressed his mind, to the relevance of such evidence to the credibility of the appellants, and also to the likelihood of their having committed the offence charged i.e. whether he had the propensity to commit the particular crime.

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** [1993] 1 WLR 471; [1993] 3 All E R 241: They are 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) Where defendant A of good character is jointly tried with defendant B of bad character, (1) and (2) still apply."

It should be noted 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 i.e. not only in the case of a defendant of positive good character, (as in the instant case), but the usual case of a defendant with no previous convictions. The necessity for giving such a direction would of course be to bring to the attention of the jury that such evidence ought to be considered in determining whether the accused, being of

such good character would have the propensity to commit the crime, and ultimately whether that being so, in the circumstances of the particular case, they could feel sure that he 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.
>
> Subject to these views, I do not believe that it is desirable to generalise about this essentially practical subject which must be left to the good sense of the trial judges."

Even before **Regina v. Aziz** (supra), Lord Lowry, delivering the speech of the Board, in the Privy Council case of **Anthony Bernard v. The Queen** P.C. Appeal No. 24/92 dated 26th April 1994 (unreported) recognized that there was such a discretion. He stated:

> "Their Lordships here refer to a series of cases, starting with **R v Berrada** (1989) 91 Cr. App. R. 131 and the latest of which is **R v Vye** [1993] 1 W.L.R. 471. Many judges have long thought

> that, if evidence of good character is to be admitted, while evidence of bad character is generally not admitted, the second consideration, that is, the improbability of having offended, is more relevant than the first, but even now a direction on the second point is not considered to be obligatory (see **R. v. Thanki** (1990) 93 Cr. App. R. 12 and other cases)."

How do these principles apply to the instant case? Given the evidence in the case, would it have "made sense" for the learned Resident Magistrate to take into consideration that each of the appellants' good character, was relevant to the likelihood of their having committed the offence.

In respect to the appellant Bernal, he was found in possession of the four boxes containing the ninety-six tins each in turn containing ganja. The real issue in his case was whether he had knowledge that the ganja was in his possession. It was therefore his state of mind that was to be determined. The question on this issue, therefore would be "given the evidence of his good character would it be unlikely that he would commit the offences for which he was charged"? Put another way, the question could be "given the evidence of good character, would he knowingly be in possession of the illegal drug, take steps to export it and deal in it illegally." The learned Resident Magistrate to answer these questions made a detailed examination of the evidence, and on the basis of his findings of fact earlier outlined, arrived at the only reasonable inference to be drawn from those facts i.e. that the appellant Bernal did have the necessary mens rea. It is against that background, that the learned Resident

Magistrate opined that the evidence of good character could not be of assistance in determining the state of mind of the appellant. In effect given the evidence in this case the fact that the appellant's good character would be relevant to the unlikelihood of his committing the offence, was overshadowed by the strength of the other evidence as to the appellant's state of mind. It is in those circumstances that the learned Resident Magistrate expressly stated that he took the character evidence into consideration, but declared that he did not find it helpful in determining the state of mind of the appellants. I see no reason to differ.

In respect to the appellant Moore, similar considerations apply. He admitted purchasing the four cases of pineapple juice and asking Bernal to take them to Washington. On the learned Resident Magistrate's analysis of the evidence, unless there was evidence upon which he could have found that the illegal substance was already in the four cases when they were obtained, (which there was not), then a switch had to be made sometime before the ganja was discovered. That aspect of the case has already been discussed, which demonstrates that, no other reasonable inference was possible than that the switch took place in the presence and with the knowledge of both appellants. In those circumstances, the learned Resident Magistrate was correct in finding that the evidence of good character was of no assistance.

Polygraph Examination

At the trial, counsel for the appellant Bernal, applied to put in evidence the result of a polygraph test done by the appellant Bernal, through an expert in polygraphy, Mr. Robert Bristintine. The learned Resident Magistrate ruled it inadmissible, and in his findings gave the following reason for having done so:

> "An expert in Polygraphy from the United States gave evidence. Although the court found him to be a competent witness in the field of Polygraphy the court ruled that the result of the test was not admissible.
>
> The court was of the view that this was not a recognized area of law and to admit into evidence the result of a Polygraph test done on an accused, would be to infringe upon the right of the court to determine certain critical issues, namely guilt or innocence."

Mr. Small, contended that the learned Resident Magistrate was wrong in refusing to admit the evidence, because it was merely a part of the circumstantial evidence, which would assist in a determination of the appellant's state of mind. The learned Resident Magistrate, having found that the witness was a competent witness, ought to have admitted into evidence, the scientific method the witness used, and his opinion as to the examination which he had conducted. Mr. Small drew the analogy of evidence of a pyschiatrist in a case concerned with diminished responsibility, which was also directly

concerned with the issue of state of mind, and submitted that the evidence of the expert does not constitute a trespass on the tribunal to decide either primary facts or ultimate issues as it was always open to the tribunal to reject or accept either the whole or a part of the expert's opinion.

As interesting as these submissions are, I have great difficulty in agreeing with them. The examination done by the expert, is with the aid of an instrument which gives certain readings in response to questions asked by the expert, and which are thereafter interpreted by the examiner to determine whether the subject has deceived the examiner. A look at the testimony of Mr. Bristintine, as to the examination would be appropriate. He testified that the polygraph measures three areas of the body. The Galvanic Scan Response measures change and anxiety, blood pressure and how swift it increases and decreases. It also measures changes in the rate of the beat of the heart. When a person is answering the skin oozes sensitivity when scan passes over skin. There is also the Pneumonigraph which measures several areas of respirations.

The examiner first gets an historical background of the subject which he uses in the design of the questions to be asked of the subject. These questions are given to the subject before the examination, so that he will know what he is going to be asked, and will not be subject to any surprises. In the second stage the subject is attached to the components:

> "Blood pressure cuffs are put on the subject's arms.

The pnuemograph chest assembly is placed on chest. One is placed in the upper and lower chest.

The last component is the G.S.R. Two finger plates put on the fingers which are not adjacent to each other.

The only discomfort the examinee receives are the blood pressure cuffs.

Most persons can be examined with an inflation of 60mm of pressure.

At this time the instrument is calibrated with the computerized system.

You then ask your questions three times. You ask all the questions once. You collect a chart asking all these question again.

I collect three charts and you ask your subject to remain still while it is done.

If in chart one the subject moves it might reflect a difference. It is sensitive. The move can look like a response and it distorts the pattern.

At the end of the examination the cuffs are removed. With conventional equipment the examiner would interpret the charts and based on the result of his interpretation he would then release or interrogate the examinee.

The final stage if this individual is not practising deception is to release him. If he is practising deception then you interrogate.

With the computer equipment prior to release of the examinee the chart is determined mathematically.

> Following chart examination by the examiner he would insert information in the computer and you ask the computer to interpret those charts."

This evidence shows that the evidence sought to be tendered would be the results of the interpretation of the responses of the appellant to questions asked by the examiner as they were recorded in the charts of the polygraph.

It appears also that if the examination had the benefit of the use of a computer, it would have been the computer that would interpret the charts based on information inserted by the examiner.

Such evidence is unknown to our jurisdiction, and perhaps this is the first attempt to introduce such evidence in our Courts. Without the assistance of any authority in our jurisdiction, I would nevertheless find that the learned Resident Magistrate was correct in ruling that the evidence is inadmissible on the basis that it would attempt to give an opinion, if opinion it can be called, on the ultimate issue upon which the tribunal is asked to determine. In our jurisdiction tribunal of facts have always been accepted as competent to determine the credibility of witnesses. Indeed from time long past, judges of facts have been determining the truthfullness of witnesses based on the evidence presented, and in particular their assessment of the demeanour of witnesses, during their testimony, bearing in mind their responses to the searching questions of cross-examination. In my view, the evidence of an expert in polygraphy based as it is on the results of an examination done

through the use of an instrument which records responses, could never be accepted in evidence, under our rules of evidence, and any change would necessarily have to be achieved by legislation. Such legislation would of necessity be the result, of detailed and indepth examination of the competence of the instrument to give such accurate readings as could be relied upon, in the determination of guilt. In the absence of precedent in our jurisdiction, however, it may be helpful to look at how other jurisdiction have dealt with such evidence.

A good starting point is the New Zealand case of **Blackie v. Police** [1966] NZLR 910 in which Turner J at page 919 cited with approval the following passage taken from **Phipson on Evidence** 10th Edition at page 488:

> "The cases are conflicting as to how an expert may be asked the very questions which the jury have to decide, but the weight of authority appears to be as follows:
>
> (a) Where the issue involves other elements besides the purely scientific, the expert must confine himself to the latter, and must not give his opinion upon the legal or general merits of the case; (b) where the issue is substantially one of science or skill merely, the expert may, if he has himself observed the facts, be asked the very question which the jury have to decide. If however his opinion is based merely upon facts proved by others, such a question is improper, for it practically asks him to determine the truth of their testimony as well as to give an opinion upon it."

Noting that in more modern times, depending on the circumstances, such questions may be allowed, (e.g. in the cases of diminished responsibilities as contended by Mr. Small) it could certainly not be allowed in the circumstances of this case, as the issues involved "other elements besides the purely scientific." Another helpful case from New Zealand is **The Queen v. McKay** [1967] NZLR 139, in which it was held as follows:

> "Evidence of psychiatrists as to self-serving statements made to them by a person accused of a crime while he was under the influence of truth drugs is inadmissible as is evidence of the psychiatrists to the effect that, as a result of their examination of the accused while affected by those drugs, they are of opinion that the testimony given by the accused on oath at his trial was true."

In delivering judgment in the Court of Appeal in Wellington North P. at page 144 used the following words, which are also appropriate to our jurisdiction:

> "The question of an accused's guilt or innocence under our system of law is to be determined by the jury on the factual evidence presented to it. To allow the admission of evidence of the nature proposed here would as T.A. Gresson J rightly said, be to substitute a trial by psychiatrists for a trial by jury. It really amounts to a modern version of trial by ordeal or inquisition: if the prisoner is resolute enough, then, as Dr. Gluckman freely concedes, he may maintain his lie.

The general rule is against the admission of opinion evidence, for it tend 'to usurp the functions of the tribunal whose province alone it is 'to draw the conclusions of law or fact': **Phipson on Evidence,** 10th ed., 475. It is true that, where necessary, opinion evidence is admitted, but only where the issue comprises a subject of which knowledge can only be acquired by special training or experience: **Campbell v. Rickards** (1833) 5 B & Ad. 840; 110 E.R. 1001; 15 Halsbury's Laws of England; 3rd ed., 321. But even in such cases the expert will not be allowed to testify to the ultimate issue when that can be avoided. Occasionally the expert may be asked the very question which the jury have to decide if he has himself observed the facts: see **Blackie v. Police** [1966] NZLR 910, 913. But this is certainly not such a case. I am quite alive to the fact that the Court must pay due regard to the advances of science, and if the time ever does come when it is established beyond doubt that answers given by an accused person under the influence of drugs are always true; then it may be that a change in the law of evidence may be called for, but such a revolutionary change would need to be introduced by an Act of Parliament, which I am sure would not be passed until after a close investigation into the scientific and moral aspects of the proposal and with proper safeguards provided to ensure that the tests were carried out in the presence of the Crown. So far as the Courts are concerned, the extension of the law must be by the development and application of fundamental principles, and the course proposed in this trial is

> quite contrary to fundamental principles: see **Myers v. Director of Public Prosecutions** [1965] A.C. 1001; 1021; [1964] 2 All E.R. 88, 885 per Lord Reid."

I need only add, that the above passage expresses an opinion which is consistent with ours, and which is applicable to the circumstances of this case though not dealing with psychiatric evidence, but which deals with comparable evidence having regard to the nature of the psychiatric evidence which was offered, but refused.

In **Regina v. Beland and Phillips** 43 DLR (4th) 641, a Canadian case McIntyre J, speaking on behalf of the majority in the Supreme Court of Canada rejected the admissibility of the polygraph examination to bolster the credibility of the accused as a witness on the following grounds:

> that it offended (i) rule against adducing evidence solely for the purpose of bolstering a witnesses' credibility (ii) the rule against admission of past consistent out of court statements. (iii) the rule relating to character evidence since the operator would be called as a witness for the purpose of bolstering the credibility of the accused and in effect show him to be of good character by inviting the inference that he did not lie during the test. It was not evidence of general reputation but of a specific incident; and (iv) that the evidence would not be receivable as expert evidence.

While understanding, and accepting the conclusions in (i) to (iii) without detailed examination, it is to the conclusion in (iv) that I now turn my attention, agreeing with the expressions of McIntyre J.

He firstly addressed his mind to the role of an expert. At page 653, he said:

> "The role of the expert witness was defined in this Court in **R v Abbey** (1982) 68 C.C.C.(2d) 394, 138 D.L.R. (3d) 202 (1982) 2 S.C.R. 24. Speaking for the Court - Dickson J. (as he then was) said at P.409 C.C.C. page 217 D.C.R. page 42 S.C.R.
>
> 'With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. 'An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. <u>If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary."</u> **(R. v. Turner** (1974), 60 Cr. App. R. 80, at p. 83, per Lawton L.J.) [Emphasis added]

Having stated the above with approval, he addressed specifically the question of the admissibility of polygraph evidence:

> "Here, the sole issue upon which the polygraph evidence is adduced is the credibility of the accused, an issue well within the experience of judges and juries and one in which no expert

> evidence is required. It is a basic tenet of our legal system that judges and juries are capable of assessing credibility and reliability of evidence. This question has been the subject of a comment by Michael Abbell in 'Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials' (1977), 15 Am. Crim. L. Rev. 29, who said, at p. 55:
>
> > Witness or defendant veracity has seldom been viewed a technical issue on which 'untrained' laymen are unqualified to reach intelligent determinations after being exposed to all the evidence in a case. Indeed, it has been the traditional function of jurors in our system to apply their own daily experiences to the testimony and the other evidence presented to them to determine which witnesses are truthful. It is the jurors' own 'expertise' in conducting their personal and business affairs which our judicial system has long regarded as making them specifically qualified to make this determination.
>
> I adopt these words, and I am therefore of the view that polygraph evidence aimed at supporting the credibility of the accused is not receivable as evidence in Canada."

