JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO: 2/98

COR: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A. (AG.)

R. v. ROY OUTAR
JONATHAN OUTAR
RALPH OUTAR
TREVOR OUTAR
RANDAL TITUS

Deborah Martin & Carolyn Reid for Roy Outar

Ian Ramsay, Q.C. for Jonathan Outar

Jacqueline Samuels-Brown for Ralph Outar

Delano Harrison & Robin Smith for Randal Titus

Kent Pantry, Q.C. Director of Public Prosecutions **& Sonya Wint** for Crown

2nd, 3rd, 4th, 5th, 6th, 9th, 10th, 11th, 12th, 13th November, 7th, 8th, 9th, 10th, 11th, December, 1998, 11th, 12th January, & 30th July, 1999

RATTRAY, P. (Dissenting):

The issues raised in this appeal range over a wide area of facts as well as of law. By the time of the hearing of the appeal, the appellant Trevor Outar had died. Reference to him therefore is for the purpose only of providing a full narrative of the events.

The evidence given before the Resident Magistrate, was to the effect that one Robert Erickson, a citizen and resident of the United States of America visited Jamaica in April 1991 and met with Ralph Outar o/c "Washy," Jonathan Outar and Roy Outar o/c

"Buna." The Outars are brothers. It is apparent that he sought out the brothers. They made an arrangement whereby the Outars would supply ganja and Erickson would arrange transportation, that is an aeroplane and pilot, for the movement of a minimum of 1000 lbs of ganja from Jamaica to the United States of America. The ganja was to be flown from an airstrip in South Manchester. Within a day or two Erickson returned to the United States of America and spoke to agent John Burns of the Drug Enforcement Agency of the United States Government reporting to him what had transpired. Acting on specific instructions from agent Burns, Erickson telephoned Jonathan Outar from the United States and they agreed that in order to make up the 1000 pounds Jonathan could supplement the cargo with 30 pounds of marijuana oil, a by-product of ganja.

There were subsequent telephone conversations between Jonathan Outar and Erickson and sometimes the phone would be answered by Ralph or Roy Outar. After each conversation Erickson would report to D.E.A. agent Burns.

In June 1991 Erickson returned to Jamaica and spoke to the brothers Outar at a garage near Mandeville. In reference to the only conversation with Jonathan, he stated - "We spoke about the load specifically the problems of getting it together." On returning to the United States of America, Erickson reported to D.E.A. agent Burns.

On the 11th September, 1991 Erickson returned to Jamaica and met the Outar brothers. Jonathan told him "that they were having trouble getting the airstrip ready and that the airstrip was quite hot." The reference was to the South Manchester airstrip originally proposed. Jonathan said "that he had made arrangements with the "Big Man" to use Vernamfield, another location, as the airfield from which to stage the load of ganja to export it to the United States of America." They further made arrangements for Erickson's pilot to come to Jamaica to inspect that airstrip. Erickson reported to agent Burns as usual, and agent Paul Pitts of the D.E.A. an airplane pilot based in Tampa Florida came to Jamaica. Along with Roy Outar and Erickson, Pitts went to

Vernamfield and inspected the airstrip there. Pitts approved the airstrip. Roy Outar said that the load would be ready in ten days or two weeks.

As nothing further happened, about a month later Erickson spoke on the phone to Jonathan Outar who told him "that the 'Big Man' has been having some problems with the airstrip." This was duly reported by Erickson to Agent Burns. Erickson returned to Jamaica the first week of November 1991. He then met with the three Outar brothers.

Early next morning on the 11th November about 4.00 a.m. in the company with another Outar brother, introduced as Trevor, they travelled in a car to Vernamfield. At the trial Trevor was pointed out in a dock identification. By arrangement Jonathan and Ralph along with Erickson went to a cow pen adjoining the airstrip. Roy and Trevor were supposed to be on the airstrip assisting in the loading of the plane. At various times they would drive into the cow pen and say a few words and on those occasions Erickson said he saw them. In the cow pen Erickson was introduced by Jonathan to a person in a dark Toyota pick-up, identified as the appellant Randal Titus, who was referred to as the "Big Man" or "Titus". Titus said to Jonathan - "Jonathan, you know this man good?" referring to Erickson. Jonathan replied "Yes man dem boy know him long time." Then Titus said "because man a go dead if things no right." Titus had a radio which he used for monitoring. He told Erickson that there were soldiers on the airstrip and under no circumstances could the plane land and that he should order the plane to turn back. Erickson complied with his request. Erickson spoke with pilot Pitts on a hand radio. The venture was thus aborted.

Erickson returned to Kingston where he spoke with agent Burns by telephone. Erickson told Jonathan to re-schedule the trip for two days later but Jonathan said it would be a big problem because they had made arrangements for the soldiers to be taken care of the very next day. Erickson insisted that it would have to be done two days later.

On the 13th November, 1991, the Outar brothers and Erickson met and Jonathan said that the problem of the soldiers had been taken care of and that the soldiers would even load the plane at about 4.00 a.m. in the morning if necessary.

On that morning Jonathan, Titus and Erickson went to the cow pen. Titus said everything was fine. At about 5.45 a.m. the plane arrived and landed. It took off in about five minutes after Erickson spoke to the Pilot on the radio.

All the relevant parties then went to the house of the Outars' sister where Jonathan told Erickson that the final count of the load was in 28 bales weighing 1200 plus pounds. It was arranged that if everything was alright Roy would go to Miami with Jonathan that night and would be in contact with people in the United States of America to take delivery of the Outars' share. Erickson returned to Kingston and spoke to agent Burns later that day. He then called Jonathan and told him everything was alright and that "they had gotten to the U.S.A."

Roy and Erickson travelled up to the United States of America. In Miami they spoke about effecting delivery in the U.S.A. Erickson told him to be ready with transport to pick up their share of the load and to meet him in Panama City, Florida on the following day. They parted company. Next day Agent Burns and Erickson waited in a hotel for Roy in Panama City but he did not turn up.

Erickson telephoned Roy who told him that he was having a problem with transportation and asked if he could effect delivery in Miami. Erickson said he could not do that, but for $10,000 Roy could use one of Erickson's vans and bring it down himself. Roy said he would make alternative arrangements and that he would come to Panama City. Erickson told him that the transfer was taking far too long and gave him the telephone number of Burns, also that when he was ready he could call the number and "Burnsey would effect the transfer". Erickson left and went to New York.

