[2011] JMCA Crim 16

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 23/2009

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA

PATRICIA HENRY v R

Oswest Senior-Smith for the appellant

Mrs Caroline Hay and Miss Michelle Salmon for the Crown

22, 23 September, 13 December 2010, 4 March and 1 April 2011

MORRISON JA

Introduction

[1] On 16 January 2009, the appellant was convicted by Her Honour Miss Winsome Henry, Resident Magistrate for the parish of St James, of the offences of possession of ganja (information #18335/07), dealing in ganja (information #18336/07) and attempting to export ganja (information #183377/07), contrary to sections 7C, 7B and 7A repectively of the Dangerous Drugs Act. She was sentenced to a fine of $15,000.00 or six months imprisonment and two and a half years imprisonment at hard labour for possession of ganja, two and a half years imprisonment at hard labour for dealing in

ganja and a fine of $500,000.00 or six months imprisonment and two and a half years imprisonment at hard labour for attempting to export ganja.

[2] The appellant appealed against the conviction and sentence and when the matter came on for hearing on 22 September 2010, Mr Oswest Senior-Smith, who appeared for her on the appeal, sought and was granted leave to argue five supplemental grounds of appeal (in substitution for the grounds originally filed by him on her behalf, which were abandoned). The hearing of the matter continued and was completed on 13 December 2010, when the court reserved its judgment, after having received extensive and very helpful submissions from Mr Senior-Smith and Mrs Caroline Hay, the acting senior Deputy Director of Public Prosecutions. These are the reasons for the decision of the court, which was announced on 4 March 2011 as follows:

> "The appeal is allowed in part. The appellant's conviction in respect of information #18336/07 (dealing in ganja) is set aside and the sentence quashed. The appeal against conviction in respect of information #18335/07 (possession of ganja) and information #18337/07 (attempting to export ganja) is dismissed; however, the appeal against sentence is allowed in part in that the sentences of mandatory imprisonment on both these informations are set aside. Finally, the sentences of payment of fines, with the alternative of imprisonment in default of payment, on information #18335/07 and information #18337/07 are affirmed."

The evidence at trial

[3] Up to 12 July 2007, the appellant was employed to All Jamaica Air Services Ltd ('AJAS') at the Donald Sangster International Airport in Montego Bay ('the airport') as customer services co-ordinator. She had originally been employed to AJAS some 10 years previously (at age 21) as a part time customer agent and was promoted through the ranks, holding various positions of increasing seniority, before being appointed customer services co-ordinator. That position placed her next in line in the company to the deputy manager, who described her as hard working and willing to extend herself whenever the need arose.

[4] On 12 July 2007, the appellant was on duty at the airport and was working as a supervisor, due to a shortage of staff. Mr Mark Atherton, who was a corporal of police stationed at the Narcotics Division with offices at the Summit Police Station in the parish of St James, was also on duty at the AJAS check-in counter at the airport at about 3:00 p.m., carrying out narcotics checks on passengers checking in for Thompson flight no. 4244 bound for Manchester in England. While there, Corporal Atherton saw a group of three passengers (two men and one woman), carrying a suitcase each, approach the check in counter. The woman's name was Claire Bell. Corporal Atherton identified himself to these three persons and requested to be allowed to search their luggage, which was done and nothing illegal was found in any of the luggage. Corporal Atherton observed the three passengers being checked in at the counter by the appellant and saw when they were each given a boarding pass by her and then left the counter

together in the direction of boarding gate number 15, where the Thompson flight no. 4244 was in the process of boarding.

[5] At about 3:30 p.m., Corporal Atherton, acting pursuant to information which he had received, proceeded to gate number 15 and, having ascertained that she had already boarded the aircraft, he went on board and discovered that Claire Bell was in fact the same person whose luggage he had checked at the AJAS counter half an hour before. In answer to the officer's enquiry, Ms Bell confirmed that she had checked in one bag and produced a British passport in her name, her airline ticket and a luggage claim stub bearing her name, a security number 272 and the bag tag number 554675. At Corporal Atherton's request, airline security then proceeded to retrieve Ms Bell's luggage from the aircraft and produced three suitcases, each bearing Ms Bell's name on the security tags with the number 272 and baggage tags number 554674, 554675 and 554685. When asked if these suitcases belonged to her, Ms Bell indicated that one of them did and she was asked to open it, which she did by opening a padlock on the suitcase. This suitcase, which Corporal Atherton recognised as the same one that he had previously checked at the AJAS counter, was then searched by him in Ms Bell's presence and found to contain female clothing and personal items. Corporal Atherton then opened the other two suitcases, again in Ms Bell's presence, and found in each of them 10 rectangular packages containing vegetable matter resembling ganja, which was subsequently confirmed by the Government Analyst to be ganja. Ms Bell immediately denied knowledge of the two additional suitcases and their contents. Corporal Atherton then requested a passenger history report from one of the boarding

agents at gate 15, which showed that there were three baggage tags generated in Ms Bell's name by an agent using the "sign in" code "PH". Recognising that code to be that of the appellant, Corporal Atherton immediately summoned her to boarding gate 15.

[6] When the appellant joined the group at the gate, she initially said that she remembered checking in a single suitcase for Ms Bell but, when shown the passenger history report, she confirmed that three security tags had been generated in Ms Bell's name (whereupon she was cautioned by the corporal) and that the two additional tags had been placed on the two suitcases in which the vegetable matter resembling ganja had been found. The appellant and Ms Bell were then escorted to the Narcotics Office, where a statement was taken from Ms Bell and the two suitcases were again opened and their contents shown to the appellant. At this point, Corporal Atherton testified, the appellant told him that she would "level" with him, saying "me want tell you how everything go". Corporal Atherton then told the appellant that a written record would have to be made of whatever she had to say and proceeded to contact Mr Norman Tomlinson, a justice of the peace for the parish of St James, who was also the security manager for the airport, and Mr Fitzroy Reid, a detective corporal of police attached to the Summit Police Station, to make arrangements for the taking of her statement.