I too adopt the words of the learned authors, (supra) and for the reasons heretofore stated conclude that polygraph evidence is not admissible for the purpose of supporting the credibility of the appellant Bernal i.e. to support his testimony as to his lack of knowledge in respect of the illegal substance

found in the cans with which he was discovered when attempting to leave the island. This ground also fails.

Apart from the matter of sentence, two other grounds of appeal were argued. One concerned the appellant Bernal, where his counsel's application to tender a document which the Crown had successfully requested to see and examine, was refused. A complaint was made before us, that the learned Resident Magistrate was wrong in not allowing the document into evidence.

It was revealed that the document was in fact a newspaper advertisement in which it was alleged that the appellant Moore had no longer any association with his family companies. There really is no necessity to consider the merits of this ground in any detail. There was no evidence available to determine the origin of that advertisement in the paper, and consequently nothing upon which its authencity could be determined. In my view even if it had been admitted, and I hold that it was not admissible in the circumstances, it would be of no assistance in determining the credibility of Moore, the attack on which would have been the real purpose for tendering it into evidence.

The other matter concerns the refusal to admit into evidence, the content of telephone conversation(s) that the appellant Moore had with Darren Bernal, while the latter was in Washington. In view of my conclusion that the circumstances surrounding the Bernals' visit to Jamaica, and the purchasing of the tickets by Moore, were collateral issues, and did not form an integral part of

the learned Resident Magistrate's determination, it is unnecessary to deal with that ground.

SENTENCE

BERNAL

Mr. Norman Davis, argued the following ground of appeal on behalf of the appellant Bernal -

> "The sentences of imprisonment imposed on this Appellant were out of keeping with the pattern of sentencing imposed for similar offences in similar circumstances and were inappropriate having regard to this Appellant's age and unblemished record."

He submitted that the learned Resident Magistrate failed to properly consider and apply the provisions of the Criminal Justice (Reform) Act, the appellant, being under the age of twenty-three years. The relevant provisions are as follows:

> "3 (1) Subject to the provisions of subsection (2), where a person who has attained the age of seventeen years but is under the age of twenty-three is convicted in any court for any offence, the court, instead of sentencing such person to imprisonment, shall deal with him in any other manner prescribed by law."

Then subsection (2) provides some exceptions. It reads:

> "(2) The provisions of subsection (1) shall not apply where -

> (a) the court is of the opinion that no other method of dealing with the offender is appropriate; or
>
> (b) a sentence of imprisonment for such an offence is fixed by law, or
>
> (c) violence or threat of violence has been used in the commission of the offence, or
>
> (d) the person at the time of the commission of the offence, was in illegal possession of a firearm or imitation firearm."

Section 3(3) provides:

> "Where a court is of the opinion that no other method of dealing with an offence mentioned in subsection (1) is appropriate, and passes a sentence of imprisonment on the offender, the court shall state the reason for so doing; and for the purpose of determining whether any other method of dealing with any such person is appropriate, the court shall take into account the nature of the offence and shall obtain and consider information relating to character, home surroundings and physical and mental condition of the offender."

Significantly, the section does not exclude from its application the offences for which the appellant has been convicted and consequently the only circumstances which should deprive the appellant of the application of its provisions are those which fall within subsection 2(a), i.e. where the court is of the opinion that no other method of dealing with the offender is appropriate. The

provisions of Section 3(3) clearly set out the matters for consideration which a court must take into account, when passing a sentence of imprisonment i.e.

> (i) the nature of the offence, and
>
> (ii) information which he has obtained relating to the character, home surroundings and physical and mental condition of the offender.

It was agreed on both sides, that the appellant, being a person under the age of twenty-three years, was entitled to consideration as to whether he should benefit by virtue of the section. There was however, disagreement as to whether the learned Resident Magistrate did apply his mind correctly to the application of the provisions of the section. This is what the learned Resident Magistrate said in pronouncing sentence -

> "The Court has taken into account the ages of both accused. Bernal is 22 years old and Moore over 23 years.
>
> In relation to Bernal who is under 23 the court will not avail him the provisions of the Criminal Justice Reform Act. The dealing and exporting of drugs is quite serious in the society. This was a brazen attempt by both accused and the court will show no mercy on persons who export or attempt to export drugs out of the island. The court also notes that it is persons in this age group and under who are used to take drugs out of the island.
>
> The court's view is that a period of incarceration is necessary and that this will act as a deterrent to others."

Absent from these words of the learned Resident Magistrate is any indication (i) that he considered "any information relating to the character, home surroundings and physical and mental condition of the offender", and (ii) that he considered whether any other method of dealing with the offender, would have been appropriate in circumstances of exporting or attempting to export drugs, offences which he described as "quite serious in the society". The question of the seriousness of an offence is of course a matter which ought to be taken into consideration in sentencing, especially having regard to the public interest. "But the public interest must take into consideration provisions as are reflected in the Act favouring young offenders." [See **Reg vs. Allen Boyd** SCCA 53/91 dated 12th February, 1992 (unreported).]

This court in commenting on the provisions of Section 3 of the Act said in **R v Alphanso Small** SCCA 100/88 dated 20th October, 1988 (unreported) per Carey, J A:

> "The law is clear that there is a bias against sending youngsters to prison unless that is the only appropriate method, and the law requires the Resident Magistrate to set out his reasons for treating him in that way."

It appears from what he said, that the learned Resident Magistrate in depriving the appellant of the application of the Act was influenced by the method in which the attempt to export ganja was undertaken. He was however incorrect in his thinking that to apply the provisions of the Act would be extending mercy rather than the result of an examination not only of the nature

of the offence but the stated circumstances of the appellant, having regard to the obvious intention of the legislation that youngsters between 18 and 23 years of age ought not to be incarcerated if some other method of punishment would be appropriate. Ironically, he concluded by imposing a sentence of imprisonment for the offence of possession, while laying great emphasis on the charge of taking steps to export ganja as his reasons for not applying the provisions of the Act. In our view the approach of the learned Resident Magistrate was incorrect, if for no other reason, but that he did not in coming to his decision consider any information relating to the character, home surroundings and physical and mental condition of the offender. The sentence of imprisonment can only remain, if this Court, having informed itself in respect to the required information, comes to the same conclusion after considering that information. There was however some evidence relating to the character of the appellant in the evidence tendered by the defence. That evidence established that the appellant is a young man of previous good character, and unblemished record, and who was, at the time of the commission of the offence, on the threshold of becoming an Architect, being a final year student at Howard University in Washington, D.C. , U.S.A. In my view, the intention of the legislature in enacting this section of the Act, must have been to provide that persons of such good character, should not be imprisoned unless some other method which could assist in the rehabilitation process would not be appropriate.

I am of the view that the learned Resident Magistrate ought to have requested a social enquiry report, so as to determine whether or not a Community Service Order [section 10 of the Criminal Justice (Reform) Act] or a Probation Order could have been made in the circumstances.

I would, had the majority not concluded that the sentences should be affirmed, make such an order, so that the matter of sentence could be properly determined.

Moore

The appellant Moore is over the age limit enacted for, by the provisions of the Act. Nevertheless, in sentencing generally, a judge ought to determine an appropriate sentence not only in relation to the offence and the public interest, but also after a consideration of the character and circumstances of the offender. There is nothing in the notes of evidence to suggest that the learned Resident Magistrate applied his mind to the antecedents of the appellant who up to the time of this conviction was also of unblemished record, and who was in the uncontradicted evidence of a witness called by him, a person of good character. In addition, the circumstances of the offence, demonstrate that both appellants participated equally in its commission, and consequently I would have applied the same process in his case, as I would have in the case of the appellant Bernal.

In the event, for the reasons earlier stated, the appeals against conviction in resepct of both appellants are dismissed and the convictions affirmed.

In respect of the appeal against sentence, as the majority is of the view that that appeal should be dismissed, the order of the Court is that the appeal against sentence is also dismissed.

DOWNER JA

Brian Bernal the first appellant had two packages with his luggage when he went to the ticket counter of American Airlines on 6th April 1994. He was accompanied by his brother Darren and they proposed to travel to Washington D.C. on that day. The alert airline staff in the security area inspected the packages by means of X-Ray and as a result of this inspection they called the police. The police then examined the packages and it was found that the two packages consisted of four cartons taped together. These packages were labeled Grace Pineapple Juice. Furthermore it was found that the four cartons contained ninety-six cans also labeled Grace pineapple juice and that these cans contained packages with compressed ganja.

What were the initial steps which led to this discovery? Christopher Moore the second appellant had an account at Stuarts Travel Service and he purchased tickets for the Bernal brothers who were in Washington. They arrived in Jamaica on 25th March, 1994. On 5th April Brian and Christopher went to Sampars a wholesale establishment where Moore purchased four cartons of Grace pineapple juice. Bernal and Moore made a journey from Sampars to the home of Franklyn Bernal the grand-father of the Bernal boys and there the four cartons were taped together to make the two packages which the police examined in the security area at American

Airlines. It should be noted that the only account of the journey from Sampars to grand-father Bernal's home comes from the appellants. Since the Resident Magistrate, His Honour Mr. M.J. Duckharan found that genuine Grace pineapple juice was purchased at Sampars, then the finding of guilt in respect of Bernal and Moore for being in possession of ganja, dealing in ganja and taking steps preparatory to export ganja had to be based on the inference that both appellants switched the cartons which were purchased and replaced them with cartons which contained cans with compressed ganja. The Resident Magistrate's findings were challenged in this court and prolonged hearings took twenty-eight days. The primary facts and inferences have a straightforward appearance, yet they raised points of law of exceptional public importance which must now be determined.

Was a prima facie case established against each appellant at the end of the Crown's case?

To justify calling on Bernal to answer the Crown's case, the appropriate starting point must be the discovery of the compressed ganja in his luggage at the security point at the American Airlines baggage area. When Inspector Rhone opened the cans in the presence of the appellant Bernal and cautioned him, his response was that his friend Chris had given him the packages to take to the United States. Under cross-examination, Inspector Rhone recalled that the tins did not smell like original pineapple

juice. He also stated that on the packages the name Brian Bernal was inscribed.

The other important evidence implicating the appellant Bernal comes from his grand-father. He recalled that the appellant went from his home on the 5th April 1994, and returned accompanied by the appellant Moore. Franklyn Bernal stated that cartons were brought to his home by both appellants. He said that Moore taped the boxes with the intention of making one package of two cartons. His curiosity was aroused and he called the appellant Bernal to his work-room and questioned him as regards the contents of the cartons and their destination. The response was that it was pineapple juice and that he was taking them to Washington to the appellant's Moore sister. Franklyn Bernal continued his questioning. He pointed out that it was a lot of pineapple juice to go to one person. The response by the appellant Bernal was that she either liked pineapple juice or was in some business. Then Franklyn Bernal delivered a warning. He told the appellant Bernal to make sure it was pineapple juice. To have persisted with his intention to take those cartons to the U.S.A. in the face of those warnings raised the inference that his conduct was reckless as adumbrated by Lord Diplock in **Sweet v Parsley** [1969] 1 All ER 347 at 360.

Franklyn Bernal gave a general description of the cartons. He said that they were two packages of two cartons each held together with

masking tape and he further stated that they were taken to the airport on the same day by the appellant Moore.

The upshot was that the Bernal brothers were late for American Airlines flight and so despite their efforts to get seats on Air Jamaica they failed and had to return home. How were the cartons transported to the airport? It was Moore who took them and Darren Bernal was his passenger. Franklyn Bernal in continuing his evidence stated that the boxes were unloaded at his house. The appellant Bernal had travelled with Franklyn and the cartons were deposited in the sitting room where they remained overnight and were put in his car the following morning by either Darren or Brian and taken to the airport by them. The fact that the cartons were brought to grand-father Bernal's house by the appellants Bernal and Moore, that Bernal was taking the cartons to Moore's sister and that Moore took the cartons to the airport and presumably took them back to the house was capable of raising the inference that the appellants were acting together. Then Franklyn Bernal told the court that he was summoned to the airport and he saw there the same cartons in the presence of his grand-son which were taken there in his car. These were the cartons examined by Inspector Rhone.

It is with respect to this evidence from Franklyn Bernal and Inspector Rhone that the law relating to possession of ganja, dealing in ganja, and taking steps preparatory to exporting ganja will be examined to ascertain if

the submissions of no case to answer, made by Mr. Small on behalf of Bernal was correct. As regards possession, as exemplified by the cases - the starting point must be **Brooks v Director of Public Prosecutions** [1974] 12 JLR 1374. Lord Diplock in the course of his opinion raised the issues posed in **R v Livingston** [1952] 6 JLR 95. Those questions deal with the principles of law of general application as to the extent of the two different degrees of knowledge on the part of the defendant needed to constitute the mental element in the criminal offence of having in one's possession a dangerous drug. The relevant questions were:

> "(i)...
>
> (ii) Does 'possession' in section 7 (c) of the Dangerous Drugs Law require that a defendant before he can be convicted, must be shown to have had knowledge that he had the thing in question?
>
> (iii) If so, must a defendant, before he can be convicted, be further shown to have had knowledge that the thing which he had was ganja?"