After this, Erickson spoke to Jonathan who told him Roy was having problems effecting the delivery in the United States of America and asked him if he could do

it. He told Roy that he could not handle it. Jonathan subsequently told Erickson that Roy "has become scared" and had left the area and asked if he could possibly sell the product up there and just give him the money. After consultation with Burns, he told Jonathan that he would. He agreed to give him US$375,000 and instructed Jonathan to make arrangements for a man to pick up the down payment of US$200,000 within a couple of weeks in Jacksonville, Florida. A couple weeks later Erickson spoke with agent Burns. Consequent on this, Erickson told Jonathan to have his people meet him at Jacksonville Airport to pick up the US$200,000 "that has been promised as the down payment." He met with Jonathan at the Avis Rent-A-Car counter at Jacksonville Airport and gave him a combination locked briefcase which contained a couple of heavy phone books. Erickson subsequently gave a statement to the Jamaican Police. This was the state of the evidence after Erickson had completed his evidence in chief.

Under cross-examination it emerged that Erickson was an informant for the Drug Enforcement Agency of the United States at the time of the relevant occurrences. A University graduate he claimed to be a part-time teacher. He maintained - I am sincere and truthful to the Court. Everytime I lied it was for the furtherance of justice and law." At the time he came to Jamaica in April, 1991 he was on bail in the United States of America having pleaded guilty to, and awaiting sentence on charges of smuggling marijuana and cocaine from Colombia. By the time of the trial of the instant case in Jamaica he was serving a sentence of seven (7) years imprisonment in the United States of America for the offences for which he had been charged. After the plane load of ganja had left Jamaica and arrived in the United States of America he made a report in the United States of America to the Jamaican Police. His expenses after the fact were paid by the Drug Enforcement Agency.

After several days of hearing and whilst under cross-examination the following further facts emerged:

1. That Robert Erickson was a fictitious name and he was in fact one Robert Moore.
2. That he was a Jamaican who had become a naturalized citizen of the United States of America.
3. That he was an international drug smuggler who practiced deception. Between 1989 and 1993 his drug smuggling activities had taken him to the Bahamas, Sara Uevo in Yugoslavia, the United Kingdom, Jamaica, Sydney in Australia Brisbane in Australia, Kenya and Zimbabwe in Africa, Fiji and Hawai in the South Pacific.
4. At the time of his coming to Jamaica and contacting the Outars he was awaiting sentencing in the U.S. Courts on the drug smuggling charges.
5. That he acted under the instructions of the U.S. Drug Enforcement Agency to whom he reported.
6. That he was at the relevant time in the witness protection programme in the United States of America.

It is in respect of this witness that the Resident Magistrate found as follows:

> "Robert Erickson the chief witness in this case is a credible and reliable witness. He was frank and forthright with the Court. He was in fact a confidential informant. In other words, an undercover agent who obtained information in Jamaica and communicated with the Drug Enforcement Agency in U.S.A. and got instructions from them."

D.E.A. agent Jack Lunsford testified to travelling to Vernamfield Jamaica on the early morning of the 13th November, 1991 and witnessing eight males load a total of 27 packages on an aircraft in which he then flew to Jacksonville, Florida. The

packages were taken to the D.E.A. offices there and placed in a vault in his presence. They were handed over to agent Shirley Rozar.

On the 6th of December, 1991 he gave a statement to the Jamaican Police in Panama City, Florida.

Shirley Rozar, special agent with the U.S.A. Customs Services with offices at Panama City U.S.A. testified that on the 14th of November, 1991 Special Agent Jack Lunsford of the D.E.A. turned over to her 27 bales of marijuana. They were placed in a locker and she maintained custody of the keys. On the 5th of December, 1991 Messrs. Gentles & Henderson of the Jamaica Constabulary Police came to her office regarding the bales of marijuana. They were taken to the evidence locker where the marijuana was kept and they took photographs of the bales in the room which were then removed and weighed and samples taken from each of the bales. After the taking of the samples the bales were turned over to Jack Lunsford of the D.E.A. and were destroyed.

Paul Pitts, a special agent of the D.E.A. and a pilot testified of coming to Jamaica in September 12, and meeting next day with Erickson who introduced him to a person identified to him as Roy Outar. Discussions were had between the three of them about his flying to the airfield to pick up some marijuana from Mr. Outar and transporting it by plane to the United States of America. He identified Roy Outar in a dock identification. On that date he had met with D.E.A. agent Harris and two unnamed members of the Jamaican police in Kingston. There is no evidence as to what this meeting was all about. Later he met Erickson who introduced him to Roy Outar and they had a discussion about his flying marijuana from the airstrip into the United States of America. He was taken to the airstrip at Vernamfield which he inspected in terms of safety for landing and take off. They spent about 20 minutes there. On the way back to Kingston he met D.E.A. agent Harris and two (2) unnamed constables. He testified - "after relating what had happened to Mr. Harris and the

constables I returned to U.S.A. on the following day 14th September." The Court had neither identification of nor evidence from these "two constables."

On the 11th of November he left Guantanamo Bay, Cuba on a flight destined for Vernamfield but on information received on a radio contact with Erickson he turned around and returned to Guantanamo Bay. On the 13th of November in the early morning he flew to Vernamfield where there was a loading process, taking about 3 minutes, in which packages were placed into his aircraft. Whilst in the aircraft someone said "Paul someone wants to say hello." He then saw Roy Outar lean in the doorway and he waved and Roy Outar waved back at him. The sighting of Roy Outar was about 10-15 seconds. He flew the aircraft to Jacksonville, Florida where the aircraft was unloaded. He gave his statement to the Jamaican police in Panama City on the 6th of December 1991. In an earlier statement which he gave he had stated that "I looked and saw Roy Outar wave to me and asked me how I was" but when he testified he said in his statement he was mistaken.

It is clear from the evidence of Det. Cpl. Errol Graham who was in the area of Vernamfield on the 13th of November, 1991 that he was not part of the surveillance team in relation to the airplane flown by pilot Pitts. Neither does it appear that he was aware of the presence in that vicinity of Erickson and the other members of that group. At about 4.40 a.m. he did hear the sound of an aircraft coming from an easterly direction. When he returned to Kingston he met with a confidential informant at the Norman Manley International Airport. At the airport he testified to seeing Roy Outar and Ralph Outar.