[7] When Corporal Reid arrived at the airport later that afternoon, he went directly to the Narcotics Office, where he met Mr Tomlinson and invited him to join him in the interview room. When he entered the room, Corporal Reid saw the appellant, who was previously known to him, sitting with Constable Shawn Johnson, another police officer attached to the airport. Corporal Reid advised the appellant that Mr Tomlinson was a

justice of the peace who was there to witness the proceedings and to ensure "that her rights were not abused" as she gave her statement. He then cautioned her and also wrote out the words of the caution on a blank sheet of paper and invited her to sign it. The appellant was advised that she could, if she wished, write the statement herself, but she expressed a preference for Corporal Reid himself to write down what she had to say. He then proceeded to take a statement from her, which he recorded on the same sheet of paper on which he had written the caution. When the appellant had completed her statement, Corporal Reid invited her to read over what he had written and to add to, alter or correct it as she saw fit. Having read over the statement, the appellant signed it, as did Mr Tomlinson. Both Corporal Reid and Mr Tomlinson said in evidence that the appellant's statement was given voluntarily, and that no favours were held out to her, neither was she threatened nor forced in any way to give the statement. She was also advised, Corporal Reid said, that she had the right to have an attorney-at-law present. While Corporal Reid's recollection was that the appellant appeared to be "a bit uncomfortable" during the taking of the statement (possibly "because of the situation she was in"), Mr Tomlinson's impression of her demeanour that afternoon was that "she appeared quite relaxed".

[8] Corporal Reid's evidence was that when he first entered the interview room, Constable Johnson was "guarding the accused…so I allowed him to stay". Mr Tomlinson confirmed that Constable Johnson was in the room while the appellant's statement was being taken. He also recalled him saying something to the appellant at one point during the giving of her statement and being told by Corporal Reid "to

desist". By the time of the appellant's trial, Constable Johnson was no longer a member of the Jamaica Constabulary Force.

[9] Although the actual notes of evidence do not disclose this, it appears from the learned Resident Magistrate's reasons for judgment that objection was taken at the trial to the admission of the statement under caution by counsel who then appeared for the appellant, apparently on the ground that it was not signed by Corporal Reid. Not surprisingly, this objection was overruled by the learned Resident Magistrate, the statement having been signed by both the appellant and Mr Tomlinson, and Corporal Reid having testified that the document itself, which was in fact in his handwriting, referred to him as being present. The statement was accordingly duly admitted. It showed that the persons present at the interview were the appellant, Mr Tomlinson, Constable Sean Johnson and Corporal Reid and it confirmed Corporal Reid's evidence that the appellant had signed below the words of the caution at the beginning of the statement. The full text of the statement is set out below:

> "I Patricia Alethia Henry wish to make a statement, I have been told that I need not say anything unless I wish to do so and whatever I say may be given in evidence. I make this statement of my own free will.
>
> Suspect: Patricia Henry (Sgd)
>
> 12/07/07
>
> Witness: Norman Tomlinson (Sgd)
> 12 July 2007

States:

I am a Customer Service Coordinator employed to AJAS Limited, I have worked with this company since March 1997. I have worked in all or several areas since been employed to AJAS. My present position I have held since March of last year. My duties are ensuring that customer service operations run smoothly as well as supervising flights and check in customers at times.

On Thursday the 12th of July 2007 about 12:00 md I arrived at work and commenced regular duties. About 1:00 pm I was at the AJAS check in counters when a Red Cap Porter who I know by the name of Vince approached me and told me that he had a passenger who had missed her flight last week and she wanted to get on the Thompson flight today. I told him that the flight was showing full, so he would have to wait until all passengers had checked in before we could take stand-bys. He left and when the counter had cleared up, he returned and I told him that we were showing available seats. He said o.k. and by this time all the other agents had left to the boarding gate, leaving only one agent at this point. I went on the counter and started to assist in checking in customer, after checking off all passengers that were standing at the counters, the say [sic] same guy, Vince walked up to the counter with two bags. A black and a blue pull bags, and I asked him why is he coming with the bags now and he said they are for the passenger Bell, when Vince came to me the first time he had told me the name of the passenger who had wanted to get on the flight was one C. Bell. When I asked him about the two bags Vince told me that one of the bags had a little something in it. I took the bags from Vince and generated electronic tags and placed the tags on the bag bearing the name Claire Bell, name tags were already on both bags with the said name Claire Bell, one of the bags had an address written on it. After tagging the bags they were placed on the conveyer belt and sent around. I know what I did was wrong because I was aware that contraband was in the bag. When Vince came to me with the bags Claire Bell was standing on the Continental side of the check in counter, at that point she was not checked in yet. I have known Vince from I came to the airport to work, whenever I am at the airport he usually say hi to me and I would say hi to him.

Suspect: Patricia Henry (Sgd)
12/07/07
Witness: Norman Tomlinson (Sgd)
12 July 2007

I have read the above and I have been told I correct, alter or add anything I wish. This statement is true. I have made it of my own free will.

Suspect: Patricia Henry (Sgd)
12/7/07
Witness: Norman Tomlinson (Sgd)
12 July 2007"

[10] Mr Douglas Sheriton was at the material time the deputy manager of the AJAS offices at the airport. He confirmed the appellant's position with the company and described her as his "right hand", having by means of several promotions in her 10 years with the company (which were "indicative of her work") risen to a position of seniority second only to his. He decribed the system then existing at the airport, whereby persons engaged in the activity of checking in customers, as the appellant was from time to time, were assigned a "sign in" code, which allowed access to the company's check in systems. He described the passenger check in process, which required the agent to ascertain the number of bags being checked in as well as the passenger's seating preference, if any. Before generating a baggage tag, the agent was required to check the name on the passenger's bag to ensure that the name on the bag matched the passenger's name, as well as that on the ticket. Once this exercise was satisfactorily completed, the baggage tags would be generated by the system and placed on the passenger's bag and a seat assigned to the passenger. A section of the baggage tag (the 'baggage claim check') would be removed and handed

to the passenger. At the same time that it generates the baggage tag, the automated check in system also assigns a security number which is printed both on the baggage tag and on the passenger's boarding pass. If a passenger were to check in three bags, the system would generate three baggage tags, but there would only be one security number per passenger, which would be recorded both on the baggage tags and the boarding pass. It was possible to identify the agent who checked in a particular passenger by the agent's sign in code, which would be recorded in the system itself, on the baggage tag and on the boarding pass.