Then Lord Diplock stated at p. 1376:

> "In the ordinary use of the word 'possession' one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under one's physical control."

In stating the meaning of possession in the criminal law in this way Lord Diplock explained the concept so as to avoid confusion with some concepts of possession in the civil law which was part of the reasoning in

Livingston. Further in demonstrating the mental element necessary in view of the legislative provisions, Lord Diplock said earlier at p. 1375:

> "The question of what are the mental elements required to constitute a criminal offence of having in one's possession a prohibited substance is a finely balanced one as **Warner's** case itself shows. It turns on a consideration not only on the particular provision creating the offence but also on the policy of the Act disclosed by its provisions taken as a whole."

There have been significant amendments to the Dangerous Drugs Act since **Brooks** was decided. So far as it was necessary to draw inferences in **Brooks** Lord Diplock said at p. 1376:

> " Upon the evidence, including his own statement to the police, the nineteen sacks of ganja were clearly in the physical custody of the respondent and under his physical control. The only remaining issue was whether the inference should be drawn that the respondent knew that his load consisted of ganja. Upon all the evidence and in particular the fact that he and the other occupants of the van attempted to run away as soon as they saw the uniformed police approaching, the magistrate was, in their Lordships' view, fully entitled to draw the inference that the defendant knew what he was carrying in the van."

It should be noted that Lord Wilberforce was presiding in this case and the Board was comprised of Lord Diplock, Lord Cross of Chelsea, Lord Salmon and Sir Eric Sachs. The principles expounded in **Warner v Metropolitan Commissioner** [1969 2 AC 256 in relation to possession in

the criminal law and how knowledge was to be inferred were similar to those which were explained in **Brooks.** It is also pertinent to point out that the Court of Appeal in **Warner's** case was (Diplock LJ, Brabin & Waller JJ) and that Lord Wilberforce delivered a powerful speech on the general principles of possession in the criminal law with which Lord Pearce agreed. It is instructive to examine passages in **Warner** which govern the law of possession particularly as this case is a container case not dissimilar to **Warner.** Also to be examined are the provisions in the amended Dangerous Drugs Act which presume a prima facie case in the offence of "taking steps" and reverses the onus of proof in "otherwise dealing" with ganja. They have significantly altered the scope of the Act and the mental element in the concept of possession.

Here is how Lord Reid emphasizes that mens rea is a necessary part of the offence of being in possession of a dangerous drug. At p. 280 he said:

> " Lord Parker referred to a decision of the Supreme Court of Canada, ***Beaver v. The Queen*** [1957] S.C.R. 531, where it was held by a majority that the offence created by legislation against the possession of drugs in terms almost identical with the British Act was not an absolute offence. He said that he preferred the view of the minority. I do not. Fauteux J for the minority founded on ***Chajutin v. Whitehead*** [1938] 1 KB 506. But I have already given my reasons for thinking that this decision is out of line with the other authorities."

To understand the force of this passage, it has to be read in conjunction with an earlier passage at 279G where he said:

> "... So if mens rea has not been excluded what would be required would be the knowledge of the accused that he had prohibited drugs in his possession: it would be no defence, though it would be a mitigation, that he did not intend that they should be used improperly. And it is a commonplace that, if the accused had a suspicion but deliberately shut his eyes, the court or jury is well entitled to hold him guilty. Further it would be pedantic to hold that it must be shown that the accused knew precisely which drug he had in his possession."

Lord Morris also shared the same views on possession. Here is how he put it at pp. 289-290:

> "...The conception to be explained, however, will be that of being knowingly in control of a thing in circumstances which have involved an opportunity (whether availed of or not) to learn or to discover, at least in a general way, what the thing is. The same result might follow if it was a matter of indifference whether there was such opportunity or not. If there is assent to the control of the thing, either after having the means of knowledge of what the thing contains or being unmindful whether there are means of knowledge or not, then ordinarily there will be possession. If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains - then, ordinarily, I would suppose that there would not be possession."

The range of inferences outlined by Lord Reid and Lord Morris is wider than which obtained in **Brooks**. They illustrate the reach of the common law and as will be demonstrated, are similar to those inferences mentioned in **Livingston** (supra). Lord Pearce stated at page 304:

> "I agree with my noble and learned friend, Lord Wilberforce, in his analysis of the concept of possession and, indeed, with the whole of his opinion in this matter."

He further emphasized the problem posed in this case thus at 305 - 306:

> " The situation with regard to containers presents further problems. If a man is in possession of the contents of a package, prima facie his possession of the package leads to the strong inference that he is in possession of its contents. But can this be rebutted by evidence that he was mistaken as to its contents? As in the case of goods that have been 'planted' in his pocket without his knowledge, so I do not think that he is in possession of contents which are quite different in kind from what he believed. Thus the prima facie assumption is discharged if he proves (or raises a real doubt in the matter) either (a) that he was a servant or bailee who had no right to open it and no reason to suspect that its contents were illicit or were drugs or (b) that although he was the owner he had no knowledge of(including a genuine mistake as to) its actual contents or of their illicit nature and that he received them innocently and also that he had had no reasonable opportunity since receiving the package of acquainting himself with its actual contents. For a man takes over a package or suitcase at risk as to its contents being unlawful if he does not immediately examine it (if he is entitled to do so). As soon as may be he should examine it and if he finds the contents suspicious

> reject possession by either throwing them away or by taking immediate sensible steps for their disposal."

This important passage recognises that the illustrations adumbrated in **Brooks** and **Livingston** relating to degrees of knowledge must be expanded as new circumstances arise. The inferences have been extended to deal with container cases.

So uppermost in the Resident Magistrate's mind at this stage of the case was the warning given to the appellant Bernal by his grand-father and his refusal to heed that warning. Because of the warning he had a reason to suspect. This passage from Lord Wilberforce states in classic language further illustrations applicable to this case at p. 310 - 311:

> " What is prohibited is possession - a term which is inconclusive as to the final shades of mental intention needed, leaving these to be fixed in relation to the legal context in which the term is used. How should the determination be made? If room is to be found, as in my opinion it should, in legislation of this degree of severity, for acquittal of persons in whose case there is not present a minimum of the mental element, a line must be drawn which juries can distinguish. The question, to which an answer is required, and in the end a jury must answer it, is whether in the circumstances the accused should be held to have possession of the substance, rather than mere control. In order to decide between these two, the jury should, in my opinion be invited to consider all the circumstances - to use again the words of Pollock & Wright [Possession in the Common Law, p. 119] - the 'modes or events' by which the custody commences

> and the legal incident in which it is held. By these I mean, relating them to typical situations, that they must consider the manner and circumstances in which the substance, or something which contains it, has been received, the accused had at the time of receipt or thereafter up to the moment when he is found with it; his legal relation to the substance or package (including his right of access to it). On such matters as these (not exhaustively stated) they must make the decision whether, in addition to physical control, he has, or ought to have imputed to him the intention to possess, or knowledge that he does possess, what is in fact a prohibited substance."

Then to demonstrate that the requirement for mens rea was not peculiar to **Livingston** or **Warner** but was also found to be necessary in **South Africa and Canada** this further passage by Lord Wilberforce at p. 311 is instructive:

> " On this same basis, the actual decision of the Court of Criminal Appeal in ***Lockyer v Gibb*** [1967] 2 QB 243 was, I think, correct: for there the accused had and knew she had control of the tablets but possibly did not know what they were; she was held to be in possession of them. One can only hold this decision to be wrong if the view is taken that to constitute possession under this legislation knowledge not merely of the presence of the thing is required but also knowledge of its attributes or qualities. But (except perhaps under the old law of larceny) no definition or theory of possession requires so much, nor does the language or scheme of the Act postulate that such a degree of knowledge should exist. I think the line was drawn here at the right point. On the same lines is the South African

> decision of ***Rex v Langa*** [1936] S.A.L.R. (C.P.D.) 158. There the drug ('dagga') was contained in a suitcase: the court held that mere physical control of it was not enough: but it was the opinion of Watermeyer J. that the necessary knowledge - viz. guilty knowledge - might have been inferred from the fact that the accused took the suitcase to a witness by night and asked him to keep it, and that on arrest he told an implausible story about the suitcase and later in the box denied all knowledge of it. The Canadian case of ***Beaver v The Queen*** [1957] S.C.R. 531 was another package case, and, as here, the question for the court was whether mere custody (control) was sufficient. The accused's story was that he believed the package to contain an innocent substance. The majority of the Supreme Court, with whose judgment I agree, held that mere custody (control) was not sufficient and it was clearly their view that if the accused had proved that he honestly believed the contents of the package to be innocent, he should have been acquitted of the charge of possession."

The principles expounded by Lord Reid, Lord Morris, Lord Pearce and Lord Wilberforce as regards the distinction between actual knowledge which the Resident Magistrate ultimately found in this case and the second degree of knowledge which he must have found at the end of the Crown's case was referred to in **Livingston**. A passage from this judgment will be cited later. Equally pertinent were the principles relating to the voluntary assumption of risk, the opportunity to inspect especially if suspicious circumstances exist and were pointed out to the appellant. In this case grand-father Bernal told the appellant that if there was any doubt in his

mind he Brian should check the packages. Also relevant were the concepts of shutting ones eyes to the obvious or wilful blindness.

In **Nicholson v R** [1971] 12 JLR 568 Luckhoo JA cited the following passage from **Livingston** at p. 570 - 571 which anticipated the principles and illustrations adverted to by Lord Reid, Lord Morris, Lord Pearce and Lord Wilberforce.

> " Merely to say 'We did not know that we had ganja' is not, however, so easy a way out for persons found in possession of ganja as might at first sight appear. As was pointed out by Devlin J., in ***Roper v Taylor's Central Garages (Exeter), Ltd*** (1951) 2 TLR at p. 288), there are two degrees of knowledge which are sufficient to establish mens rea in cases of this kind. The first is actual knowledge, which the magistrate may find because he infers it from the fact of possession, or from the nature of the acts done, or from both. The magistrate may find this even if the defendant gives evidence to the contrary. The magistrate may say 'I do not believe him: I think that that was his state of mind.' Or if the magistrate feels that the evidence falls short of actual knowledge, he has then to consider the second degree of knowledge, whether the defendant was, as it has been called, deliberately shutting his eyes to an obvious means of knowledge, whether he deliberately refrained from making enquiries the results of which he might not care to have. Either of these two degrees of knowledge would be sufficient to support a conviction, though mere neglect to make such enquiries as a reasonable and prudent person would make, would not be sufficient. (***Roper v Taylor's Central Garage (Exeter), Ltd.*** [1951] 2

> TLR at pp. 288, 289), ***Evans v Dell*** ((1937) 53 TLR at p. 313))." [Emphasis supplied]

Then turning to the conditions necessary to establish a prima facie case Luckhoo JA expressed the principle thus at 571:

> "... Once the prosecution adduces evidence in proof (i) of the 'fact of possession,' that is that the accused person had the thing in question in his charge and control and knew that he had it, and (ii) that the thing is ganja, it may be inferred that he knew that the thing he had was ganja. This inference if drawn is in the nature of a rebuttable or provisional presumption arising from the fact of possession of a substance the possession of which is prohibited and may be displaced by any fact or circumstance inconsistent therewith whether such fact or circumstance arises on the case for the prosecution or for the defence. If displaced by any fact or circumstances inconsistent therewith on the case for the prosecution then a prima facie case is not made out. Where a prima facie case is made out, the evidential burden shifts to the defence to displace the inference of knowledge in the accused person even though the legal burden of proof remains throughout on the prosecution."

A significant feature in this case was that the defence to the charge was that the Crown had not proved affirmatively that the accused knew that the cannabis sativa found in his possession came from the pistillate plant. The court found that he had shut his eyes to an obvious means of knowledge by making enquiries. An alternative way of stating the issue

was Lord Wilberforce's statement in **Warner** (supra) at p. 311. He said **Lockyer v Gibb** was rightly decided on the basis that no definition or theory of possession obliged the Crown to prove the knowledge of the attributes and qualities of the prohibited drug. This formulation would have equally disposed of the argument in **Nicholson** that the Crown must prove affirmatively that the accused knew he had cannabis sativa of the pistillate in his possession.

It is against this background that I find that the Resident Magistrate correctly found that in respect of the appellant Bernal there was a case to answer in respect of possession. Apart from being obliged to answer the information on possession Bernal had to answer the other two informations with respect to the statutory inchoate offence to take any step preparatory to exporting ganja, and dealing with ganja. The following statutory presumption was applicable pursuant to section 7A (2) of The Dangerous Drugs Act:

> "7A. - (2) Where there is evidence-
>
> (a) that the ganja for which an accused person has been charged under this section is packaged in such a way as to make it reasonably suitable for exporting; or
>
> (b) that the ganja for which a person is charged was found to be in or at any prescribed port or place,
>
> that evidence shall be prima facie evidence of steps being taken preparatory to the exporting of the ganja by the person charged."

On either limb of this subsection it was correct for the Resident Magistrate to call on Bernal to answer. This is one of the amendments subsequent to **Livingston** and **Brooks** and demonstrates Parliament's intention to cope with the cunning of drug traffickers.

As for the information charging dealing in ganja, the following statutory presumption comes into play. Section 22 (7) (e) reads:

> "(7) A person, other than a person lawfully authorized, found in possession of more than-
>
> (e) eight ounces of ganja,
>
> is deemed to have such drug for the purpose of selling or otherwise dealing therein, unless the contrary is proved by him."