Detective Sergeant Winston Henderson of the Jamaica Police testified to receiving certain instructions from Senior Superintendent Errol Gentles in charge of the Narcotics Division at about midday on the 13th of November. This would have been after the arrival of the plane in the U.S.A. Consequently, he commenced investigations "into an alleged conspiracy to export from Jamaica to USA over 1000 pounds of ganja."

On the 5th of December 1991 in company of Mr. Errol Gentles he went to Panama City, Florida USA where he met with USA Customs Special Agent Shirley Rozar who took him into a Customs Storeroom and handed over to him 27 packages of various colours and sizes. He numbered each package from 1 - 27, cut and removed a sample from each package of vegetable matter resembling ganja. He also took photographs of each package using a Polaroid camera. He kept the samples in plastic bags which he took back with him to Jamaica on the 7th of December 1991 and handed over to the storekeeper at the Narcotics Division for safekeeping. On the 10th of March 1992 he took the two plastic bags containing the 27 samples to the Forensic Laboratory 102 Hope Boulevard in the parish of Saint Andrew and handed them over to Mr. Fitzroy Coates, the Government Analyst. On the 12th of March 1993 he returned to the Forensic Laboratory where the plastic bags were returned to him still sealed and a certificate signed by Mr. Coates, Government Chemist identifying them to be ganja. The samples were then handed over to the storekeeper for safekeeping. In 1996 a fire at the Narcotics Division destroyed samples numbered 13 - 27 but parcels 1-12 were produced in court at the trial.

The defendants made unsworn statements from the dock denying any involvement in the alleged actions concerning ganja or any knowledge of the persons giving evidence against them.

These appeals raise several questions for consideration. Did the evidence establish Erickson's involvement to be part of a joint operation between the Jamaican police and the United States Drug Enforcement Agency?

In ***R. v. Peter Gordon and Wesley Gordon*** R.M.C.A. No. 30/91 Forte, J.A. in delivering the judgment of the Court of Appeal stated:

> "The evidence against both appellants, was acquired by virtue of the co-operation between the law agents of the Government of the United States of America and of Jamaica. In effect, the appellants were targetted by law agents, who working undercover, participated in the commission of the offence so as to

> gather evidence upon which the appellants could be apprehended, and placed on trial.
> The co-operation of drug dealers on an international scale has necessitated the co-operation of law agents throughout the world in their efforts to control the international trade in prohibited drugs. This was one such case."

This co-operation is not achieved by an ad hoc or informal arrangement. Both the Government of the United States of America and the Government of Jamaica are parties to a Treaty on Mutual Legal Assistance in Criminal Matters under which - "The contracting parties undertake to assist each other upon request and in accordance with the provisions of this Treaty in investigations and proceedings for criminal enforcement purposes." Specific procedures are laid down to effect this objective. This Treaty was signed by the parties on July 7, 1989. However, it came into effect on the 25th of July, 1995 upon the exchange of the instruments of ratification. It seems clear that since its signing by the parties there was co-operation between both countries sanctioned by its signing specifically in relation to the control of illegal activity in relation to drugs. D.E.A. agent Lunsford had testified that he came to Jamaica on the 12th September to set up an office here.

The (Mutual Assistance) Criminal Matters Act which was enacted by the Jamaican Parliament and came into effect on the 14th July, 1995 establishes procedures to be followed when requests are made by foreign states for assistance in this regard. However Section 3 of the Act specifically provides that:

> "Nothing in this Act shall be construed so as to abrogate from any agreement or practice respecting co-operation between Jamaica and a foreign state or organization as the case may be."

Implicit in the provision of the Treaty and the legislative provisions is the exclusion of wild cat forays by the Law Enforcement Agencies of either nation into each others territories outside the Treaty or legislative or other arrangements. The test of the legal validity of the operation is the touchstone of compliance with these arrangements and commitments.

Although the formal Treaty and legislative enactment post-date the events which are the subject matter of this appeal, the provisions of the Act recognize the existence of the prior arrangements and practices for co-operation between the Law Enforcement Agencies of both countries. If the operations fell under such arrangements it would have been very easy for the evidence to state that the Drug Enforcement Agency's involvement and participation was as a result of acting in co-operation with the Jamaican police. An assessment of the evidence indicates that the Jamaican police authorities were brought into the picture after the plane had arrived with its ganja load in the United States of America.

What legal consequences if any, flow from this fact? It is now well established that the manner of the obtaining of evidence is irrelevant to its admissibility so long as the evidence is relevant in the trial of the criminal offence: (See ***Kuruma v.R*** [1955] A.C. 197, **Callis v. Gunn** [1964] 1 Q.B. 495; **Regina v. Sang** [1980] A.C. 402). Furthermore, entrapment is not a defence to a criminal offence charged (**Reg. v. Sang** above cited).

As far therefore as the failure to follow formalities are concerned the admissibility of the evidence thus obtained is not affected. It has been further submitted by counsel for the appellants that after the ganja was placed in the aircraft on the 13th November and until the time Sergeant Henderson of the Jamaican police came to the office of the D.E.A. in Panama City on the 5th December, 1991 and took samples the packages were not in proper custody. The submission is that they were unlawfully in the possession of the D.E.A. and so no proper chain of custody existed which would make the evidence admissible in the Court in Jamaica.

It is a question of fact whether there is evidence which establishes on the required standard that the packages which came from Jamaica contained ganja. The packages were properly secured and not tampered with from the time they left Jamaica until Sergeant Henderson took his samples in Panama City, which were certified by the

Government Chemist in Jamaica to be ganja. There is a chain of custody accepted as properly established by the Resident Magistrate and the submission must therefore fail.

What is of more concern is the status of the witness Erickson found by the Resident Magistrate to be "a confidential" informant ... and undercover agent." The several counsel for the appellants have urged upon us that he should properly be classified an accomplice or accomplice vel non. Thus designated the Resident Magistrate would be required to give herself the warning required in respect of the special categories of witnesses into which accomplices fall, which is that it is dangerous for her to act on the evidence of such a witness unless there is corroboration. Nevertheless having so warned herself, even if there is no corroboration, she could if she believed the evidence convict upon it. The warning is mandatory even if in fact ample corroboration existed: (***Davies v. D.P.P.*** [1954] 1 All E.R. 507). The Resident Magistrate's findings of facts in a case dealing with evidence of a special category, for example that of accomplices and identification evidence, must reflect that she gave herself the warning. In R.M.C.A. 73/89 ***R.v. Vince Stewart*** [unreported] delivered on February 14, 1990, Gordon, J.A. delivering the judgment of the Court of Appeal stated that:

> "Section 290 of the Judicature (Resident Magistrates) Act requires that the Resident Magistrate gives a brief summary of the facts found. It does not require otherwise, but the authorities indicate that where the decision of the tribunal is governed by the application or settled legal principles, e.g. the desirability of corroboration, it must appear that the tribunal's mind was adverted to it - ***R. v. Donaldson*** (supra). Even if there is a presumption that the Judge knows the law, there is no presumption as to its application."