[11] In cross examination, Mr Sheriton was also asked about the luggage allowance to which each passenger was entitled. His response was that on an "English destination flight", such as the Thompson flight in question had been, the baggage allowance per passenger was 20 kilograms in economy class and 30 kilograms in "premier" class. Passengers with baggage in excess of the free allowance would be required to pay excess baggage charges. He agreed that agents did sometimes give passengers "a chance" by not charging them for excess baggage, but said that they were not supposed to do this and that any such indulgence would usually require prior approval from a supervisor or the airline representative. It was not the usual practice, Mr Sheriton said, for baggage claim tags to be left behind by passengers at the check in counter and then taken to them at the boarding gate. This would generally only happen with respect to a passenger who arrived late for check in, in which case the passenger's documents would be checked, the agent "would want to ensure" that the name on the baggage was the same as it appeared on the ticket and the passport and then, in the interest of time, the

boarding pass would be given to the passenger to enable him or her to go through immigration and security, the bag would be tagged later and the claim check taken to the passenger at the boarding gate.

[12] After the appellant had given her statement under caution to Corporal Reid, she was taken to the Montego Bay Police Station and on the following day, 13 July 2007, Corporal Atherton went to the station and charged her with the offences of possession of, dealing in and attempting to export ganja.

[13] That was the case for the Crown, at the end of which counsel for the appellant made an unsuccessful no case submission and the appellant, called upon to state her defence, chose to give sworn evidence. She confirmed that on 12 July 2007 she supervised the Thompson flight and stated that, by about 3:00 p.m., it was past the time for the check in counters to be closed and that all but one of the agents had gone to the boarding gate. A number of standby passengers were being accepted on the flight and she had herself gone to the counter to assist in checking them in. The appellant then gave the following account of how two additional bags came to be checked in on the flight in the name of Ms Bell:

> "After we checked in the passengers a red cap porter that I know by the name of Vince came to the counters with two additional bags. When I asked him who they were for he said they were for a standby passenger Ms. Claire Bell. Her first name is Claire. When he told me Claire Bell I ask him why the suitcases were just coming and at that point I was examining the tags that were on the bags they were incoming tags from the flight that was in bound as well as name tags were on the bags, being Claire Bell. Vince said to me that one of the bags had a little something in it. Judging from the bags on the

> scale I thought the bags were a bit overweight. It is a normal process for me to tag the bags. I do not know what is inside them. The bags are searched at the back so that is what I do I tagged the bags and send them around the back after I tagged the bags and sent them around I closed the flight and the computer system and gave the passenger figure to the operations department. That is the normal process, who [sic] would then pass that information onto captain of the flight."

[14] About 15 minutes later, the appellant was told that she was being requested to come to the boarding gate by the police. At the gate, she saw a number of police officers, including Corporal Atherton, who she knew before. Asked by Corporal Atherton how many bags she had checked in for Claire Bell, she went on to the system, which indicated that Ms Bell had checked in three bags, which is what she then confirmed to Corporal Atherton. She was shown three bags by the corporal and asked if these were the three bags and, after examining the bags as well as the computer generated tags, she told him that "more than likely these are the bags". She was then asked to stand to one side at the gate, when Constable Shawn Johnson, who was also known to her, came and stood by her.

[15] In due course, the group of persons, which included Corporal Atherton, two British police officers, Ms Bell and two other passengers who had disembarked from the aircraft with her, moved off in the direction of the Narcotics Office. The appellant's evidence was that, at his request, she walked alongside Constable Johnson and remained with him when they got to the office, where Corporal Atherton went inside with Ms Bell and some other police officers. In due course, the appellant was also called inside, where she was asked to identify the three bags again, which she did, and

she was again asked to step outside with Constable Johnson, who at this point took her into another room, closed the door and asked her to tell him "what really happen". When she told him that she had checked in the passenger Claire Bell in the normal way, his response was, "listen the passenger is saying the bag is not hers and it's your computer tags that are on the bags…[t]herefore all evidence is pointing at you, you know about the bags". Constable Johnson then went on to say that the appellant had "to tell us something, so we can lock up the lady because you say it's her bags and she is saying they are not hers", and continued to insist that unless she said something that implicated Ms Bell, "we have to lock you up". It was at this point, the appellant said, that she responded, saying, "ok then I will tell you all that I know".

[16] As a result of this indication from the appellant, arrangements were made for her statement to be taken by Corporal Reid, who was also previously known to her, and she was introduced to Mr Tomlinson, who she knew to be in charge of security at the airport, as the justice of the peace who would observe the taking of the statement. When her statement was almost complete, Constable Johnson, who had remained in the room with Corporal Reid and Mr Tomlinson, "shook his head from side to side" and told her that she wasn't saying anything about Claire Bell, at which point, the appellant said, "'"Mr Reid said something to Mr Johnson". After she had signed the statement and her signature had been witnessed by Mr Tomlinson, both men left her in the room alone with Constable Johnson, who again told her that she "should have said more about Claire Bell" and that she was going to be arrested. She was subsequently taken in a police car by Constable Johnson and a female police officer to the Freeport Police

Station. The appellant insisted that she did not know that ganja was in the bags which she had checked in.

[17] When she was cross examined, the appellant confirmed that her sign in code was in fact "PH" and that she was the person who had checked in Ms Bell on 12 July 2007. She also confirmed that the total weight of the three bags which she checked in in Ms Bell's name was over the 20 kilogram weight allowance to which economy class passengers on the flight in question were entitled. In fact, she had the impression, she said, that the reason why the porter had brought the two bags to the counter was that they were too heavy. However, she had not imposed the company's standard overweight charge in this instance. She said that persons in her position had a discretion not to impose the charge in certain cases, such as when the passenger was a friend, or had no money, or was checking in late (at "close off crunch time"). The only reason she was able to give for not imposing overweight charges on this occasion was the fact that the "flight was ready to go".