This is a classic instance where by an amendment, Parliament has shifted the burden of proof. In this specific instance it appears that Parliament was responding to the suggestion by Lord Pearce at p. 307 in **Warner**. He said:

> " It would, I think, be an improvement of a difficult position if Parliament were to enact that when a person has ownership or physical possession of drugs he shall be guilty unless he proves on a balance of probabilities that he was unaware of their nature or had reasonable excuse for their possession."

In the light of this provision where the onus of proof lay on him it was difficult to understand any submission which suggested that Bernal ought

not to be called upon to answer this information. It is the principal charge and had this been recognised below or heeded to in this court, as I emphasised it, the relevance of **Warner** would have been grasped. The proceedings would also have been considerably shortened.

Turning to the evidence at the conclusion of the Crown's case against Moore he went voluntarily to Inspector Rhone on 7th April 1994 accompanied by his counsel and produced a receipt to demonstrate that he had purchased Grace pineapple juice at Sampars. This information was given in response, under caution, to Inspector Rhone's question as to his knowledge of the ganja found with Brian Bernal at the airport. He did admit that he gave the appellant Bernal cartons to carry, but expressed surprise that ganja was found in the cartons with the appellant Bernal.

In this instance the evidence of Franklyn Bernal is also crucial. It was Moore who accompanied the appellant Bernal with the four cartons which were taped to form two packages at grandfather Bernal's home. It was Moore, grandfather Bernal told the court, who took the packages in his car accompanied by Darren Bernal to the airport on the 5th April, 1994. The presumption of continuance must have been relied on by the Magistrate as regards the inference that the cartons found with the appellant Bernal at the airport were the same cartons brought by the appellants Moore and Bernal to grandfather Bernal's home on April 5. The

inference was, it was the cartons Moore told Inspector Rhone he gave Bernal.

Phipson on Evidence Thirtieth edition states the doctrine with clarity at p. 122:

> " States of mind, persons, or things, at a given time may in some cases be proved by showing their previous or subsequent existence in the same state, there being a probability that certain conditions and relationships continue. This sort of inference is sometimes called the presumption of continuance. While it is preferable to characterise this as a presumption of fact **Chard v Chard [1956] P. 259** and not a presumption of law (that is, a true presumption) **See below 41-03** it is more sensible and more accurate to regard it as a type of ordinary reasoning which applies in circumstances of the utmost frequency and diversity."...

As regards the charge of possession, Moore's involvement may be viewed from two aspects. Firstly he was an aider and abetter to Bernal as both brought the cartons which were taped up by Moore on the evidence at this stage: see **Mohan v R [1966] 11 WIR 39.** Further he transported the cartons on the 5th of April to the airport. Secondly, he was in joint possession of the cartons with Bernal up to the point when the ganja was found at the airport. A good working definition of joint possession is to be found in section 5 (2) of the Criminal Code in Canada. It reads:

> " '(2) If there are two or more persons, and any one or more of them, with the knowledge and consent of the rest, has or have anything in his or their custody or

> possession, it shall be deemed and taken to be in the custody and possession of each and all of them.' "

See **Rex v Colvin & Gladue** [1943] 1 DLR 20 at p. 22.

It is true that when the cartons were returned to grandfather Bernal's home from the airport the cartons were in the appellant Bernal's physical control. But grandfather Bernal saw the cartons in the same condition in the sitting room the following morning.

It was those cartons which he saw being taken to the airport that morning that he said he saw later in that day at the airport when summoned by the police. This is an appropriate case where the presumption of continuance was applicable. As for the contention by Mr Ramsay that Moore was no longer in possession, the doctrine of joint possession is relevant. Even though the appellant Bernal was in possession at the airport, Moore shared possession with him. Moore admitted he gave the two packages to Bernal to take to his sister in the United States of America. So he had the right to recall them. Moore was a person having the right to immediate possession. In **Sullivan v Earl F Caithness** [1976] 1 All ER 1970 cited with approval in **Regina v Stafford Chin** (unreported) SCCA 101/87 delivered 17th December 1987 at p. 13 the following passage is helpful where Lord Parkersaid:

> " ' The person having the right to immediate possession is, however, frequently referred to in English law as being the 'possessor' - in truth, the

> English law has never worked out a completely logical and exhaustive definition of 'possession.'"

The principle of joint possession was also illustrated in **R v Payne** [1910] 3 Cr. App. R. 259 - counsel submitted at p. 261:

> "...This is exactly what the evidence shews Payne to have done. His business was admitted to be that of a carrier, and whether he knew the goods were stolen or not, he had no control of the goods nor joint control of them for a single instant. He took the thief and the goods to Rotherhithe. Even if he took a message for the thief, and so helped him knowingly to get rid of the proceeds of the burglary, he was not guilty of receiving, though he might be guilty as an accessory after the fact." [Emphasis supplied]
>
> [The Lord Chief Justice: Can there not be a joint possession?]".

Phillimore J in delivering judgment said at p. 262:

> "... There was here ample evidence to go to the jury of possession by Payne, and the jury may well have believed that Smith and Payne were jointly acting together. Moreover, as counsel did not take the objection at the trial that there was no evidence of joint possession, it is too late to do so here."

Once there was a finding that at the conclusion of the Crown's case, Moore was in joint possession with Bernal of the ganja, then there was a case to answer as he was also present as an aider and abetter to Bernal. The inference from the fact that both appellants brought the cartons to the

house together and that Moore carried the cartons to the airport and presumably back, was a basis for inferring that they were acting together. These features of aiding and abetting and joint possession together with what he told Inspector Rhone, were powerful factors that there was a joint venture between Bernal and Moore. (So that Bernal's possession must also be attributed to Moore.) **R v Abott** [1955] 2 All ER 899 where there was no evidence to implicate the appellant either alone or in concert at the conclusion of the Crown's case, was therefore of no assistance to the appellant Moore.

Then the statutory presumptions referred to previously as regards dealing and taking steps preparatory to exporting ganja are also applicable to Moore. So Moore was obliged to answer to all three informations. At this point it should be noted that Darren Bernal was also before the court but was discharged as the Crown offered no further evidence against him before it closed its case.

Was a separate trial for Moore appropriate having regard to the circumstances of this case?

Mr. Ramsay contended that he was deprived of the opportunity to apply for a separate trial for Moore, because he was not informed by counsel for Bernal that the defence of Bernal necessitated an attack on Moore. Therefore, it is appropriate to examine the basis of joint trials on informations in the Resident Magistrate's Court.

The starting point must be section 22 of the Criminal Justice Administration Act. It reads:

> "**22.-(1)** Where, in relation to offences triable summarily -
>
> (a) persons are accused of similar offences committed in the course of the same transaction; or
>
> (b) persons are accused of an offence and persons are accused of aiding and abetting the commission of such offence, or of an attempt to commit such offence; or
>
> (c) persons are accused of different offences committed in the course of the same transaction, or arising out of the same, or closely connected, facts,
>
> they may be tried at the same time unless the Court is of the opinion that they, or any one of them, are likely to be prejudiced or embarrassed in their, or his defence by reason of such joint trial."

There are similar provisions in section 6 of the Justice of the Peace Jurisdiction Act. Additionally the Crown opened its case on the basis of common design and the verdict was returned on that basis. Be it noted however that the verdicts were joint and several: see **DPP v Merriman** [1972] 3 All E R 42.

The ground of appeal which comes nearest to projecting the issue of separate trials reads in part:

> "That the learned Resident Magistrate probably distanced by the sustained and personal attack on the appellant Moore's case explicit in the case for Bernal failed to give any attention or any adequate attention to the objective features of the case"

In raising this issue Mr. Ramsay relied on the principle in **Peter Barnes v James Richards** [1940] 27 Crim App Rep 154. In delivering the judgment of the Court Lord Hewart said at p. 165:

> " With regard to the law upon that point, there is no longer any room for doubt or difference. The question whether there should be separate trials is a question for the discretion of the Judge. The Judge exercised his discretion in this case; he heard argument, and he acted after the argument had been heard. In our view, there is no ground here for the contention that it was necessary for the administration of justice that the trials should be separated."

Then he continued thus on pp. 165-166 -

> ".. It is quite obvious, when one reads that evidence and those statements, that what those witnesses were concerned with was to excuse themselves, not to attack others. The mere fact that in the course of excusing themselves they made observations which might have the effect of throwing blame upon others who were in the dock is no sufficient reason why the trials should have been separated. Apparently, the contention is that the Judge, exercising a kind of prophetic

> power, is to perceive in advance that the effect of the evidence, if given by one prisoner, may inculpate another, and that in all cases where that may happen, it is the duty of the Judge to order a separate trial. That is not a correct statement of the position, and, in our opinion, there was no sufficient reason in this case for ordering separate trials, and there is no ground for the contention that this conviction cannot be supported for the reason that separate trials were not had."

Another relevant case is **King v Reginam** [1962] 1 All ER 816 where Lord Morris said at p. 817-818:

> "... At the trial in November 1960, those respectively representing the appellant and Yarde applied that there should be separate trials, and urged that the defence of each involved an attack on the other. This application was successfully resisted by the Crown on the ground that it was the essence of the case for the Crown that the death had resulted from the joint enterprise of the two accused."

Lord Morris addressed the issue again in **Lowery v The Queen** [1973] All E R 662 where at pp 663 - 664 he said:

> " ... No application for separate trials had been made and any such application would have been difficult to present having regard to the facts and circumstances of the case: the case for the Crown was that both men were acting in concert as principals in the first degree or alternatively that one was a principal in the first degree and the other, as an aider and abetter, a principal in the second degree."

As there was no application for a separate trial in the court below, this passage is particularly apt.

What was Bernal's defence insofar as he blamed it on Moore. Bernal's contention was that he was an innocent participant as he had no knowledge that the cartons he voluntarily took from Moore contained ganja. His case was he honestly believed that he was carrying genuine pineapple juice. Secondly the appellant Bernal contended that the appellant Moore deceived him as to the price of the airline ticket and that was evidence that he was not part of a common design with Moore.

Perhaps it is helpful to summarise the Resident Magistrate's finding on this issue to determine if this was an issue which would have warranted the ordering of a special trial. There was a finding that Moore represented to Bernal that the price of the ticket was US$149 each. When the appellant Bernal accompanied by his brother and mother went to the airport in Washington the ticket was pre-paid and the price displayed on the ticket was US$517. The Resident Magistrate found that as a frequent traveller between Washington and Kingston he must have known that $149 was an exceptionally low price. The Resident Magistrate was even handed. He found that rival versions reflected on the credit of both appellants. In fairness to Moore, it must be noted that Mr. Ramsay submitted that once the Resident Magistrate found that Bernal paid Moore US$300 as Moore testified not US$298 as Bernal testified, then the inference ought to have

been that Moore's account of the transaction was to be preferred. That version being that the US$300 was a partial refund.

To my mind the ticket issued was a side show. It could not have been relied on as a basis for ordering a separate trial for Moore. Additionally, it had no bearing on the principal finding of the Resident Magistrate that there was a common design between Bernal and Moore to export 96 cans of ganja to the U.S.A. The Resident Magistrated also found that they resorted to the device of purchasing pineapple juice as part of a concoction "for the purpose of escaping the consequences of their crime": Lord Hudson **Mawaz Khan v Reginam** [1967] 1 All ER 80 at 83. Furthermore, they switched the cases of pineapple juice by replacing them with compressed ganja in cans labelled Grace pineapple juice. Then Bernal's role was to be the courier and his status as one who had a diplomatic visa with a permanent residence in the Jamaican Embassy in Washington where his father was Ambassador would be an advantage. These advantages would facilitate the passage in the U.S.A. of the valuable contraband concealed in cartons and cans labelled Grace pineapple juice. It is against this background that it must be determined whether the circumstantial evidence satisfied the principles laid down in **Teper v The Queen** [1952] AC 480 implicitly sanctioned in **Ramlochan v the Queen** [1956] AC 475 and expressly approved in **McGreevy v The Queen** [1973] 1 All ER 503.

The circumstantial evidence connecting the appellants with the crimes charged in the informations

The evidence marshalled to establish a prima facie case has already been assessed. It is now necessary to advert to additional evidence led by the Crown and to consider as well the evidence led by the defence so as to determine whether on consideration of all the evidence, the Resident Magistrate was justified in returning a verdict of guilty. Both appellants went to Sampars and Moore purchased four cartons of Grace pineapple juice. Sampars is a wholesale self service store and Moore selected the cartons and paid the cashier and was given an invoice. The exercise took some fifteen minutes and Bernal waited for him in Moore's car and then assisted him in putting the cartons in the car. The suggestion on behalf of Bernal that the switch could have taken place before the cartons were put in the car is best described by Lord Keith in **Ramlochan v The Queen** at p. 490 "too incredible to be worthy of serious consideration". Equally unworthy of serious consideration is the submission on behalf of Moore that the ganja could have been displayed on the shelves at Sampars. This was the basis on which it was contended Moore was mistaken as to the contents of the cartons. This was valuable contraband and would not be left on the open shelves of a self service store. The system by which the cartons were transferred from Grace to Sampars was outlined by Lorna Allen Lowe for the Crown. She also gave evidence on the process of

manufacture. Then Dr. Morton Hamilton for the defence of Moore gave supporting evidence. A factor to be noted was that the concentrate was imported. The sugar was also imported from the United States. So in a way sending Grace pineapple juice to the U.S.A. was like sending coals to Newcastle or exporting ganja to Jamaica. Another factor to note is that both the evidence from the Crown and the evidence for the defence show that there are other canneries in Jamaica.

The canned compressed ganja in this case, could not have emerged from the Grace cannery as the Grace identification was copied but the attempted disguise was exposed. This was an essential part of the Crown's evidence.