If the witness Erickson fell into a special category of witness of whom corroboration is required the warning would have been necessary and its recording in the findings of the Resident Magistrate mandatory. However, if as the Resident Magistrate found he was "an undercover agent" or "confidential informant" or even,

not mentioned by her, an agent provocateur or police spy as put forward by the D.P.P no such warning would be required.

The assessment of Erickson's role and status is not without difficulty. In urging that Erickson should be designated an accomplice defence counsel have referred us to ***Yip Chiu-cheung v. R*** [1994] 2 All E.R. 924 in which the headnote reads as follows:

> "The appellant met one N in Thailand and arranged that he would act as a courier to carry 5 kilos of heroin from Hong Kong to Australia. N was to fly to Hong under an assumed name, where he would be met by the appellant and he was then to fly on to Australia with 5 kilos of heroin supplied by the appellant, for which he was to be paid $US16,000. In fact unknown to the appellant, N was an undercover drug enforcement officer of the United States and the Hong Kong and Australian authorities were prepared to permit him to carry the drugs from Hong Kong to Australia in the hope of breaking the drug ring of which the appellant was a member. However, on the subsequent advice of the Hong Kong authorities the plan was not carried through and N did not fly to Hong Kong. The appellant was nevertheless arrested in Hong Kong and charged with conspiring with N to trafficking heroin. At his trial the judge directed the jury that if they found that N intended to export the heroin out of Hong Kong he was in law a co-conspirator and they could convict the appellant of a conspiracy with him. The appellant was convicted and sentenced to 15 years' imprisonment. He appealed to the Court of Appeal of Hong Kong which dismissed his appeal. He appealed to the Privy Council, contending that N could not in law be a co-conspirator because he lacked the necessary mens rea for the offence and therefore there could be no conspiracy.
>
> **Held** - There was no general defence of superior orders or of Crown or Executive fiat in English or Hong Kong criminal law and the Executive had no power to authorise a breach of the law. Accordingly, the fact that N would not have been prosecuted if he carried out the plan to carry the drugs from Hong Kong to Australia as intended did not mean that he did not intend to commit the criminal offence of trafficking in drugs by exporting heroin from Hong Kong, albeit as part of a wider scheme to combat drug dealing. N intended to commit that offence by carrying the heroin through the customs and on the aeroplane bound for Australia. It followed that there had been a conspiracy

> and that the appellant had been properly convicted. The appeal would therefore be dismissed."

At page 927 of the Report the judgment of Lord Griffith stated:

> "It was urged upon their Lordships that no moral guilt attached to the undercover agent who was at all times acting courageously and with the best of motives in attempting to infiltrate and bring to justice a gang of criminal drug dealers. In these circumstances it was argued that it would be wrong to treat the agent as having any criminal intent, and reliance was placed upon a passage of the speech of Lord Bridge of Harwich in ***R. v. Anderson*** [1985] 2 All E.R. 961 at 965, but in that case Lord Bridge was dealing with a different situation from that which exists in the present case. There may be many cases in which undercover police officers or other law enforcement agents pretend to join a conspiracy in order to gain information about the plans of criminals, with no intention of taking any part in the planned crime but rather with the intention of providing information that will frustrate it. It was to this situation that Lord Bridge was referring to in ***Anderson.***" [Emphasis mine]

The question then arises: Was Erickson participating in order to gain information about the plans of the criminals with no intention of taking any part in the planned crime but rather with the intention of providing information that would frustrate it? In the present appeal it is clear that Erickson was part of a plan to bring the crime to completion and that the D.E.A. agents also participated in the crime and took it to its conclusion with the transportation of the ganja out of Jamaica into the United States of America. Erickson as well as the D.E.A. participants would then be classified as particeps criminis and in such a case would be designated as accomplices even though they were doing so with the best of motives. As stated by Forte, J.A. in ***R. v. Peter Gordon and Wesley Gordon*** (above cited) the D.E.A. agents - "participated in the commission of the offence." Indeed, in the instant case the D.E.A. agents transported the plane load of ganja out of Jamaica which clearly constitutes the offence of exporting. Erickson was an active participant in the exportation.

It is true that both in ***Yip v. Chiu-cheung*** v. R (supra) and in ***R v. Anderson*** [1985] 2 All E.R. 961 their Lordships were concerned with the crime of conspiracy. In ***Anderson*** at page 965 of the Report Lord Bridge stated:

> "I have said already, but I repeat to emphasise its importance that an essential ingredient in the crime of conspiring to commit a specific offence or offences under section 1(i) of the 1977 Act is that the accused should agree that a course of conduct be pursued which he knows must involve the commission by one or more of the parties to the agreement of that offence or those offences. But, beyond the mere fact of agreement, the necessary mens rea of the crime is, in my opinion established if, and only if, it is showed that the accused, when he entered into the agreement, intended to play some part in the agreed course of conduct in furtherance of the criminal purpose which the agreed course of conduct was intended to achieve. Nothing less will suffice; nothing more is required."

The part intended to be played by Erickson and the D.E.A. agents and indeed effected was with the intention of involving themselves in the commission of the criminal offence. That criminal offence was taken to its very conclusion by the taking out of Jamaica by the D.E.A. agents of the plane load of ganja thus exporting it into the United States of America. As Lord Griffiths stated in ***Yip Chiu-chueng v. R*** (supra) at page 928:

> "Nobody can doubt that Needham was acting courageously and with the best of motives; he was trying to break a drug ring. But equally there can be no doubt that the method he chose and in which the police in Hong Kong acquiesced involved the commission of the criminal offence of trafficking in drugs by exporting heroin from Hong Kong without a licence. Needham intended to commit that offence by carrying the heroin through the customs and on to the airflown plane bound for Australia."

It cannot be doubted equally that in this case the Drug Enforcement Agency officers with possibly the best of intent and Erickson for his own motives, chose a method which involved the commission of the criminal offence of trafficking of drugs by exporting ganja from Jamaica to the United States of America.