[18] The appellant told the court that the computer system at the check in counter recorded the times at which things happened, such as when a particular bag was checked in. In this instance, she agreed that the records indicated that Ms Bell had checked in two bags at 14:55 hours and a third at 15:18 hours, but was not able to explain how that might have happened in Ms Bell's case, though she did say that sometimes, if something was "punched in" the system and then the agent signed out, it would generate another tag when the agent subsequently "sign back in". She also agreed that the standard procedure was that, before a baggage tag was generated at

check in, the agent was required to check the name on the bag to ensure that it matched the name on the passenger's travel documents, as well as on the ticket, but confirmed that this procedure was not followed when the porter came to her with the two additional bags, as Ms Bell had already left the counter. The appellant also stated that every passenger would normally be given a baggage claim tag, but that the baggage claim tags for the two additional bags checked in by her in Ms Bell's name had been "thrown out". Asked by the Resident Magistrate why she had not taken the tags to the boarding gate for delivery to Ms Bell, the appellant's answer was that the gate was "a far walk from the ticket counter".

[19] With regard to the statement allegedly given by her under caution, the appellant identified the document that had been tendered by the Crown (exhibit 5) and confirmed that the signature at the end of it was hers. However, in addition to denying that it was Corporal Atherton who had escorted her from the boarding gate to the Narcotics Office, she denied that he had shown her the bags containing the ganja or that she had offered "to level" with him. She also denied that Corporal Atherton had told her anything about wanting to wait until a justice of the peace or an attorney-at-law could be present.

[20] The only other witness called on the appellant's behalf was Mr Cecil Clarke, the Detective Sergeant of Police who had taken a statement from Ms Bell on the afternoon in question after the drugs had been found. Sergeant Clarke stated that he had seen the appellant, Corporal Reid and Constable Johnson, as well as Mr Tomlinson, in and in the vicinity of the Narcotics Office. However, he did not hear Constable Johnson, who

he saw standing at the door of the office, say anything to the appellant, who was seated inside the office.

The verdict

[21] At the end of her detailed reasons for judgment, after a full and careful review of the evidence, the learned Resident Magistrate accepted the case for the prosecution, making a specific finding that the statement under caution had been voluntarily given and identifying some other aspects of the evidence in the case which, in her view, indicated the appellant's "involvement in the attempt to smuggle drugs out of the island". The learned Resident Magistrate accordingly concluded that she was "satisfied beyond a reasonable doubt that the…accused…was in possession of the drugs, had knowledge and made attempts to smuggle the drugs out of the country", and found the appellant guilty as charged. We shall in due course have to consider in greater detail some aspects of the Resident Magistrate's findings.

The grounds of appeal

[22] Dissatisfied with this result, the appellant filed notice and grounds of appeal on 27 January 2009. As we have already indicated, the original grounds filed were abandoned at the outset of the hearing of the appeal and the following grounds were substituted for them:

> 1. The learned Resident Magistrate erred in law and fact when she found that the statement given by the appellant and on which she relied, was voluntary.

2. The learned Resident Magistrate erred in coming to a finding vesting possession of ganja in the appellant, on which foundation the convictions for dealing in ganja and taking steps preparatory to the export of ganja were based.

3. The finding of guilt on information # 18336/07 for the offence of dealing in ganja was an injustice to the appellant.

4. The appellant lost an opportunity of acquittal by the learned Resident Magistrate's failure to give demonstrable credence and due consideration to the evidence of her good character that emerged during the trial.

5. The sentences imposed by the learned Resident Magistrate were manifestly harsh and excessive having regard to the evidence available in terms of the appellant's antecedents.

The appellant's submissions

[23] Mr Senior-Smith supplemented his detailed skeleton arguments with careful oral submissions. We hope that we do not misrepresent him in any way by summarising his submissions in the following way. On ground one, Mr Senior-Smith invited the court's attention to two features of the evidence with regard to the appellant's statement under caution, firstly, the fact that Mr Norman Tomlinson, who was the justice of the peace who witnessed the statement, was at the material time the security manager for the airport and, secondly, the conduct of Constable Sean Johnson prior to and during the actual taking of the statement. It was submitted that the Resident Magistrate ought to have assessed and analysed the parts played by both gentlemen in the taking of the statement, particularly bearing in mind that Mr Tomlinson was in a position of conflict of interest in his dual role as the person in charge of security at the airport and the person required to look after the appellant's interests during her interview by the police. In

these circumstances, it was incumbent on Mr Tomlinson as a justice of the peace to have played an active role in the questioning of the appellant to ensure that her will was not "overcome or vitiated" by Constable Johnson, whose intervention may well have resulted in the holding out of a hope of advantage to the appellant in return for her agreeing to make a statement to the police. Further, the Resident Magistrate did not have any regard to the several discrepancies between the evidence of Corporals Atherton and Reid and Mr Tomlinson. In support of these submissions, Mr Senior-Smith referred us to a trio of well known cases on confession evidence, ***Ibrahim v R*** [1914] AC 599, ***Deokinanan v The Queen*** [1969] AC 20 and ***Director of Public Prosecutions v Ping Lin*** [1976] AC 574.

[24] On ground two, Mr Senior-Smith submitted that the evidence did not warrant the Resident Magistrate's finding of possession of ganja in the appellant, in that it did not disclose "a coincidence of a guilty mind from either of the requirements of actual or constructive knowledge, and [the] fact of possession". He cited in support of his submissions on this ground the cases of ***R v Richard Nicholson*** (1979) 12 JLR 568; 570; ***R v Outar & Senior*** (1998) 35 JLR 473; ***R v Bernal & Moore*** (1997) 34 JLR 159 and ***R v Daley & Whyte*** (1997) 27 JLR 171. ***Outar & Senior*** was also relied on by Mr Senior-Smith as regards his submission on ground three, which was that the appellant ought not to have been convicted for the offence of dealing in ganja on the same evidence upon which the conviction for taking steps preparatory to exporting ganja had been based.