The journey from Sampars to Phadrian Avenue, the residence of grandfather Bernal was important. Conspirators are invariably cunning and they do not broadcast their plans. In such circumstances, inferential evidence is necessary. The appellants stopped at the Moore's petrol station and the Resident Magistrate found on the evidence of Andrea Moore that both appellants were always together. The purpose of that visit was to introduce the appellant Bernal to Andrea who is Moore's sister. They both stopped at Sovereign Centre to purchase roti. Before that, the appellant Bernal stopped to pick up a package for his father at Frame Centre. The Resident Magistrate found that they were always together and this finding was justified on the evidence.

The Resident Magistrate, on these facts, inferred that the switch must have taken place with the knowledge of both appellants and that both appellants arrived at grandfather Bernal's home with the ganja. They had the opportunity, the means was established by proving the existence of canneries other than Grace, and the motive was the rich rewards if the venture was successful. Bernal helped Moore to tape up the boxes and inscribed his name on it and affixed his permanent Washington residence on the cartons. The appellant Bernal gave evidence that his mother planned to meet him at the airport in Washington and he gave evidence that he had a diplomatic visa and diplomatic privileges were extended to him. He further stated that as a rule his luggage was not searched and that if someone from the embassy or his parents came to meet him privileges would be extended to him. For confirmation of those privileges see Diplomatic Immunities and Privileges Act sections 2, 3 and 4 and the First and Second Schedules which are the Vienna Convention on Diplomatic Relations. He lived at Howard University during term time and the University was scheduled to resume on April 5. The sequence of events after the arrival at Phadrian Avenue has already been recounted in setting out the prima facie case.

An important factor to note was that Bernal, on his own account at Sampars, was surprised at the quantity of pineapple juice he was being asked to carry. Moore persuaded him that the four cartons could be

combined to make two packages. Bernal protested that his grandfather's car was rather small and could not take the packages. Moore offered to provide the transportation to the airport and did. Bernal complained of overweight, Moore promised to pay. These factors must be stressed as they reveal the appellant Bernal had misgivings at Sampars about quantity yet he ignored his grandfather's warnings. The inference must be that those warnings would have interfered with his plans. Two additional features should be noted. Moore returned to Phadrian Avenue with the Bernals after the Bernal brothers failed to get a flight on 5th April. The other point was that it was submitted on behalf of Moore that between the time the cartons were returned to Phadrian Avenue on the afternoon of the 5th April and the early morning of the following day, Brian Bernal had sole control over the cartons and the switch could have taken place then. Such a suggestion could be described as fanciful: see **Miller v Minister of Pension** [1947] 2 All ER 373 cited with approval in **R v Miller v Wright** [1973] 12 JLR 1263 at 1267. Because of the relevance of the passage it must be cited. It runs thus at p. 1267:

> "... 'That degree', said Lord Denning in **Miller v Minister of Pensions** ([1947] 2 All ER at p. 373) 'is well settled". Lord Denning continued: 'It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a

> remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable,' the case is proved beyond reasonable doubt, but nothing short of that will suffice.' "

In any event, as Miss Llewellyn pointed out, on the very day that the Bernals failed to get a flight Moore had borrowed a cassette set and promised to return it. He returned to grand-father Bernal's home at around 11:45 p.m.. Bearing in mind the valuable contraband was in the sitting room, Moore's visit could hardly have been innocent. Further, the flight on the 6th was at 7:00 a.m.. So the 10 hour gap stressed by Mr. Ramsay when the appellant Bernal had exclusive physical control over the cartons was considerably reduced.

Since the Resident Magistrate's approach to circumstantial evidence has been severely criticised by Mr. Small, it becomes necessary to examine the classic authorities on this branch of the law of evidence. It is best to commence with Lord Normand's notable opinion in **Teper v The Queen** [1952] AC 480 at p. 489. It reads:

> "... Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. Joseph commanded the steward of his house, 'put my cup, the silver cup, in the sack's mouth of the youngest,' and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other

> co-existing circumstances which would weaken or destroy the inference."

It is this ratio which is binding on the judiciary in Jamaica. Be it noted that the starting point of the so-called **Hodge/Bailey** rule case was **R v Clarice Elliott** 6 JLR 173 and up to **R v Burnsand Holgate** 11 WIR 110 **R v Teper** does not seem to have been cited. In fact the manner in which **R v Hodge** was cited in **R v Clarice Elliott** does not suggest that the court was laying down a rule of law. Here is the relevant passage at page 174.

> " The proper rule to apply to cases which depend solely on circumstantial evidence is well known and is as follows:
>
> A jury may convict a prisoner on purely circumstantial evidence, but they should be satisfied 'not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.' (**Hodge's** Case 2 Lewin C.C. 227, 228). Or, as it was put by Lord Heward in **R v Podmore** (cited in Wills on Circumstantial Evidence 7th edition at page 43), 'Circumstantial Evidence consists of this that when you look at all the surrounding circumstances you find such a series of undesigned, unexpected coincidences that, as a reasonable person you find your judgment is compelled to one conclusion.' Or as Wills puts it at page 320, in what he calls the fundamental rule, 'In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than

> that of his guilt.' Or, as Lord Chief Baron Macdonald enunciated the same rule in **Rex v Patch** (cited in Wills at page 323) 'the nature of circumstantial evidence was that the jury must be satisfied that there is no rational mode of accounting for the circumstances, other than the conclusion that the prisoner is guilty.' "

Then in **Ramlochan v The Queen** [1956] AC 475 the following passage at p. 487 from the summing up of Celestian J was approved by Lord Keith in delivering the opinion of Their Lordships' Board. In following **Teper** it runs thus:

> " ' Now gentlemen, if you are satisfied that the evidence given by the prosecution is reliable and trustworthy, having regard to all the other evidence in the case, then and only then may you proceed to the next step in dealing with this circumstantial evidence; namely, that you are satisfied beyond reasonable doubt that you have drawn the correct inference from the facts before you, and then that they prove the case for the Crown with the accuracy of mathematics; in other words, that you are irresistibly impelled to one conclusion and one conclusion only and that is, that the accused murdered the girl Minwatee. If that is so, then you will convict him - it matters not if there were other persons with him; if each took part in the furtherance of a common criminal purpose, in encompassing the death of that woman and one of them struck the fatal blow, even if it was not he, the accused, he would nevertheless be guilty of murder. That is the position.' "

It is instructive to note that this passage is not qualified by the rule described by Mr. Small as the Hodge/Bailey rule. There are good reasons for this Court to ignore the so-called **Hodge/Bailey** rule. See **Tai Hing Ltd. v Liu Chong Hing Bank** [1986] AC 80 at 108 which reads:

> " It was suggested, though only faintly, that even if English courts are bound to follow the decision in **Macmillan's** case the Judicial Committee is not so constrained. This is a misapprehension. Once it is accepted, as in this case it is, that the applicable law is English, their Lordships of the Judicial Committee will follow a House of Lords' decision which covers the point in issue. The Judicial Committee is not the final judicial authority for the determination of English law. That is the responsibility of the House of Lords in its judicial capacity. Though the Judicial Committee enjoys a greater freedom from the binding effect of precedent than does the House of Lords, it is in no position on a question of English law to invoke the **Practice Statement (Judicial Precedent)** [1966] W.L.R. 1234 of July 1966 pursuant to which the House has assumed the power to depart in certain circumstances from a previous decision of the House."

There was no express mention of the so-called rule either in **Teper** or **Ramlochan** nor was there an analysis of **McGreevy** which ought to have guided the court in **Bailey** 13 JLR 46. It is most unusual for an intermediate appellate court to prefer the summing up of a Judge on circuit to the considered reasons of the Privy Council and the House of Lords on the course of the common law. Moreover, when Alderson B

gave his directions to the jury, the accused Hodge was not permitted to give evidence. Additionally, no Jamaican case was cited to us where the ratio was based on the dictum in **Hodge's** case, although there were assertions that **Hodge's** case formed part of the common law of Jamaica.

Circumstantial evidence is inferential or indirect evidence and neither Luckhoo J.A. in Nicholson in the passage cited (supra), nor Waddington JA in **R v Warwar** [1970] 15 WIR 208 in a passage which will be cited later, found it necessary to rely on the so-called Hodge/Bailey rule.

It is against this background that **McGreevy v DPP** [1973] 1 All ER 503 should be examined. At p. 507 Lord Morris in explaining **R v Hodge** [1838] 2 Lew CC at 228 & 68 ER 1136 said:

> " ... The short report of the case records what Alderson B said in summing-up to the jury. He told them that the case was 'made up of circumstances entirely' and that before they could find the prisoner guilty they must be satisfied -
>
> ' not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.'"

Then in emphasising that the tenor of the judge's summing up must be to guide the jury that proof must be established beyond a reasonable doubt, Lord Morris continued thus at p. 509:

> "... I consider that the form in which this general requirement is emphasised to a jury is best left to the discretion of a judge without his being tied down by some new rule which would be likely to have the effect that a stereotyped form of words would be deemed necessary. In a case in which inferences may have to be drawn by a jury such facts as are found by them a judge will wish to give the jury guidance as to their approach and in giving that guidance he will certainly be assisted by having in mind what was said by Alderson B and by Dixon CJ and by others who have given expression to the same line of thought."

Then Lord Morris cites **Teper** which it is pertinent to reiterate:

> "To the same effect were the words used by Lord Normand in **Teper v R [1952]** AC 480 at 489 when he said:
>
> > ' Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. Joseph commanded the steward of his house, 'put my cup, the silver cup, in the sack's mouth of the youngest,' and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.' "

Lord Morris then continues thus:

> "So also were the words used by Lord Goddard CJ in **R v Onufrejczyk** [1955] 1QB 388 at 394, cf [1955] 1 All ER 247 at 248 (in dealing with the situation where in a murder

> case no corpse had been found) when he said:
>
> ' Now it is perfectly clear that there is apparently no reported case in English law where a man has been convicted of murder when there has been no trace of the body at all. But it is equally clear that the fact of death, like any other fact, can be proved by circumstantial evidence, that is to say, evidence of facts which lead to one conclusion, provided that the jury are satisfied and are warned that it must lead to one conclusion only.' "

This approach was similar to the passage cited in the Jamaican case of **R v Clarice Elliot** cited previosuly. Miss Llewellyn for the Crown in recognising the logic of **Teper** and **McGreevy** as the authoritative guides on this branch of the law cited **George Edwards v Regina** (unreported) SCCA No 32/83 delivered 16th December 1983 and pointed out that in the following passage Kerr JA grasped the essentials of the issue which was that the jury be adequately and fairly directed. He said at p. 6:

> "Speaking for myself it would seem that if the circumstantial evidence must point indubitably to the guilt of the accused then impliedly if it points to any other reasonable conclusion it would not meet the test; nor do I think that to tell a jury of laymen that it must be 'inconsistent with any other rational hypothesis' is clarifying or edifying."

Then he followed this excellent analysis with an inconsistent passage which ought to be regarded as surplusage:

> "Be that as it may, the rule in Hodges' case is so firmly established here that trial judges are well advised to adhere to the formula, thereby obviating the risk of the directions on

> this question being made grounds of appeal."

Lord Morris at p. 510 of **McGreevy** posited the true rule thus:

> "If, having regard to the facts and circumstances of a particular case, a summing-up is held to have been inadequate and to have failed to set the jury on their proper line of approach or to give them proper guidance a conviction might be held to be unsafe and unsatisfactory. But I am averse from laying down more rules binding on judges than are shown to be necessary."

It is necessary to cite one further authority to demonstrate that the true understanding of the nature of circumstantial evidence was fully understood by (Lyall-Grant CJ, Brown & Clarke JJ) in the Supreme Court. In **R v Junor** 1933 JLR 24 at p. 52, Clarke J said:

> " The case for the prosecution is that, although it has been done largely by circumstantial evidence, it has nevertheless been satisfactorily proved that the defendant T. A. Junor in fact knew of and authorized the making and sending of the documents containing the false pretences so that their contents are equivalent to pretences made personally by him.
>
> There is, on the one hand, nothing in the whole of the evidence inconsistent with the guilt of the defendant.
>
> On the other hand the facts proved and the inferences that can properly be drawn from them point clearly to his guilt, as being (to quote the words of Chief Justice Abott in **R. v. Burdett** (1820), 4 B. & Ald.) a 'reasonable and just conclusion' which 'in the absence of explanation or contradiction'

> by him fully justify his conviction on the two charges as drafted."

It ought to be borne in mind that this was a case coming from the Resident Magistrate's Court from Hanover and counsel in the case was Manley K.C. for the Prosecution and Smith K.C. for Junor. Clarke J continued thus at p. 53:

> " The passages of the **Martiartu** [40 T.L.R.] case which are, however, more directly in point in this case are those passages in the speech of Lord Birkenhead in which the learned Lord Chancellor said:-
>
> 'We were reminded with reiteration that an onus, carrying with it a criminal charge, must be discharged by those who undertake it, with meticulous completeness. The case must, of course, be proved. So must every other case. But some offences admit of much more direct proof than others. It was no doubt for this reason that the principle of circumstantial evidence was admitted into our law. Those who contrive crimes do not as a rule summon witnesses. There are certain crimes which are specially easy to conceal and therefore specially difficult to discover. In fact many would be entirely undiscoverable unless the law permitted inferences to be drawn. The question in such cases is always whether the facts of the case, taken as a whole, render the general inference proper to be drawn from those facts so irresistible that the matter, though not established by direct evidence, has escaped from the atmosphere of reasonable doubt,' and, again,
>
> 'I am satisfied that the respondents have discharged the task which the case imposed on them. In other words, they have proved facts from which there springs an

> irresistible inference that the owners were accomplices in the fraudulent destruction of the vessel. There would have been ample evidence to place before a jury upon this issue; and I have no doubt as to the conclusion which a jury would have reached.' "

This judgment has been ignored by those who contend that **Hodge's** case has always formed part of the law of Jamaica.