As was stated by Willes, J in ***Mulcahy v. The Queen*** 3 English and Irish Appeals, p. 306, at p. 317:

> "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, is punishable if for a criminal object or for the use of criminal means."

If, as in my view therefore Erickson and the D.E.A. Agents had the intention of taking part in the planned crime, albeit with the highest of motives, and if as is the evidence the planning was taken to its conclusion and implementation by the actual exportation of the marijuana from Jamaica, the initial participation would have blossomed out from being a criminal conspiracy to the actual carrying out of the illegal act contemplated by the conspirators.

The Resident Magistrate in these circumstances was required to warn herself and so demonstrate in her findings, the danger of convicting on the uncorroborated evidence of Erickson and the D.E.A. agents as participants even though she could then having so warned herself nevertheless proceed to conviction whether there was corroboration or not.

What cannot be doubted, is that Erickson is clearly a witness with an interest to serve. There are circumstances in which although the trial judge is not required to give the full accomplice warning an appeal will be allowed in the absence of a warning that a jury must proceed with caution in relying on the evidence of a witness with an interest to serve: See ***R. v. Smith & Brown*** [1987] 24 J.L.R. 342. Carberry, J.A.

The Resident Magistrate's assessment of Erickson as a witness clearly ignored the important dimensions as to his obviously bad character and the interest which he had to serve in coming to Jamaica as a convicted person awaiting sentence in the

United States Court. Even if he could not be categorised as an accomplice the authorities establish that the Resident Magistrate was required in this situation not necessarily to give herself the full accomplice warning but to warn herself that she should proceed with caution. Her fulsome acceptance of Erickson in the glowing terms in which she described him, indicates that such caution was not administered. If therefore Erickson could not be classified as a participant and thus not attract the full warning given in respect of accomplices there should nevertheless be some indication that the Resident Magistrate warned herself to proceed with caution. His bad character and the clear interest which he had to serve required the Resident Magistrate to so demonstrate. Her statement of findings do not indicate this approach on her part.

In ***R. v. Bagshaw* and others** [1984] 1 All E. R. 971 O'connor L.J. in delivering the judgment of the Court cited with approval Lord Hailsham L.C. in ***D.P.P. v. Kilbourne*** [1973] 1 All E.R. 440 at 447 where he stated:

> "By now the recognised categories also include children who give evidence under oath, the alleged victims, whether adults or children, in cases of sexual assault, and persons of admittedly bad character. I do not regard these categories as closed. A judge is almost certainly wise to give a similar warning about the evidence of any principal witness for the Crown where the witness can reasonably be suggested to have some purpose of his own to serve in giving false evidence."

O'connor L.J. continued at page 977:

> The cases recognise that there is a difference between a warning that the jury should approach the evidence of a witness with caution and a warning that it is dangerous to convict. Indeed, the difference is obvious...".

In ***R. v. Spencer and Others, R. v. Smails and Others*** [1985] 1 Q.B. 771 the trial judge in the passage referred to at page 776 of the Report had directed the jury inter alia as follows:

> "The law in rules which are formulated over many years requires me to tell you even if they are merely persons of bad character and nothing else, that you must approach their evidence with great caution."

May L.J. in delivering the judgment of the Court of Appeal rejected the addition of persons of bad character as witnesses in respect of whom the full warning must be given, failure to do which would result in a successful appeal against conviction. The court however, at page 784 emphasised:

> "... the duty of a trial judge in appropriate cases is to warn the jury of 'a special need for caution' in relation to the evidence of certain witnesses in terms appropriate to the particular case under consideration."

The court explained the statement in ***R.v. Prater*** [1960] 2 Q.B. 464 at 466:

> "...it is desirable that in cases when a person may be regarded as having some purpose of his own to serve the warning against uncorroborated evidence should be given"

is related to cases where witnesses may be participants or involved in the crime charged has not remained a wholly unqualified decision: ***R. v. Stannard*** [1965] 2 Q.B. 1 where Winn J., said at page 14:

> "...it really seems to amount to no more than an expression of what is desirable and what, it is to be hoped, will more usually than not be adopted, at any rate, where it seems to be appropriate to the judge. It certainly is not a rule of law..."

or as Acknor L.J. stated in ***R v. Beck*** [1982] 1 All E.R. 807 at page 813:

> "While we in no way wish to detract from an obligation on the judge to advise a jury to proceed with caution where there is material to suggest that a witness's evidence may be tainted by the improper motive, and the strength of that advice must vary according to the facts of the case, we cannot accept that there is any obligation to give the accomplice warning with all that entails, when it is common ground that there is no basis for suggesting that the witness is a participant or in any way involved in the crime the subject matter of the trial."

The authorities therefore establish (a) that the full warning must be given where the witness is a participant or in any way involved in the crime the subject matter of the trial; (b) a warning, the strength of which would vary with the circumstances should be given to proceed with caution when the witness' evidence may be tainted by improper motives.

Certainly, no proper analysis of the evidence in this case could support the acceptance of the witness Erickson in the terms stated by the Resident Magistrate in her findings of fact. Her reference to him as "frank" and "forthright" expresses a failure on her part in the adjudication process to exercise caution, and to apply a standard of assessment required in criminal trials which would support her conclusion of his being "credible" and "reliable".

REVERSE ONUS

Counsel for the appellants further raised the question of the constitutionality of the reverse onus placed upon the appellant by virtue of the provisions of section 22(7) of the Dangerous Drugs Act which provides:

> "That a person found unlawfully in possession of more than 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 submission was likewise fully argued in ***R. v. Outar & Senior*** R.M.C.A. 47/97 (unreported) in a judgment of Downer, J.A. delivered on the 31st of July, 1998 and for the reasons stated in that judgment I conclude that there is no merit in this ground of appeal.

DOCK IDENTIFICATION

Also challenged was the dock identification of the appellant Titus, otherwise called the "Big man" by the witness Erickson. Titus was introduced by Jonathan Outar at the Airstrip at Vernamfield in the early morning of the 11th November 1991. He was at that time sitting in a dark Toyota Pick-up. He, it was who at that time enquired of Jonathan if he knew Erickson well. Titus was monitoring the air with a radio. He also

told Erickson that there were soldiers on the airstrip and the plane should turn back. It is consequent on that, that the order was given to the plane to turn back. Two days later again on the 13th of November in the early morning Erickson saw Titus at the Airstrip sitting in the car and they spoke. There was therefore ample opportunity for Erickson to be able to identify Titus. Under cross-examination he maintained that he had sufficient opportunity to note his features, that it was not a fleeting glance, and also that he was not mistaken in his identification. In these circumstances this evidence raised a question of fact to be determined by the Resident Magistrate, and the ground of appeal must therefore fail.