[25] On ground four, Mr Senior-Smith drew the court's attention to a number of places in the transcript in which, on the prosecution's case, evidence of the appellant's good character had been adduced at the trial. In the light of this evidence, the submission was that the Resident Magistrate ought to have given the appellant the benefit of the good character direction, both in relation to propensity and, in the light of her having given sworn evidence, crediblity. On this ground, reliance was placed on ***R v Vye*** [1993] 1 WLR 471; ***R v Aziz*** [1996] AC 41 and ***Teeluck & John v The State*** (2005) 66 WIR 319. Finally, on ground five, Mr Senior-Smith pointed out that the Resident Magistrate had gone ahead and sentenced the appellant on the same day on which she handed down her verdict, thus depriving herself of the benefit of a social enquiry report or any other material that might have assisited her in determining the appropriae sentence. In the result, the sentence imposed was harsh, particularly in the case of a first offender and as such manifestly excessive.

The Crown's response

[26] Mrs Hay for the Crown indicated that she proposed to respond to the submissions on grounds one, two and four only, ground three being conceded. Just as Mr Senior-Smith had done, Mrs Hay provided us with full skeleton arguments in addition to her oral submissions. We are indeed grateful to both counsel for the sustained high quality of their advocacy on both sides in this matter.

[27] On ground one, Mrs Hay pointed out that at the trial the only objection taken by counsel who then appeared for the appellant to the statement under caution being

admitted in evidence was on the ground that it had not been signed by Corporal Reid. The appellant herself had given no indication in her evidence of any hope of advantage having been held out to her and there was no evidence that she had been mistreated or induced in any way by any of the persons who had anything to do with the taking of the statement, all of whom were known to her. The learned Resident Magistrate had therefore been fully entitled to find, as she did, that the statement had been voluntarily given. Although Mrs Hay conceded that it was probably not "ideal" for Mr Tomlinson, as the airport's security manager, to have participated in the role of justice of the peace in the taking of the appellant's statement, she submitted that there was no evidence to suggest that his presence had had any impact on the appellant's mind in any way. In the circumstances, no element of unfairness to the appellant had been established. On this point, Mrs Hay referred us to and relied on the decision of the Privy Council in ***Shabadine Peart v R*** [2006] 1 WLR 970.

[28] As regards ground two, Mrs Hay submitted that the Resident Magistrate was entitled to find that possession of ganja had been established in the appellant. Referring to what she described as "the elements of possession", Mrs Hay pointed out that, on the appellant's own admission, she had taken the two suitcases which were found to contain ganja from the porter and had printed the two additional baggage tags for those suitcases, thus settling the issues of custody and control. As far as knowledge was concerned, it was submitted that the appellant was a skilled and experienced employee, who was aware of the relevant procedures and ought to have been put on notice that something was wrong with the two suitcases brought to the counter by the

porter. In the light of that evidence, and the fact that the appellant had voluntarily opted to make a statement about her own involvement, it was submitted that there was more than enough evidence from which the Resident Magistrate could infer the appellant's knowledge of the contents of the suitcases. On this ground, we were referred by Mrs Hay to the well known cases of ***Cyrus Livingston v R*** (1952) 6 JLR 95 and ***DPP v Wishart Brooks*** [1974] AC 862.

[29] And finally, as regards ground four, Mrs Hay submitted that the Resident Magistrate had been under no duty to give a good character direction in the circumstances of this case, as the appellant did not "distinctly raise" the issue of her good character, as she was required to do. In the alternative, it was submitted that, even if on the evidence this court were to find that the appellant's good character had been sufficiently raised, there was nevertheless "overwhelming evidence" to support the conviction, which should not therefore be disturbed. On this ground, we were referred to the recent decision of the Privy Council (on appeal from this court) in ***Noel Campbell v R*** [2010] UKPC 26, the decision of this court in ***Michael Reid v R*** (SCCA No. 113/2007, judgment delivered 3 April 2009) and to two earlier decisions of the Board in ***Gerald Muirhead v R*** [2008] UKPC 40 and ***Bally Sheng Balson v The State*** [2005] UKPC 2; (2005) 65 WIR 128. We were also referred by Mrs Hay to some older English authorities on character evidence generally and to the decision of the Barbadian Court of Appeal in ***Nurse v R*** (C.A. No. 34 of 2004, judgment delivered 22 February 2007).

Ground one – the appellant's statement under caution

[30] The decision of the Privy Council (on appeal from the Supreme Court of Hong Kong) in ***Ibrahim v R*** is the usual starting point in any modern discussion on the admissibility of confessions. Delivering the judgment of the Board in that case, Lord Sumner said this (at page 609 - 610):

> "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale."

[31] In the leading modern case of ***DPP v Ping Lin***, a decision of the House of Lords, Lord Morris of Borth-y-Gest after referring to Lord Sumner's famous statement, explained that if an objection is taken by the defence to the admission in evidence of a statement made by him on the ground of voluntariness, it will be for the judge to determine its admissibility. This he will generally do by hearing, in the absence of the jury, evidence as to the relevant circumstances surrounding the manner in which the statement was obtained from the defendant. The judge's decision on this issue will generally be one of fact and his task in this exercise will be "to apply the spirit and intendment of the rule...he will consider whether the statement of an accused was brought about by some hope or fear held out or caused by someone who could be classed as a person in authority" (per Lord Morris, at page 594). In ***Shabadine Peart***, which was a case primarily concerned with the effect on the admissibility of a statement

by a defendant of a breach of the Judges' Rules (as to which, see ***Practice Note (Judges' Rules)*** [1964] 1 WLR 152), Lord Carswell described the "overarching criterion" of admissibility of such a statement as being "the fairness of the trial, the most important facet of which is the principle that a statement made by the accused must be voluntary in order to be admitted in evidence" (para. [23]). Thus, if the statement is not voluntary, it will not be admitted in evidence.