To conclude, the inference drawn by the Resident Magistrate that there was a switch of the pineapple juice to compressed ganja in cartons was correct. For it was inferred that the switch took place between the Moore's gas station and grandfather Bernal's home and was based on correct finding that pineapple juice was bought at Sampars. Ganja was taken to Phadrian Avenue and detected at the American Airlines baggage area in the cartons which were taken by Bernal and Moore to Phadrian Avenue. This presumption of fact was based on the presumption of continuance. There were no co-existing circumstances to weaken the inference of guilt of both appellants based on the doctrine of common design. The verdicts were joint and several in respect of each appellant. To affirm the verdicts, it is necessary to indicate the knowledge proved in respect of the three informations.

At the conclusion of the Crown's case for the possession charge, the knowledge had to be inferred from the conduct of the appellants. In Bernal's case, failure to examine despite a warning. In Moore's case, the

presumption of continuance together with his going to Inspector Rhone with his planned excuse of the invoice from Sampars and aiding and abetting Bernal by transporting the cartons. At the end of the case, the inference was actual knowledge as it was rightly inferred that they both participated in switching Grace pineapple juice to compressed ganja. As regards dealing with ganja, both accused had to prove on balance of probabilities that they were not dealers. They failed. The excuse that they intended to send pineapple juice to Moore's sister was unconvincing. The evidence of the appellants strengthened the Crown's case with regard to "taking steps." They proposed to export the 96 tins of ganja to the U.S.A. The cunning method of packaging coupled with the fact of being in possession of ganja at the airport was sufficient to establish a prima facie case. At the conclusion of the case, the joint excuse of the Sampars invoice, the switch to compressed ganja, in which both participated and the evidence of Bernal's diplomatic privileges made a finding of guilt on these informations irresistible.

Was the Resident Magistrate correct in ruling that the Polygraph evidence was inadmissible?

Miss Pyke, junior counsel for the Crown, in a logical and economical submission, demonstrated that on principle and authority, the Resident Magistrate was correct to rule the proposed polygraph evidence inadmissible. In **DPP v Jordon** [1976] 3 All ER 775 at 779 Lord

Wilberforce in approving the approach of Lawton LJ in **R v Turner** [1975] 1 All ER 70 said:

> "The point has been well put in the Court of Appeal :
>
> 'An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does.' "

In determining guilt or innocence, the legislature and the courts have devised the adversary system which relies on the common sense of the fact finding tribunal, be it judge or jury to use its general knowledge of human nature in finding facts and drawing inferences in determining guilt or innocence. In some instances where specialised knowledge is necessary, the tribunal may be assisted by expert evidence, but it has never been part of our jurisprudence to require an expert to give the tribunal his opinion on the guilt or innocence of the accused. In this case the Resident Magistrate was required to assess the circumstantial evidence initially at the end of the Crown's case and then ultimately to

determine whether the requisite intent of either or both accused was established. That intent was the knowledge that the cartons which they both took to Phadrian Avenue and took steps preparatory to exporting, was ganja. That it was ganja, was determined by the analyst whose certificate was admissible in evidence. He is an expert who used scientific tests to satisfy the tribunal.

The Resident Magistrate was required to find primary facts and draw inferences to determine Bernal's knowledge. That a polygraph test may be useful to the private or public organisations who determine their own procedures for discovering the truth or otherwise is not denied. But they have no role in the legal system in determining guilt or innocence. A polygraph examiner is an expert in terms of his specialised knowledge but he is not qualified to give expert evidence on the issue of the credibility of the accused which is the issue for the tribunal to decide. The issue of the role of expert evidence in general was raised in both **Turner** and **Jordan.** As for the use of truth drugs and polygraph tests this was determined in New Zealand and Canada and in both instances the ruling was that the evidence was inadmissible.

It is now necessary to examine **Blackie v Police** [1966] NZLR 960 **The Queen v McKay** [1967] NZLR 130 and **Regina v Beland** 43 DLR 641.

In **McKay** the issue was whether psychiatric evidence which was derived after the use of truth drugs was admissible. Two passages from the judgment of McCarthy J are useful. The first on p. 152 states:

> "... The time could come when we should make further exceptions in the light of what wider scientific knowledge and improved techniques show to be desirable. But the use of drugs and instruments such as the polygraph to delve into man's unconscious mind can conflict with the upholding of human dignity. The problem is a complex one. Not all means of arriving at truth can be justified, and the use of drugs and machines, if uncontrolled, could lead to practices as objectionable as those adopted in more barbarous ages."

Then in conclusion at p. 153 the learned judge said:

> " Since the evidence of Dr Gluckman recounting what the appellant said was not admissible, the question whether he could express an opinion as to the reliability of what was said does not arise. But the problem could possibly be stated another way; accepting that he could not have been allowed to relate what was said under examination, could he not have expressed his view that, as a result of that examination, he was of the opinion that the testimony given by the accused on oath at his trial was true? This raises again the question which this Court considered recently in Blackie v Police [1966] NZLR 910, viz., the occasions when an expert may state his opinion as to what is really the ultimate issue which the Court has to decide. As North P. and I said in that case, English Courts have not sought to arrange those occasions in any philosophical order, but have acted pragmatically. In my view, English Courts would not permit, and we in New Zealand

> should not permit an expert to give evidence as to the credibility of the testimony given by an accused in his own defence. R. v. Toohey [1965] A.C. 595; [1965] 1 All E.R. 506, which Mr Williams cited, is a very different case. It concerns medical evidence called to establish some defect of mind that diminishes the reliability of a witness's evidence. Here the witness sought to express his conviction that an accused was telling the truth, and therefore did not commit the act charged. That question must be reserved wholly for the jury."

In **Regina v Beland & Phillips** 43 DLR 641-642 the issue of polygraph evidence had to be determined. The extended headnote on 641-642 summarises the position taken by the Supreme Court of Canada. It reads:

> " *Per* McIntyre J., Dickson C.J.C., Beetz and Le Dain JJ. concurring: The polygraph evidence which the accused proposed to tender in this case was inadmissible. The admission of such evidence in the circumstances of this case offends several of the rules of evidence. First, to admit evidence of the polygraph examination to bolster the credibility of the accused as a witness offends the well established rule against adducing evidence solely for the purpose of bolstering a witness's credibility. As well, the admission of polygraph evidence would offend the rule against admission of past consistent out-of-court statements. Polygraph evidence which the accused proposed to tender would be entirely self-serving and shed no light on the real issues before the court. Since the evidence did not fall within any of the well recognized exceptions to the operation of the rule against prior consistent statements such as to rebut an allegation of recent fabrication the evidence should be rejected. Otherwise the trial process would be opened

up to time consuming and confusing consideration of collateral issues and be deflected from the fundamental issue of guilt or innocence. The evidence which the polygraph examiner would give would also offend the rule relating to character evidence since the operator would be called as a witness for the purpose of bolstering the credibility of the accused and in effect to show him to be of good character by inviting the inference that he did not lie during the test. It was not evidence of general reputation but of a specific incident. Finally, the evidence would not be receivable as expert evidence. The function of an expert is to provide the jury or the trier of fact with an expert's opinion as to the significance of, or the inference which may be drawn from, proved facts in a field in which the expert witness possesses special knowledge and experience going beyond that of the trier of fact. Where, however, the question is one which falls within the knowledge and experience of the trier of fact there is no need for expert evidence and his opinion will not be received. In this case the sole issue upon which the polygraph evidence was tendered was the credibility of the accused, an issue well within the experience of judge and juries and one on which no expert evidence is required. Finally, there was no reason for creating a special rule for the admission of polygraph evidence. Not only would the admission of polygraph evidence run counter to the well-established rules of evidence but its admission would serve no purpose which is not already served. To the contrary it could disrupt proceedings cause delays and lead to numerous complications which will result in no greater degree of certainty in the process than that which already exists."

The Resident Magistrate ruled that the polygraph evidence sought to be adduced on behalf of Bernal was inadmissible and his ruling on principle and authority was correct.

The Resident Magistrate's findings of fact in relation to (a) Character Evidence (b) Resolution of Conflict in the appellants' evidence (c) Circumstantial Evidence.

It was submitted on behalf of both appellants that on the basis of the recent case of **R v Asiz** [1995] 3 WLR 53 that both appellants are entitled to a verdict of acquittal. In order to determine this important issue, it must first be ascertained what is required of the Resident Magistrate pursuant to section 291 of the Judicature (Resident Magistrates) Act (The Act in this section) and the role of this Court in criminal appeals from that court.

Prior to the amendment of section 291 of the Act, it was the invariable rule that Resident Magistrates returned a general verdict of guilty or not guilty. This court on many occasions pointed out that this was unsatisfactory and it was anticipated that the legislature would respond. Here is how the matter was put by Fox JA in **R v Connell** [1971] 12 JLR 578 at p. 580:

> " The magistrate did not state his findings of fact. Neither the law nor the practice in his court requires him to do so. This situation is unsatisfactory. This court has said so in numerous judgments. In this way it has called attention to the urgent need for reform. But the court has never

> attempted to coerce reform by taking up drastic positions. It has sought to cope with the existing realities - not the least of these being the extreme pressures under which business is likely to be conducted in magistrate's courts in the island - by endeavouring to ascertain from the printed evidence and the verdict of guilty what must, or could have been the magistrate's findings as to those facts which depend upon the truthfulness of the witnesses. For this purpose, the court assumes that the magistrate found all such facts which were in dispute at the trial, in favour of the Crown's case. If these findings of fact so ascertained are justified by the evidence in that there is nothing glaringly improbable about the story they disregarded or misunderstood an admitted fact which is material, the appeal is considered on the basis of these findings so ascertained. In such a situation the court has never regarded itself as being entitled to take a contrary view of the evidence, and to substitute its own findings in place of those which could reasonably have been made by the magistrate." [Emphasis supplied]

Since 1971, with the growth of criminal activities the burden on the Resident Magistrate has increased enormously especially since the legislature has increased the jurisdiction of those courts.

Generally, no reasons were given as was required when exercising a civil jurisdiction: see section 256 of the Act. Nor were there any findings of fact as in a special verdict by a jury in the Supreme Court nor was there a requirement to state a case as when sitting as two justices in Petty Sessions: see section 49 of the Justices of the Peace Act or under Part III of the Criminal Justice Administration Act.

In **R v Mary Lynch** unreported RMCA 16/93 delivered 28th June 1993 this Court (Wright, Downer, Wolfe JJA) said at p. 7:

> " A Resident Magistrate is obliged by section 291 of the Judicature (Resident Magistrates) Act, to:
>
> > 'Record or cause to be recorded in the notes of evidence, a statement in summary form of his findings of fact on which the verdict of guilty is founded.'
>
> This statutory formula follows closely the course of the common law provisions, for a Special Verdict in the criminal law. Here is how Archbold states it in the 36th edition at paragraph 586:
>
> > '... such verdict must state positively the facts themselves, and not merely the evidence adduced to prove them, and all the facts necessary to enable the court to give judgment must be found:'
>
> A classic example of a Special Verdict is to be found in The Queen vs Dudley & Stephens [1884]-85] 14 Q.B. 237. In recording the findings on which the verdict of guilty is found, it is necessary for the Resident Magistrate to set out the facts in summary form, so as to enable the court to give judgment. By so doing, the facts on which the verdict of guilty is found, can be put in its proper context. The manner of recording the facts in this case which was of some difficulty, was exemplary."...

This manner of making "a statement in summary form of his findings of fact" was recognised in **Mawaz Khan v Reginam** [1967] 1 All ER 80

where Lord Hodson sets out in summary form the findings of fact in a case based on circumstantial evidence at pp. 81-82. It reads thus:

> " The case for prosecution rested on circumstantial evidence which may be summarized as follows: (a) One Farid Khan testified that in 1958 in his village of Haider in West Pakistan he had seen the deceased stab and kill one Wassal Khan, at a time when the appellants were living in the same village. The deceased had served a term of imprisonment before coming to Hong Kong and among the possessions of the second appellant was found a photograph of a girl on the back of which was written the name "Wassal Khan" and the words "West Pakistan." a possible motive for the killing of the deceased was revenge for his having killed Wassal Khan. (b) Some evidence of bloodstains on the clothing and shoes of the second appellant; this was of group B and group O; the blood group of the deceased was group B, that of the first appellant group O. These stains could not be accounted for by the statements of the two appellants that they sustained injuries in a fight with one another which would account for the blood. (c) A small ring was found at the scene of the crime; a photograph of the second appellant taken about a month before the incident shows him wearing a small ring on his signet finger, although he was not wearing that ring when interviewed by the police after the incident. (d) At the scene of the crime the police found a number of shoe impressions, three of which were clear enough to be photographed. One impression corresponded with the rubber heel of the shoes the deceased was wearing. Among the belongings of the second appellant was found a pair of rubber-heeled shoes. A comparison of a heel impression found at the scene of the crime showed six similar points of comparison with

> one of this pair of shoes. The heels of these shoes were identical with one another. In the same way five points of similarity were to be seen by comparing a third heel impression found at the scene of the crime with the right heel impression of shoes taken from the first appellant. Of particular significance was an impression on the floor corresponding with a nail hammered into the right heel of the pair of shoes belonging to the first appellant. In that the shoes of two persons were involved there was thus a double coincidence."

It is of course acknowledged that a jury in returning a special verdict would have been directed in law during the course of the summing-up and equally a Resident Magistrate in recording his findings of fact in summary form would have directed himself in law after hearing addresses from counsel on both sides. As to whether these implicit directions in law were correct is one of the functions of an appellate court on hearing from counsel and by a close examination of the evidence in the case.