DUPLICATION OF SENTENCES

The appellants were given custodial sentences on charges (I) Possession of Ganja (2) Dealing in Ganja (3) Trafficking in Ganja (4) Exporting Ganja. It is clear that although possession is a separate charge the same facts were relied upon to establish dealing, trafficking and exporting ganja. A similar submission was dealt with in the case of ***R. v. Outar and Senior*** (supra), when the offences of which the appellants had been found guilty were dealing in ganja, possession of ganja and taking steps preparatory to exporting ganja. Downer, J.A. in the judgment of the Court of Appeal stated -

> "Was it appropriate to return a verdict against the appellants in this case for dealing in ganja? They were found guilty of possession of ganja together with the statutory inchoate offence of taking steps preparatory to exporting ganja. If the full offence had been completed there would have been exporting of ganja contrary to Section 7A of the Act. Exporting, as selling ganja and taking steps preparatory to exporting, are specific forms of dealing expressly mentioned in the Act. It was appropriate for the Crown to charge this additional offence of dealing, but is it appropriate for the court to return a verdict on this offence also? The general and correct procedure in a court of first instance in circumstances where the charges are in the alternative was to have returned no 'verdict' on one information and the appropriate sentence on the other. Alternatively if the charges are not in the alternative as in this case the practice is to

> return a verdict of guilty on one information and a nominal sentence, and the appropriate custodial sentence on the other ...".

I agree with the reasoning of Downer J.A. and his conclusion in relation to how to proceed on sentence when the charges have been duplicated. In the instant case the two charges which if proven would attract the sentences, would be the possession charge and the charge of exporting. It is on these charges that the sentences of imprisonment should have been imposed to run concurrently.

The principle is also stated in ***D.P.P. v. Stewart*** [1982] 35 W.I.R. 296 a Privy Council appeal from Jamaica in which the headnote in part states:

> "Where a defendant was convicted on two counts arising out of the same facts as a matter of principle substantial penalties should not be imposed on both counts."

Support for this position is also to be found in ***Parody v. Golt*** [1987] L.P.C. (Crim) p. 110.

CONCLUSION:

On the authority of ***Yip Chui-Cheung v. R*** (supra) it is established that both the witness Erickson and the D.E.A. Agents were participants and the Resident Magistrate was required to indicate in her findings that she warned herself of the danger of convicting on the uncorroborated evidence of these witnesses before she could proceed to conviction. She clearly did not.

For this reason I would allow the appeal, quash the conviction and set aside the sentences imposed.

HARRISON, J.A.

I have read the reasoning of Rattray, P. and regrettably I do not agree with him in those areas on which he bases his views that these appeals should be allowed.

Mr. Ramsay for the appellant Jonathan Outar, argued that the main witness Robert Erickson, an informant for the Drug Enforcement Agency of the United States of America (DEA), acting exclusively of the local police with no authority to "suborn or to induce, or incite or to participate in offences for the purpose of detecting crime within the jurisdiction of Jamaica", was an accomplice vel non and/or a person with an interest to serve. Accordingly, the learned Resident Magistrate should have recognised this special category of evidence, and warned herself of the dangers of relying on it, and having failed to do so fell into error which vitiated the conviction against the said appellant.

The arguments of Mr. Ramsay on this ground were adopted by counsel for each of the other appellants.

The facts of the case are that the main witness Robert Erickson, otherwise called Robert Moore, an American citizen, born in Jamaica, came to Jamaica in April 1991, and visited the appellants, Outar brothers in Mandeville, two of whom, Roy and Ralph Outar he had known since 1988. Jonathan introduced the subject of them shipping ganja to the United States of America and Erickson providing the transportation. They all spoke . It was agreed that the appellants would send a minimum of 1000 lbs of ganja and be responsible for the expenses in Jamaica and Erickson would provide the transportation from Jamaica.

Erickson had been co-operating with the Drug Enforcement Agency (DEA) since 1990 as a confidential informant. He had been convicted of trafficking in ganja and cocaine. He returned to the United States of America and spoke to one Burns, an agent of the DEA, with whom he had spoken before coming to Jamaica. Agent Burns gave him instructions. Erickson spoke to the appellant Jonathan, one month later and came to Jamaica in June and September 1991, meeting with the appellants the Outars. In September Erickson met with Jonathan, Ralph and Roy at Jonathan's house in Mandeville. Jonathan reported that the "Big Man" had arranged to use Vernamfield. Erickson asked that his pilot inspect the airstrip, spoke to agent Burns from Kingston and agent Paul Pitts, a pilot for the DEA having received instructions, came to Jamaica on 12th September, 1991, and spoke to DEA agent Jerome Harris in Kingston. On 13th September 1991, Pitts and Harris met with two (2) constables of the Jamaican Police in Kingston. Pitts met Erickson and they both had discussions and went to Para Villa where they met Roy Outar and spoke about Pitts picking up 1200 lbs of ganja and 30 lbs of hash oil in Jamaica and flying it to the United States of America. Pitts and Erickson returned to Kingston where they met with agent Harris and the said two constables and Pitts related to them what happened. He returned to the United States of America and spoke to DEA agent Burns.

Appellant Roy Outar had said that the ganja would be ready within ten(10) days. No ganja was sent. In October 1991, the witness Erickson again spoke to appellant Jonathan who said "Big Man having problems" with the airstrip. Erickson spoke to agent Burns and came to Jamaica the first week in November 1991. He went to Para Villa and was taken to a house with appellant Roy, Ralph and Jonathan and at 4:00 a.m. they all went to Vernamfield into a cow pen where Jonathan introduced

Erickson to appellant Titus as "Big Man or Titus," sitting in a dark Toyota pickup. Titus asked Jonathan if he knew him Erickson, and Jonathan replied "yes dem boy know him." Titus replied "Because man a go dead if things no right." Subsequently, appellant Titus told Erickson excitedly "Soldiers on airstrip" and the aeroplane could not land and he was to tell the pilot to turn back. Erickson told Pitts so, on a V.H.F. radio. Returning to the house, with the exception of appellant Titus, appellant Jonathan stated their intention to make arrangements with the soldiers and re-schedule the trip. Erickson returned to Kingston, spoke to Burns and again spoke to Jonathan.