[32] In respect of the 'person in authority' requirement, the Board in ***Deokinanan*** cited with approval (at page 33) the statement of Bain J in the Canadian case of ***Rex v Todd*** (1901) 13 Man. L. R. 364, 376 that a person in authority "means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him". So in ***Deokinanan*** itself, a confession made by the defendant to a trusted friend during a conversation at a police station after the defendant's arrest, allegedly in exchange for promises of help by the friend, was held to be admissible on the ground that the friend was not a person in authority.

[33] While it is a fact that, as Mrs Hay submitted, no objection was taken at the trial in the instant case to the voluntariness of the appellant's statement under caution, it is clear from the evidence of the appellant herself that she was seeking to raise an issue as to its voluntariness, given the part allegedly played by Constable Johnson before and during the giving of the statement. Indeed, that this is how the learned Resident Magistrate understood the appellant's position can be seen from her observation in her findings of fact that "The defence places great emphasis on the presence of Officer Johnson and whatever he said to the accused influenced her to make the statement,

and therefore it was not voluntary". In the light of the decision of the House of Lords in ***R v Mushtaq*** [2005] 3 All ER 885, which is, on the authority of the subsequent decision of the Privy Council in ***Barry Wizzard v R*** (2007) 70 WIR 222, fully applicable in Jamaica, the learned Resident Magistrate, as judge and jury, was therefore obliged to consider the question of voluntariness at the end of the day, notwithstanding the fact that the appellant's statement under caution had been admitted in evidence without objection as to its voluntariness at an earlier stage of the trial.

[34] So the question remains whether the Resident Magistrate was correct in her finding that the statement was voluntarily given. We will deal firstly with Mr Senior-Smith's complaint as to the role played by Mr Tomlinson, the justice of the peace. We should say at once that, in our view, it was entirely inappropriate for Mr Tomlinson, as the airport's security manager, to have been asked – and to have agreed – to take on the role of the person who would ensure that the rights of the appellant, a person in employment at the airport who was under suspicion for a serious breach of airport security, "were not abused", as Corporal Reid put it. While we do not doubt that, in making the arrangements for the appellant's statement to be taken, both Corporal Atherton and Mr Tomlinson were motivated solely by considerations of convenience and expedition, it is precisely because of the central importance that the statement was self evidently likely to assume in any subsequent proceedings against the appellant that it appears to us that greater care was needed to ensure that the process by which it was taken was completely transparent.

[35] This much was very properly conceded by Mrs Hay. But it seems to us that her further submission that there was no evidence to suggest that Mr Tomlinson's presence during the interview had any impact on the appellant's mind in any way is sound. Certainly, the appellant herself attributed nothing to him, save to say that, when Corporal Reid had completed the taking of her statement, he had asked both her and Mr Tomlinson to sign it, which they both did. Corporal Reid for his part said that he had no recollection of Mr Tomlinson saying anything to the appellant, or of the appellant asking any questions of him. As for Mr Tomlinson himself, his only recollection of anything in particular occurring during the taking of the statement was that Constable Johnson said "something" to the appellant at one point, whereupon Corporal Reid intervened by telling him to "desist". On the basis of all of this, it therefore appears to us that there is no evidence that the, albeit unfortunate, fact that Mr Tomlinson was asked and agreed to participate in the role of justice of the peace during the taking of the appellant's statement under caution resulted in any unfairness to the appellant.

[36] Mr Senior-Smith's further complaint on this ground relates to the role of the absent Constable Johnson in the taking of the appellant's statement. Again, we consider it necessary to observe at the outset that it is not at all clear why Constable Johnson was allowed to remain while the appellant gave her statement to Corporal Reid, given Corporal Atherton's evidence that he played no part in the investigation of the offences for which the appellant was suspected. Even if, as Corporal Reid assumed to be the case, Constable Johnson was initially present for the purpose of guarding the appellant before the interview commenced, the need for him to play that role appears

to have disappeared by the time that Corporal Reid commenced the actual taking of the statement from the appellant. In our view, it cannot be said in these circumstances that Constable Johnson might not reasonably have appeared to the appellant to be a person in authority, in the sense of being someone with authority or control over her or over the proceedings or the prosecution against her.

[37] But this aside, it nevertheless seems to us that there is absolutely no evidence that Constable Johnson offered or held out any inducement of hope of advantage to the appellant as reward for her giving a statement implicating herself in the suspected offences. On the contrary, on the appellant's own evidence, what Constable Johnson seemed concerned to achieve was that she should give a statement that implicated Ms Bell. Thus, when he was asked by the appellant to explain what he meant when he told her that "we have to lock you up if you cannot tell us something", his response was "you have to tell us something, so we can lock up the lady because you say it's her bags and she is saying they are not hers". Then when the appellant had almost completed giving her statement, she said that Constable Johnson "shook his head from side to side" and told her that she was "not saying anything about Claire Bell", which, according to the appellant, elicited from her what can only be described as a telling response, which was that "I don't know anything about Claire Bell so I have to tell what I know". (It is, incidentally, on the appellant's account, this intervention by Constable Johnson that gave rise to Corporal Reid's rebuke that he should "desist".) To the end, on the appellant's account, Constable Johnson persisted in the same vein, telling her

that she "should have said more about Claire Bell", and again she responded "I don't know the lady from Adams, so how could I tell you more about her".

[38] If the appellant's account of these exchanges between herself and Constable Johnson during the taking of her statement is believed, it seems to us that, far from her being offered an inducement to confess her guilt of the suspected offences, she was being offered a lifeline by which to extricate herself by pointing a finger at Ms Bell, an invitation which she repeatedly declined in favour of, as she put it, telling "what I know". In these circumstances it cannot be said, in our view, that the appellant's statement under caution "was brought about by some hope or fear held out or caused by someone who could be classed as a person in authority" (per Lord Morris, in ***DPP v Ping Lin***, at page 594).