Mr Small initially contended that reasons ought to be required as in the case of a Supreme Court judge sitting without a jury and cited **R v Alex Simpson & McKenzie Powell** SCCA 151/88 & 71/89 now reported at [1993] 3 LRC 631. That submission ignored the different requirements imposed on a Resident Magistrate recording his findings of fact in a summary manner, a Supreme Court judge summing-up to a jury, or exceptionally delivering his reasons for judgment in a criminal trial, where

as in the Gun Court he sits without a jury. There are of course, instances when a Resident Magistrate in recording his findings of fact must show by the manner in which he records those facts that he is aware that the evidence necessary to find a verdict of guilty is in a special category as in the case of identification evidence. There was no such requirement in this case. The Resident Magistrate in this case, recorded his findings of fact in a narrative form so it was necessary to extract his primary findings of facts and determine whether the inferences he drew were correct.

As regards character evidence both appellants called witnesses to testify that they were of good character. Bernal at the time of trial was a student at Howard University. He was also the son of the ambassador to the United States of America. Moore was a man of business and comes from a family of substance. They were elites of equal status in my eyes as well as in the eyes of the law. Here is how the Resident Magistrate recorded his findings in this regard:

> " Character evidence was given for both accused. The court took that into consideration. However exemplary ones life and conduct may be it is not possible to give evidence about the state of mind of another person and what his intentions are."

What then is character evidence capable of proving? In **Berry v R** [1992] 3 All ER 881 their Lordships' Board comprised of Lord Keith of Kinkel, Lord Roskill, Lord Ackner, Lord Jauncey of Tullichettle and Lord Lowry in an opinion delivered by Lord Lowry said:

" The appellant then complained that the trial judge had failed to direct the jury adequately with regard to the appellant's previous good character in that he failed to point out that this is primarily relevant to the question of credibility. While the historical survey of Viscount Simon LC in **Stirland v DPP** [1944] 2 All ER 13 at 17-18, [1944] AC 315 at 324-326 is both interesting and instructive the modern case law all points the same way on this point: see **R v Bellis** [1966] 1 All ER 552, [1966] 1 WLR 234, **R v Falconer-Atlee** [1973] 58 Cr. App R 348, **R v Marr** [1989] 90 Cr App R 154, **R v Cohen** [1990] 91 Cr App R 125 and **R v Berrada** [1989] 91 Cr App R 131n. The last three cases are also authority for the proposition that it is proper though not obligatory for the trial judge to tell the jury that as well as going to credibility good character is relevant when considering whether the defendant is the kind of man who is likely to have behaved in the way that the prosecution alleged. But the primary point, one now has to accept is credibility. The Crown admitted that the judge's direction as to the effect of a good character was flawed in the manner contended for by the appellant but adopting the view of the Court of Appeal while admitting the error contended that it had caused no injustice.

Their Lordships, however, did not feel able to accept this conclusion. Such case as the defence were able to make depended like the defence in some of the cases cited above almost entirely on the appellant's credibility if it was to have any prospect of success and therefore the misdirection was material. Had this been the only ground of complaint, their Lordships might have reached a different conclusion on the appeal."

The implication was that had this been the only ground of appeal the Board might have followed their previous decision in **Anderson v The Queen:** [1971] 3 WLR p. 718. Incidentally, this was a case on circumstantial evidence and there was no mention by Their Lordships' Board of **Hodge's** case. If **Hodges'** case was part of the law of Jamaica one would expect to find it mentioned in this case. Character evidence speaks of general reputation. It was evidence that goes to the credibility of the appellants and positive evidence to show that the appellants did not have the propensity to commit the offences. The Resident Magistrate took both these features into consideration. How was it established what the Resident Magistrate took into consideration? Bearing in mind Mr. Small was counsel for **Berry** before Their Lordships Board, it is not surprising that he would have stressed the need for the Resident Magistrate to take into account both credibility and propensity in coming to a decision. Here is the Resident Magistrate's summary of his address on this aspect

> "Character of witness:
>
> Important evidence - where state of mind and character is an issue. To show he was not the kind of person to be involved and to show the positive.
>
> There is also evidence of Brians demeanour.
>
> When prosecution relies on circumstantial evidence and there are areas on relevant circumstances which affect the

> inferences which prosecution is asking court to draw and prosecution fails to address evidence in that ated they they (sic) would have failed to discharge the burden."[Emphasis supplied]

As for Mr. Ramsay's address, the Resident Magistrate noted "Miss Dyce - character evidence". The Resident Magistrate went further than was required by statute and said that it was not possible when giving evidence of character to give evidence of the state of mind of the appellants and what their intentions were when they were planning and executing their common design. This was correct as character evidence is of general reputation. In effect, what the Resident Magistrate said was that after considering all the evidence, the Crown had satisfied him on "possession" and "taking steps" to make him feel sure, and that the appellants had not satisfied him on balance of probabilities on dealing, so the verdicts were - guilty. In this regard I can find no fault with the finding or the explanation given by the Resident Magistrate although it was not as elegantly worded as counsel for the appellants would have wished.

How then did **Regina v Aziz** [1995] 3 WLR 53 a House of Lords decision alter this situation as propounded by **Berry**. It does not appear that **Berry** was cited either in speeches of Their Lordships or in the submission of counsel but Lord Lowrie was on the panel of both courts. Be it noted that these were jury trials where the judge in summing up was obliged to give directions in law to the jury. No such requirement obtains

in the Resident Magistrate's Court. The omission to give directions on both credibility and propensity was the fault found in the summing up.

Here is how the headnote summarised the decision at p. 53:

> " *Held,* dismissing the appeals, that a defendant with no previous convictions who had testified or made pre-trial answers or statements containing admissions as well as self-exculpatory explanations was prima facie entitled to a good character direction going both to credibility and propensity, although the judge, in giving such a direction, had a residual discretion to add words of qualification concerning other proved or possible criminal conduct of the defendant which had emerged during the trial, so as to place a fair and balanced picture before the jury; that in the limited case where the defendant's claim to good character other than his lack of previous convictions was so spurious that it would make no sense to give the general character direction, the judge could dispense with the direction in its entirety; and that, accordingly, since none of the three defendants had been given good character directions extending to both credibility and propensity, the Court of Appeal had correctly quashed their convictions."

What **Aziz** has done is to make it obligatory to give propensity directions where formally this was discretionary. The directions on credibility were always obligatory. It was a matter for the Court of Appeal in the circumstances of **Aziz** to determine whether to apply the proviso and they did not in view of their decision in V**ye** [1993] 1 WLR 471. The House of Lords in those circumstances also refused to apply the proviso.

I am unable to see how **Aziz** compels this court to enter a verdict of acquittal in the case of these appellants. The role of this court having regard to the finding of good character, and to the law on character evidence in **Berry** & **Aziz** would be, to examine the transcript to ascertain if, despite the good character of the two appellants, the evidence was such that the verdict of guilty can be supported. I find that the verdict can be supported so this ground fails.

It was submitted that there were conflicts in the defence adduced by Bernal with that adduced by Moore and that the failure to resolve such conflicts in Bernal's favour deprived him of an acquittal. Further, it was contended that Bernal's defence was not adequately considered by the Resident Magistrate. As Miss Llewellyn for the Crown pointed out, the conflicts between the appellants were on collateral matters as for example precise time when Moore asked Bernal to carry pineapple juice. This was so, despite the submission advanced on behalf of Bernal that because they had different versions in relation to the price of the tickets, that was proof that Bernal was not in common design with Moore.

It was contended that Bernal's conduct at the airport in the presence of Inspector Rhone, was normal and co-operative and that such conduct negatived knowledge that the cans contained ganja. In the first place, once the airline security had inspected the cartons and said that they were calling the police Bernal knew that the game was up. The

evidence was not in his favour at all but part of his plan to fabricate a defence. The following passage from **R v Warwar** [1970] 15 WIR 299 at p. 306 is instructive:

> " Mr Blake submitted that the remark made to the yard boy was equivocal and capable of two interpretations, the one favourable and the other unfavourable. The unfavourable interpretation, if adopted, would have characterised the accused in the sight of the jury as a fabricator and perjurer and a guilty man, and the trial judge failed to direct them that in those circumstances they were obliged to adopt that interpretation of the remark which was more favourable to the accused.
>
> We did not agree with this submission. Clearly, the correct interpretation to be placed on the statement would depend on which of two conflicting sets of fact the jury accepted. If they accepted the facts on which the Crown's case was based, viz., that sergeant Graham had never gone on top of the outhouse, then the only inference that could be drawn was that the accused was endeavouring to get Cawley to tell a lie in order to support the defence. If, on the other hand, they rejected the facts on which the Crown's case was based and accepted the accused's unsworn statement, then the only inference they could draw would be that he was merely telling Cawley to state the truth.
>
> In our view, the directions of the learned judge on this piece of evidence were correct, and we did not consider it necessary to call on the Crown to reply to this ground of appeal."

Once the Resident Magistrate drew the inference that there was a switch and found that both appellants were in concert, then the sedate behaviour at the airport was correctly found to be part of the defence if the scheme failed. Similarly the conduct of Moore in turning up at the Narcotics Squad with the invoice from Sampars was part of the planned defence. Lord Hodson in **Mawaz Khan** (supra) at p. 83 had this to say of a planned defence:

> "... What is found against the appellants is that the statements were concocted for the purpose of escaping from the consequences of their crime"...

The role of this court in appeals from the Resident Magistrate's Court in relation to (a) Applications to supplement the record (b) Stroud v Stroud (c) Sentencing

The statutory provisions governing Resident Magistrates' appeals are to be found in the Judicature (Resident Magistrate's) Act and Judicature (Appellate Jurisdiction) Act. It is clear from section 296 that appeals are permissible on either fact or law for the appellant is obliged to comply with section 296 (2) & (3) of the Act. These sections read:

> " (2) The grounds of appeal shall set out concisely the facts and points of law (if any) on which the appellant intends to rely in support of his appeal and shall conclude with a statement of the relief prayed for by the appellant.

> (3) The Court of appeal may dismiss without a hearing any appeal in which the grounds of appeal do not comply with the provisions of subsection (2)."

The Court of Appeal has extensive powers of amendment pursuant to section 302 and appeals are precluded if the point was not taken below and they relate to defects in form and substance of the indictment or information: see section 303. Section 304 has a similar restrictive provision, for errors in the judgment order or conviction, save where this may result in an injustice. This saving clause also applies to section 303. Then there is a provision for the Court of Appeal to order a new trial where the appeal is allowed.

Mrs. Samuels-Brown in an interesting argument submitted that if the appeal on sentence succeeded a less severe sentence is the only course open to the Court of Appeal. She based her submission on section 305 (2) of the Act which reads:

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

This provision has been expressly repealed by section 23 of the Judicature (Appellate Jurisdiction) Act. Section 22 of that Act reads:

> "22. Subject to the provisions of this Act, to the provisions of the Judicature (Resident Magistrates) Act regulating appeals from Resident Magistrates in criminal proceedings

> and to rules made under that Act, an appeal shall lie to the Court from any judgment of a Resident Magistrate in any case tried by him on indictment, or on information in virtue of special statutory summary jurisdiction.

Then section 23 reads

> "23. On appeals under this Part the Court shall have and may exercise the powers and authorities conferred on the Court by subsection (3) of section 14."

Section 14 (3) of this Act reads:

> " (3) On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal."

There is also a proviso in the Judicature (Resident Magistrate's) Act at section 305 (3). It reads:

> " (3) The Court may, notwithstanding it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal, if it considers that no substantial miscarriage of justice has actually occurred."

The result of this examination is to demonstrate that the powers of this court as regards sentence are similar to those exercised when there is an appeal from the Supreme Court. However, I am aware of the doubts of my brothers as regards this interpretation. It is of vital importance as

regards sentencing power as I hold the sentence on possession simpliciter in this case ought to be varied downwards and the sentence on "otherwise dealing" increased.

Now that the Resident Magistrate is directed to record a summary of his findings of fact on which the verdict is based, it is useful to examine section 15 of the Judicature (Appellate Jursidiction) Act relating to special verdicts in Supreme Court appeals. It reads:

> "15. Where on the conviction of the appellant the jury have found a special verdict, and the Court consider that a wrong conclusion has been arrived at by the court before which the appellant has been convicted on the effect of that verdict, the Court may, instead of allowing the appeal, order such conclusion to be recorded as appears to the Court to be in law required by the verdict, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law."

Since the findings of fact in summary form of the Resident Magistrate are in the nature of a special verdict, this Court could exercise the powers akin to that pursuant to section 15 above by virtue of section 304 of the Judicature (Resident Magistrates) Act. To reiterate, that section ordains that a judgment order or conviction shall not be reversed or quashed for errors of form or substance unless the error has caused injustice.

Additionally if the verdict can be supported by evidence then the conviction will be affirmed. Miss Llewellyn for the Crown in answer to

criticism of the Resident Magistrate's finding of fact referred to **R v Joseph Lao** [1973] 12 JLR 1238 and referred specifically to the following passage at p. 1240 which was from Ross - The Court of Criminal Appeal:

> "...'The jury are pre-eminently judges of the facts to be deduced from evidence properly presented to them, and it was not intended by the Criminal Appeal Act, nor is it within the functions of a court composed as a court of the appeal that such cases should practically be retried before the court. This would lead to a substitution of the opinion of a court of three judges for the verdict of the jury.'"

By substituting Resident Magistrate for jury, I agree with her submission.

Application to supplement the record

Section 300 of the Judicature (Resident Magistrates) Act reads.