On 13th November, 1991, Erickson again went to Para Villa. Then he went to Vernamfield at about 4:00 a.m. He saw Titus there in his car in the cow pen. They were there together, the appellants and Erickson, until 6:00 a.m. Fifteen (15) minutes "after the first light" DEA agent Pitts, with agents Jack Lunsford and Philomon Martin landed an aeroplane on the Vernamfield airstrip after Pitts had spoken by radio to the witness Erickson and another DEA agent on the ground. Pitts saw appellant Roy Outar at the door of the aircraft which was thereafter loaded in approximately five (5) minutes by several men with twenty-seven (27) bales (packages) of ganja. Pitts flew the aeroplane along with Lunsford and Martin to Guantanamo Bay, Cuba, and then to Opalacka, stopping to refuel, and then to Jacksonville, Florida, U.S.A. where the packages were unloaded and placed in a sealed vault at the DEA office by agent Lunsford

Lunsford, also a witness at the trial, took the said packages on 14th November, 1991 to Panama City, Florida, where he handed them over to Shirley Rozar, a senior agent of Customs, an evidence custodian. She testified receiving the twenty-seven (27) packages from the witness Lunsford on 14th November, 1991 and placed them in a

storage locker, the keys to which she kept, and on 5th December 1991, Superintendent Gentles and Detective Sergeant Henderson went there. Detective Sergeant Henderson took a sample from each of the twenty-seven (27) bales and placed each in a separate envelope which both Rozar and Detective Sergeant Henderson signed.

On 14th November 1991, at the Vernamfield airstrip, the witness Erickson, had seen the aeroplane approach, but did not see it while it was on the ground. After it took off, in approximately five (5) minutes, Erickson spoke to Pitts by radio, and then left the airstrip with appellant Jonathan, stopped at a house with Jonathan and others and then returned to Kingston. Erickson spoke to agent Burns and consequently called applicant Jonathan later that day telling him that "everything was alright."

As previously arranged, the appellant Roy met Erickson that day at the Norman Manley International Airport and they flew together to Miami. In Miami Erickson and appellant Roy had discussions and agreed that the latter would take delivery, that is, "pick up their share of the load" in Panama City, Florida, the following day. Agent Burns and the witness Erickson awaited the appellant Roy in a hotel there the following day; the appellant Roy did not arrive. The appellant Roy contacted by telephone at a number given by him to Erickson, explained that he had transportation difficulties and arranged to take delivery the following day.

Erickson and agent Burns awaited him; he did not appear. Erickson later met appellant Roy in Tallahasse, Florida, and Erickson gave him a telephone number he Roy could call when he was ready to effect the transfer. The telephone number was that of DEA agent Burns. Erickson spoke with appellants Roy and Jonathan several times thereafter by telephone in November, 1991. Eventually the appellant Jonathan advised Erickson that Roy was afraid and that he wished the witness Erickson to sell

"the product" and give him the money. Erickson agreed, after consulting DEA agent Burns, to do so and to give to someone recommended by the appellant US$200,000 as a downpayment.

The witness Erickson met appellant Jonathan's agent in Jacksonville and gave him a locked briefcase with heavy telephone books instead. Erickson made a report to Detective Sergeant Henderson and Superintendent Gentles in U.S.A. on 6th December, 1991.

An accomplice is a witness who is particeps criminis in respect of the actual crime charged. Where it is not clear whether or not such a witness is an accomplice but there is evidence led on which it could be found that he is, the issue of accomplice vel non arises for the jury to decide. In both cases it is the duty of a trial judge to inform the jury, or a Resident Magistrate to advise himself that it would be dangerous to convict on the uncorroborated evidence of such a witness. (**Davies vs. D.P.P.** [1954] A.C. 378). On the other hand, where such a witness is classified as an agent provocateur, or police spy, no such warning is required.

An agent provocateur is one who involves himself in inducing or enticing another to commit a crime or joins an organization or group involved in crime or other unlawful activity for the purpose of detection or investigation, with a view to reporting such crime or offence committed. Such a person is not an accomplice.

In **Sneddon v Stevenson** [1967] 2 All E.R. 1277, a police officer who drove and stopped his car on the street near to a known prostitute, the appellant, who approached, opened the car door and asked him if he "wanted business", and who

asked "how much" and agreed to her reply, was held not to be an accomplice. No warning was required. Lord Parker, C.J. said at page 1280:

> "... though a police officer acting as a spy may be said in a general sense to be an accomplice in the offence, yet if he is merely partaking in the offence for the purpose of getting evidence, he is not an accomplice who requires to be corroborated."

An informer may properly be used by the police for this purpose, that is to obtain evidence - (**R v. Brittles Bickley** (1909) 2 Cr. App. R.53). Relying on **Bickley's** case, this Court held in **R.v. Craigie et al.** (1986) 23 J.L.R. 172, per Kerr, J.A. at p. 184:

> "We accept as correct the statement that a person who participated in an offence simply for the purpose of obtaining evidence is not an accomplice for the purpose of the rule requiring corroboration."

In the latter case, two D.E.A. agents of the United States of America, had had discussions in Florida with one of the appellants, and arrangements made for the supply of ganja in Jamaica to the said agents posing as buyers. The appellants, who included a police officer, were apprehended by the Jamaican authorities, offshore in St. James as they attempted to make delivery, and convicted on the evidence of the said agents found to be agents provocateurs. The headnote of the case reads, at page 173:

> ".. A person who participates in an offence simply for the purpose of obtaining evidence is not an accomplice for the purpose of the rule requiring corroboration, and the witnesses who were members of the U.S. Drug Enforcement Agency could not be treated as accomplices by reason of the fact that they were not law enforcement officers in Jamaica."