[39] Mr Senior-Smith's final complaint on this ground was that the Resident Magistrate did not take into account the discrepancies between the evidence of Corporals Atherton, Reid and Mr Tomlinson. However, we were not directed to anything in particular with regard to this complaint and we have not been able to discern any differences between the witnesses that might have had an impact on the Resident Magistrate's accepatane of the evidence of the prosecution witnesses. We are therefore of the view that ground one has not been made good and that the learned Resident Magistrate was entirely correct to find that the appellant's statement under caution had been given voluntarily.

Ground two – the finding that the appellant was in possession of ganja

[40] The appellant was charged with possession of ganja under section 7C of the Dangerous Drugs Act. The ingredients of an offence under this section were restated by the Privy Council in ***Bernal & Moore v R*** (at page 167), in the following terms:

> "The *actus reus* required to constitute an offence under section 7C of the Dangerous Drugs, Act is that the dangerous drugs should be physically in the custody or under the control of the accused. The *mens rea* which is required is knowledge by the accused that that which he has in his custody or under his control is the dangerous drug. Proof of this knowledge will depend on the circumstances of the case and on the evidence and any inferences which can be drawn from the evidence. The court which has to determine the issue of knowledge will have to look at all the evidence and, always remembering the burden of proof which rests on the Crown, decide what inference or inferences should be drawn. There will be great variations in the circumstances of different cases. It will be for the tribunal of fact to inquire into these circumstances to decide whether or not the accused had knowledge (a) that he had the sack (or as the case may be) and its contents in his possession or control, and (b) that the contents consisted of the prohibited substance."

[41] The key elements of the offence of possession of ganja are therefore (i) physical custody or control of the drug and (ii) knowledge that the substance which is in the defendant's custody or under his control is ganja. These are pure questions of fact, and in the instant case, the learned Resident Magistrate, after a full and careful review of the evidence, expressed herself to be satisfied beyond a reasonable doubt that the appellant "was in possession of the drugs, had knowledge and made attempts to smuggle the drugs out of the country". It seems to us that, on the basis of the evidence which was accepted

by the court, the Resident Magistrate was fully entitled to come to this conclusion. As Mrs Hay pointed out, the appellant by her own admission took the bags containing the ganja from the porter when they were brought by him to the check in counter and caused the two additional baggage tags to be printed and placed on them, thus facilitating the movement of the bags from the counter and on their way to actually being loaded onto the aircraft. By this means, the requirement of custody or control was in our view amply satisfied.

[42] With regard to the question of knowledge, it will be remembered that in her statement under caution the appellant had said that, when she had asked him about the two additional bags brought by him to the counter, the porter had told her that "one of the bags had a little something in it". She nevertheless took the bags from him, generated electronic tags which were placed on the bags, caused them to be placed on the conveyer belt and "sent around". She went on to say in the statement that "I know what I did was wrong because I was aware that contraband was in the bag when Vince came to me with the bags". In considering this issue, the learned Resident Magistrate said this:

> "In the caution statement the accused said she knew that contraband was in the suitcase. By the time the statement was being recorded the evidence reveals that the accused knew Miss Bell had been taken off the aircraft because the two extra suitcases she generated tags for contained ganja. Corporal Atherton's evidence said she was shown the ganja. In cross examination she agreed, when the caution statement was being taken in the presence of the J.P. and Mr. Reid she knew that it was ganja the whole thing was about. Although she denied Corporal Atherton showed her the suitcases with the ganja she admits another officer did. She is an intelligent, 32 year old Senior Customer Service

> Co-coordinator with ten years experience. She has assisted Detective Atherton in relation to previous drug cases. Her evidence is that caution means "stop you from saying anything." In her caution statement before she used the word "contraband", she said she knew what she did was wrong. There is only one inference that can be drawn, and that is, the accused had knowledge that ganja was in the two suitcases, and when she used the word contraband she is referring to ganja."

[43] In our respectful view, this analysis cannot be faulted. If, as the Resident Magistrate found to be the case, the appellant's statement under caution was freely and voluntarily given, the fact that her offer to Corporal Atherton to "level" with him was made shortly after the two suitcases with the packages had been opened in her presence, plainly suggests knowledge of what was in them and a resignation to the consequences of what the packages, when opened, would shortly reveal. But the learned Resident Magistrate also went beyond the statement itself and identified a number of other items of evidence in the case which, in her view, indicated the appellant's involvement in the attempt to smuggle drugs out of the island:

> "Apart from the above evidence in relation to the caution statement, there is other evidence to indicate the accused [sic] involvement in the attempt to smuggle drugs out of the island. For example after she had checked in Clare Bell and given her her boarding pass and luggage claim, approximately fifteen minutes later porter Vince came with two extra suitcases for Clare Bell and she accepts them. The passenger is not in front of her. This alone is a breach of standard procedure for processing passengers. The maximum weight allowed on a charter flight is 20 kilos. In addition the two extra suitcases that were produced, the Forensic Certificate confirmed them to be 32 kilos. This was more than the passenger's allotted weight. Not only did she accept these suitcases but she did not charge for

> the "little extra weight." Post the bombing in America called "Nine Eleven." She said the airline did not require her to ask customers the security questions about packing their bags and what was contained in them.
>
> She threw away the passenger's luggage claim, she had generated for the two extra suitcases. The procedure would be to take them to the passenger at the departure gate if the customer was late. She admits it might have caused some inconvenience to the customer when they arrive at their destination and the luggage claim cannot be produced. Nevertheless she throws them away. Reason being it is too far to walk to the departure gate. It is noted the incident took place at the Sangster Airport in Montego Bay not at a large airport like Miami.
>
> When the customer history document is examined, it indicates that the smuggling of the drugs was pre-arranged between the accused and Vince. Atherton saw Clare Bell whilst she was checking in with only one bag. The accused evidence carrobates [sic] this. From the customer history and the time the tags were generated whilst Miss Bell was at the checking in counter, two tags were generated at 14.55. The accused_corrabates [sic] this evidence. One of these tags was on Clare Bell's luggage. The other one was on the suitcase that contained ganja. The third tag was generated later at 15.18. Whilst Atherton was observing the accused checking in Miss Bell the porter was not present. The accused evidence in chief was that after Vince came with the two bags she printed the two tags. This clearly is a lie. When she was further questioned why the two tags were produced at the same time she said the system if sign out and sign in the computer will send out another tag. The accused evidence is inconsistent."