> "300. The notes of evidence taken by the Magistrate or Clerk of the Courts, or a copy of the same certified by the Clerk of the Courts as being a true copy, and the documents received in evidence before the Magistrate, or copies of the same certified by the Clerk of the Courts as being true copies, shall be read and received by the Court of Appeal as the evidence in the case.
>
> Provided always, that the Court may in any case require the production of the original documents, or any of them, or of the original notes of evidence."

There were several applications by both appellants to supplement the official notes of the Resident Magistrate. It is true that in some circumstances, see **R v Junor** [1933] JLR 24 at p. 28 this court has

sought comments or even requested the Resident Magistrate's notes where the interests of justice required. It must be realised that these notes are not verbatim and none of the applications made to supplement the notes of evidence or to adduce additional evidence before this court, had any merit. In more than one instance, counsel notes at the trial did not agree. There was also an application on behalf of Bernal to adduce further evidence concerning the price of the ticket. It had no merit and was also rejected.

Stroud v Stroud

In the court below, Mr. Small sought to put in evidence an advertisement appearing in a newspaper which referred to one Moore. The notes of evidence read thus:

> " (Document shown to witness by Mr Small)
>
> Mr Ramsay objects to Mr Small reading out document.
>
> Counsel is using a passage in a newspaper and he has not established what has put it there. There is no probative value.
>
> Mr McDonald also objects.
>
> Mr Small
>
> Hearsay rule is not one needs to rely on or assertion. It is admissible the witness said he had no knowledge of article or it was brought to his attention.
>
> Court rules it cannot go in evidence."

Stroud v Stroud [1963] 1 WLR 1050 was a civil case and at page 1080-1081 Wrangham J said:

> "... He was cross-examined by Mr. Lawson on behalf of the husband. In the course of his cross-examination Mr. Lawson called for certain documents, which were then obviously in the possession of the witness, because they were lying upon the sill of the witness-box in front of him. They were handed over to Mr. Lawson, who read them and decided to put some, but not all, of them in evidence. The documents consisted of medical reports from doctors, who at various times had had occasion to examine the wife, and were all of them relevant to the matters in issue. Privilege was not claimed in respect of any of them." [Emphasis supplied]

The Resident Magistrate in a criminal trial has a duty to exclude hearsay evidence especially when such evidence is not pertinent to the issues to be decided. In any event, Miss Pyke cited the following passage from Phipson on Evidence 13th edition:

> " Whether a cross-examiner was bound to put in evidence a document was formerly of importance in criminal cases, and may still be of importance in civil cases, on the question of who has the 'last word' in speeches. It is submitted that the rule has now fallen into disuse in criminal cases, and that in any event in such cases the production of such documents does not enable them to be relied on in breach of the rules against hearsay."...

This passage is accurate, although the defence may be deprived of the last word in jury trials, if they introduce evidence

Mr. Ramsay also had a complaint that the Resident Magistrate refused to allow evidence to be given of a conversation between the appellant Moore and Darren Bernal which would have indicated that it was Darren who initiated the proposal that Moore use his credit account with his travel agent to purchase tickets for the Bernal brothers.

I find no fault with the Resident Magistrate's ruling as Darren Bernal was no longer an accused. The upshot of all this is that the appellants have failed to reverse the convictions in respect of all three informations so the convictions are affirmed.

Sentences

Both appellants were sentenced to 12 months imprisonment on the possession charges. Bernal was 22 years of age at the time of trial, Moore was somewhat over 23. In those circumstances, as Bernal was under the age of 23, the provisions of the Criminal Justice (Reform) Act are applicable. The relevant section reads:

> "3.-(1) Subject to the provisions of subsection (2), where a person who has attained the age of seventeen years but is under the age of twenty-three is convicted in any court for any offence, the court, instead of sentencing such person to imprisonment, shall deal with him in any other manner prescribed by law."

Then section 3(2) states:

> " (2) The provisions of subsection (1) shall not apply where-
>
> (a) the court is of the opinion that no

> other method of dealing with the offender is appropriate; or
>
> (b) a sentence of imprisonment for such an offence is fixed by law; or
>
> (c) violence or threat of violence has been used in the commission of the offence; or
>
> (d) the person at the time of commission of the offence, was in illegal possession of a firearm or imitation firearm."

Then the important subsection reads:

> " (3) Where a court is of opinion that no other method of dealing with an offender mentioned in subsection (1) is appropriate, and passes a sentence of imprisonment on the offender, the court shall state the reason for so doing; and for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall take into account the nature of the offence and shall obtain and consider information relating to the character, home surroundings and physical and mental condition of the offender."

It is necessary to set out the Resident Magistrate's reasons to determine whether in imposing a custodial sentence on Bernal, there is a legitimate ground of complaint.

> "Court
>
> Court has taken into account the ages of both accused. Bernal is 22 years old and Moore over 23 years.
>
> In relation to Bernal who is under 23 the court will not avail him the provisions of

> the Criminal Justice Reform Act. The dealing and exporting of drugs is quite serious in the society. This was a brazen attempt by both accused and the court will show no mercy on persons who export or attempt to export drugs out of the island. The court also notes that it is persons in this age group and under who are used to take drugs out of the island.
>
> The court's view is that a period of incarceration is necessary and that this will act as a deterrent to others."

It is clear that in the exercise of his discretion, the Resident Magistrate applied section 3(2) of the Criminal Justice (Reform) Act. The basis of his decision being that imprisonment was the only method appropriate to Bernal. So this court ought to decide whether the discretion to impose a custodial sentence for the offence of possession was correct. If it was not, it is open to this court to impose such a sentence on the more serious offence. It is not open to an appellate court to impose a different sentence on the ground that, were we sitting on the Resident Magistrate's bench, we would impose a lesser or more severe sentence. Again, in some instances, a Resident Magistrate may find it necessary to secure a Social Enquiry Report as provided for in section 22 of the Probation Of Offenders Act. In this instance, however, the court had all the material available to exercise its discretion. The offences were serious especially since the international community is concerned about drug trafficking. It is clear that Bernal intended to abuse the diplomatic

privileges that the visa in his passport availed him. Had he succeeded, he might well have provoked a diplomatic incident. It was the offence of possession which laid the foundation for the even more serious offences of "taking steps" and "otherwise dealing" in ganja. There were other facts which must have been in the Resident Magistrate's mind as he described the offences as a brazen attempt to export drugs out of the island. Quite apart from the organisational skills necessary to plan these offences, considerable financial resources had to be found. If a joint venture had been successful, there would have been handsome rewards for the appellants.

Additionally, Bernal and Moore were of one mind and in cases of common design, consideration has to be given to the sentences which are appropriate to both offenders. As for Moore, The Criminal Justice (Reform) Act did not apply to him. Despite the forceful address on his behalf by counsel, there was no convincing argument that the sentences were manifestly excessive.

Additionally, the Resident Magistrate found that the sentences would have a deterrent effect on youngsters who take drugs out of the island. Courts are public institutions. The sentencing power of the court is of public interest. That a sentence of imprisonment can have a deterrent effect on the appellants as well as on potential offenders, was recognised by the court and the criticisms of this aspect of the Resident

Magistrate's reasons were not well founded. Unless there are exceptional circumstances, this court expects Resident Magistrates to impose custodial sentences for drug traffickers. In the case of those to whom the Criminal Justice (Reform) Act applies, a custodial sentence should be imposed where imprisonment is the only method appropriate.

Conclusion

The order of the court ought to be as follows:

> (a) Convictions on all three informations affirmed in respect of each appellant;
>
> by a majority
>
> (b) Sentence on information on possession varied to $15,000 or 6 months imprisonment and the original sentence is quashed;
>
> (c) Sentence on information on "otherwise dealing" varied to $50,000 and imprisonment for 12 months and the original sentence is quashed;
>
> (d) Sentence on "taking steps" affirmed.
>
> (e) Sentences to run concurrently if fines are not paid but consecutively to 12 months imprisonment;
>
> (f) Sentences of imprisonment to take effect forthwith.

To my mind, the quashing of the original sentences in respect of each appellant and these variations would reflect the intent of the legislation as "otherwise dealing" which is akin to the English offence of

"possession with intent to supply" and "taking steps" are more serious offences than possession simpliciter. However, in deference to my brother Wolfe JA and to avoid confusion in this case I will expressly affirm the Resident Magistrate's order on conviction and sentence. In any event, if I did not expressly affirm the order on sentence, it would have been implicitly affirmed, having regard to the varying decisions on sentence in this case.

WOLFE J.A.

I have read the draft judgments of Forte and Downer JJ.A. and for the reasons given by Forte J.A. I agree the appeal must be dismissed as to conviction. As to sentence I agree with Downer J.A. that the appeal must also be dismissed.

On the question of sentence I am satisfied that the Learned Resident gave due consideration to the provisions of Section 3 of the Criminal Justice Reform Act.

At page 153 of the Notes of Evidence the Learned Resident Magistrate had this to say:

> "Court has taken into account the ages of both accused. Bernal is twenty-two (22) years old and Moore over twenty-three (23) years.
>
> In relation to Bernal who is under twenty-three (23) the Court will not avail him the provisions of the Criminal Justice Reform Act. The dealing and exporting of drugs is quite serious in the society. This was a brazen attempt by both accused and the Court will show no mercy on persons who export or attempt to export drugs out of the island. The Court also notes that it is persons in this age group and under who are used to take drugs out of the island.
>
> The Court's view is that a period of incarceration is necessary and that this will act as a deterrent to others."

Section 3 (1) of the Criminal Justice Reform Act states:

> "Subject to the provisions of subsection (2) , where a person who has attained the age of seventeen (17) years but is under the age of twenty-three (23) is convicted in any court for any offence, the court, instead of sentencing such person to imprisonment, shall deal with him in any other manner prescribed by law".

Subsection (2) states:

> "The provisions of subsection (1) shall not apply where
>
> (a) the court is of the opinion that no other method of dealing with the offender is appropriate.
>
> (b) a sentence of imprisonment for such an offence is fixed by law; or
>
> (c) violence or threat of violence has been used in the commission of the offence; or
>
> (d) the person at the time of the offence was in illegal possession of a firearm or imitation firearm."

Subsection (3) stipulates the procedure to be followed by the Resident Magistrate where he is of the view that Section 3 (2) (a) applies.

Subsection (3):

> "Where a court is of the opinion that no other method of dealing with an offender mentioned in subsection (1) is appropriate, and passes a sentence of imprisonment on the offender, the court, shall state the reason for so doing; and for the purpose of determining whether

> any other method of dealing with any such person is appropriate the court shall take into account the nature of the offence and shall obtain and consider information relating to the character, home surroundings and physical and mental condition of the offender;"

During the course of the trial character evidence was adduced by the defence on behalf of the appellant Bernal. Mr. William Saunders, who studied at Howard University, Washington, D.C. with Bernal, testified as to his good character. Dr. Ronald Irvine, a Medical Practitioner of renown and a Parliamentarian for over twenty one (21) years, a former Minister without portfolio in the government, who has known the appellant since birth also testified as to his character.

By way of the testimony of these two witnesses the Learned Resident Magistrate had before him evidence as to the character and home surroundings of the appellant, who is a son of the Jamaican Ambassador to the United States of America. The evidence also disclosed that he was involved in sporting activities and was Vice President of the Students' Assembly and Association and was receiving good grades in his school work. In my view there was an abundance of evidence before the Magistrate which he could properly consider whether any other method of dealing with the appellant was appropriate.

Having stated "the court will - not avail him the provisions of the Criminal Justice Reform Act" is a clear indication that the sentence was focussed on the requirements of the Act.

This court has repeatedly said that persons who are convicted for exporting or attempting to export dangerous drugs out of the island must receive custodial sentences. See **R v Robert Brooks** S.C.C.A.No.18/92 (unreported) - delivered July 31,1992.

The trafficking of drugs has taken on serious proportions in the Jamaican Society. Drug trafficking has had serious international implications for Jamaican citizens and Jamaican export industries. It has had adverse effects upon the economic life of the country. Such have been the consequences that I am satisfied that the Learned Resident Magistrate was absolutely correct in not availing the appellant of the provisions of the Criminal Justice (Reform) Act. The underlined portion of what was said by the Magistrate in his consideration of sentence is just another way of saying that "there is no other method of dealing" with the Appellant.

In imposing the sentence of imprisonment the Learned Resident Magistrate did so in respect of the offence of Possession. This is permissible by virtue of section 7C (b) (iii) of the Dangerous Drugs Act. The indications are that he intended to impose the sentence of imprisonment for the offence of taking steps preparatory to exporting ganja in keeping with the admonitions of this Court. Although it is customary within this jurisdiction to impose the custodial sentence in respect of the exporting offence which is the most serious of the offences charged,I can see nothing wrong with imposing the sentence of imprisonment in respect of the offence of possession where a person is

convicted of the offences of possession simpliciter, as well as taking steps preparatory to export and dealing in. Any attempt by this court to regularize the sentence, by imposing the sentence of imprisonment in respect of either the offence of taking steps preparatory to export or dealing in would in my view be merely cosmetic.

As to the Appellant Moore, the complaint that the sentence of imprisonment is manifestly excessive is without merit for the reasons which have already been stated in this judgment. Persons who embark upon this type of scheme to export ganja and in the process enrich themselves, unmindful of the consequences to the lives of other persons as well as to the likely punishment if caught, must expect to receive a custodial sentence. The custodial sentence is the "sting in the tail." Exporting and dealing in drugs generate large sums of money. A mere fine is no deterrent at all. Those who are prepared to take the risk with their eyes wide open must expect to be imprisoned when convicted. It is as simple as that.