[44] In our view, it was clearly open to the Resident Magistrate on the evidence to treat all of the matters identified by her in the foregoing passage as serving to strengthen the inference that the appellant was fully aware of what the two additional

bags contained. We do not therefore see any basis upon which her conclusion can be disturbed on this ground.

Ground four – the conviction for dealing in ganja

[45] As has been seen, the appellant was also charged with the offences of dealing in ganja and attempting to export ganja. She was found guilty of both on the identical evidence. In ***R v Outar & Senior***, it was held that these two offences were in fact alternatives and that where, as here, convictions on both were based on possession of the same ganja, convictions of both offences were irreconcilable and could not stand. In this case, where there was clear evidence establishing the offence of attempting to export ganja, the charge for dealing in ganja was therefore superfluous and the Crown quite properly conceded that the conviction for that offence cannot be sustained.

Ground five – evidence of good character

[46] In ***Michael Reid v R***, this court adopted and applied the earlier decision of the Court of Appeal of England and Wales in ***R v Vye,*** in which it was held, firstly, that the trial judge should direct the jury as to the relevance of a defendant's good character to his credibility where he has testified or given pre-trial answers or statements, and, secondly, that a direction as to the relevance of his good charaacter to the likelihood of his having committed the offence charged is also to be given, whether or not he has testified or given pre-trial answers or statements. However, although it is now well established that, "where credibility is in issue, a good character direction is always relevant", the defendant is not entitled to the benefit of such a direction unless he has

distinctly raised the issue, either by direct evidence given by or on his behalf or by eliciting it in cross-examination of prosecution witnesses (see ***Teeluck & John v The State***, per Lord Carswell, at para. [33] (iv) and (v)).

[47] However, despite the cardinal importance of the rule, it is nevertheless clear from the authorities that the absence of a good character direction is not necessarily fatal to the ensuing conviction. In this regard, much will depend, as the Privy Council observed in ***Jagdeo Singh v The State*** (2005) 68 WIR 424 (at para. [25]), "on the nature of and issues in a case, and on other available evidence". So, for example, in ***Balson v The State*** (at para. [38]), the Board considered that, on the facts of that case, any assistance that a good character direction might have given was "wholly outweighed by the nature and coherence of the circumstantial evidence" (see generally ***Noel Campbell v R***, paras [37–43], where all the earlier authorities are very helpfully reviewed by Lord Mance, who delivered the judgment of the Board).

[48] In the instant case, Mr Senior-Smith pointed out that, although there was no evidence coming from the appellant herself as to her previous good character, there was evidence from a couple of the witnesses for the prosecution that spoke specifically to this issue. Thus, when he was cross examined, Corporal Atherton said that he had known the appellant for 10 years and that he had never associated her with contraband or charged her for any offence. Similarly, Mr Sheriton, her direct supervisor, gave evidence of her steady upward progress at AJAS, which was "indicative of her work", and said that he could not recall any complaint having been made by Corporal Atherton

about her. He also stated that on previous occasions when situations had arisen in respect of passengers being found with illegal substances, the appellant would provide information to the police as necessary. As a result of this evidence, Mr Senior-Smith submitted, the appellant ought to have had the benefit of good character directions.

[49] There can be no question, in our view, that, the appellant having given sworn evidence, this was a case in which her credibility was plainly in issue. We therefore consider that, in the light of the fact that the evidence elicited by her counsel on her behalf showed her to be of good character, the appellant was entitled to the benefit of a direction "that a person of good character is more likely to be truthful than one of bad character, and…that [she] is less likely to commit a crime, especially one of the nature with which [she was] charged" (***Teeluck & John***, para. [33] (iii)). It is common ground that the Resident Magistrate did not warn herself in these terms and the question that therefore remains is what should be the consequence of her not having done so in the particular circumstances of this case.

[50] This question has given us anxious concern. The giving of a good character direction in an appropriate case is, as Lord Steyn observed in ***R v Aziz*** (at pages 50-51), a case to which we were referred by Mr Senior-Smith, an aspect of the duty of a trial judge to "put the defence case before the jury in a fair and balanced way". To the extent that evidence of good character can carry probative significance, therefore, a failure to give the direction where it was clearly called for on the evidence in a case can have a direct impact on whether a defendant's right to a fair trial has been observed.

But on the other hand, it is equally clear from the authorities that, as Mrs Hay submitted, the approach required of this court in a case in which it considers that such a direction should have been given is to make its own assessment of the evidence to and to consider whether the outcome would have been the same had the trial judge given the proper direction.

[51] In all the circumstances of the instant case, taking into account in particular the appellant's confession and the other items of circumstantial evidence referred to by the learned Resident Magistrate in her reasons for judgment (see para. [43] above), it appears to us that this is a case in which the potential benefit of a good character direction to the appellant was wholly outweighed by the nature and coherence of the evidence which she accepted. We accordingly consider that ground four must fail as well.

Ground five - sentence

[52] It is not clear from the record why the learned Resident Magistrate did not request that a social enquiry report be obtained for sentencing purposes and no reason was given in the reasons for judgment to indicate why she considered that the sentences which were in fact imposed by her, particularly the compulsory custodial sentences of two and a half years in addition to fines, were appropriate in this case. The appellant, who does not appear to have had any previous convictions, had worked with AJAS at the airport in positions of increasing responsibility and seniority for more than 10 years. While there can

be no question that the offences for which she was convicted are serious offences, it is clear from what was known from the evidence of her background that this was an occasion of wholly aberrant behaviour, rather than a manifestation of a deep seated criminal tendency. In these circumstances, it therefore appears to us, in agreement with Mr Senior-Smith, that the custodial sentences imposed by the Resident Magistrate were indeed manifestly excessive and it is for this reason that we came to the conclusion that the appeal against sentence should be allowed by setting aside that aspect of the sentences.

Conclusion

[53] These are the reasons for the decision of the court, which is set out at para. [2] above.