Counsel for the appellants relied heavily on the decision in **Yip Chiu-cheung v R** [1994] 2 All E.R. 924, in support of this ground, a decision which also impressed the

Honourable President that he was bound thereby. In that case the appellant and one N agreed in Thailand, that N would meet the appellant in Hong Kong from where N would take five (5) kilos of heroin provided by the appellant to Australia and would be paid US $16,000. Unknown to the appellant, but to the knowledge of the Hong Kong and Australian authorities, N was an undercover drug enforcement officer of the United States, and such authorities, in an effort to detect and break up a drug smuggling ring, intended to permit N to carry through the plan to take the drugs through customs. On the advice of the Hong Kong authorities N did not go to Hong Kong. However, the appellant was arrested in Hong Kong and charged with conspiring with N to traffic in heroin. He was convicted on the basis that N was a co-conspirator intending to export the heroin out of Hong Kong. His appeal was dismissed by the Court of Appeal of Hong Kong and he appealed to the Judicial Committee of the Privy Council arguing that N had not the necessary mens rea and so could not be in law a co-conspirator, and accordingly there was no conspiracy. His appeal was dismissed. The advice by their Lordships' Board, in the headnote reads, at page 925:

> "There was no general defence of superior orders or of Crown or Executive fiat in English or Hong Kong criminal law and the Executive had no power to authorise a breach of the law. Accordingly, the fact that N would not have been prosecuted if he carried out the plan to carry the drugs from Hong Kong to Australia as intended did not mean that he did not intend to commit the criminal offence of trafficking in drugs by exporting heroin from Hong Kong, albeit as part of a wider scheme to combat drug dealing. N intended to commit that offence by carrying the heroin through the customs and on to the aeroplane bound for Australia. It followed that there had been a conspiracy and that the appellant had been properly convicted."

It is obvious that N in the **Yip Chiu-cheung** case, had committed the offence of conspiracy. By the agreement with the appellant the completed offence was performed.

The Board, in its advice, said (per Lord Griffiths), at page 928:

> "There may be many cases in which undercover police officers or other law enforcement agents pretend to join a conspiracy in order to gain information about the plans of the criminals, with no intention of taking any part in the planned crime but rather with the intention of providing information that will frustrate it. It was to this situation that Lord Bridge was referring in **Anderson.** The crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out. It is the intention to carry out the crime that constitutes the necessary mens rea for the offence. As Lord Bridge pointed out, an undercover agent who has no intention of committing the crime lacks the necessary mens rea to be a conspirator.
>
> The facts of the present case are quite different. Nobody can doubt that Needham was acting courageously and with the best of motives; he was trying to break a drug ring. But equally there can be no doubt that the method he chose and in which the police in Hong Kong acquiesced involved the commission of the criminal offence of trafficking in drugs by exporting heroin from Hong Kong without a licence. Needham intended to commit that offence by carrying the heroin through the customs and on to the aeroplane bound for Australia."

In the instant case the witness Erickson, from the outset displayed no intention to commit any offence. The desire to tranship the ganja was initially expressed by the appellant Jonathan. Erickson said, in examination in chief that on his return to the United States of America he made a report to D.E.A. agent Burns. Erickson also said in cross-examination, page 21 of the transcript:

> "I called Burns to report on the proceedings that had taken place for him to take the appropriate action. On returning to U.S.A. I took instructions from him how I ought to proceed."

Under "specific instructions" from the DEA agent Burns, Erickson, feigning involvement, continued his discussions with the appellants for the purpose of gaining information and relayed it to the DEA authorities. Erickson, at no time, was in possession of, dealt in or transported ganja. Even when the aeroplane was being loaded he was not able to see that operation. He committed no offence nor participated in any of the offences for which the appellants were charged. In that respect therefore the instant case is clearly distinguishable from the **Yip Chiu-cheung** case, in which the offence of conspiracy was in fact committed by the undercover agent Needham and the appellant. Furthermore, it is incorrect to say that the witness Erickson acted exclusively outside the knowledge of the local police. The evidence before the learned Resident Magistrate was that on 13th September, 1991, approximately two (2) months before the actual delivery of the ganja on 13th November, 1991, the witness Pitts, along with DEA agent Harris met with two constables of the Jamaican police and after Pitt and Erickson went to May Pen spoke to the appellant Roy, they returned to Kingston on the same day and met with Harris and the said two constables and Pitts related to them what happened.

Any rank of the police force, for example, a police constable may be utilized in order to ensure police support in undercover activities; it shows official sincerity of purpose for detection and prosecution. The fact that, these two police constables were involved prior to 13th November 1991, that, Detective Corporal Roy Graham was at the said airstrip at 4:40 a.m. on 13th November, 1991, and spoke to an informant near to Norman Manley Airport where he saw Roy and Ralph Outar and that Senior Superintendent Gentles and Detective Sergeant Winston Henderson went to Panama City, United States of America on 5th December, 1991, spoke to the witness Shirley

Rozzar and took supplies of ganja from each of the twenty-seven (27) packages of ganja, are together ample evidence of the involvement of the Jamaican police.

The learned Resident Magistrate found that the witness Erickson was, "... a confidential informant... an undercover agent who obtained information in Jamaica communicated with the Drug Enforcement in United States of America and got instructions from them." This was a finding that could properly be made on the evidence before her. I agree with Mr. Pantry that the witness Erickson was a "police spy", and an agent provocateur and not an accomplice, accordingly, there was no requirement that the said Resident Magistrate warn herself of the need for corroboration.

Furthermore, that finding by the Learned Resident Magistrate was re-inforced by the further finding that:

> "From the time the packages were put on aircraft they were always in proper custody."

This finding by the learned Resident Magistrate is a recognition that she drew the inference that the placing of the ganja onto the aircraft was a reducing of the twenty-seven (27) packages of ganja into official custody, from that moment until the tendering of the exhibits of ganja at the trial. The learned Resident Magistrate had thereby found that the activities of the appellants were, up to then, complete and the offences committed. There was therefore, no opportunity thereafter to hold that any further offences were committed. I am therefore of the view that because of that finding the convictions of the appellants of exporting ganja cannot be sustained. Furthermore, the said finding "...in proper custody," conclusively shows that the learned Resident Magistrate correctly regarded the witness Erickson as not being

involved in any aspect of the commission of the offences in view of the fact that the one activity he had "consented" to be involved in namely, transportation, never materialised. The stage of transportation of the ganja was never reached and could not be because of the prior intervention of the official act of taking it into "proper custody." Erickson was an agent provocateur simpliciter in all the circumstances of this case.

In April, 1991, when Erickson arrived in Jamaica he had been convicted in the United States of America of trafficking in ganja and cocaine and awaiting sentence. When he gave evidence on 27th May, 1993, he was then serving a sentence of seven (7) years imprisonment, having already been sentenced by a United States Court six (6) months previously. He denied in cross-examination that he was promised by the DEA that if he played a certain role this would be considered favourably as regards sentence , "or that his sentence would come up for consideration from time to time," if he played a role favourably. He said, at page 16 of the transcript:

"The DEA does not control my fate. The judge does."

This evidence was unchallenged. The credit of every witness is always in issue in a court of trial. The learned Resident Magistrate on an examination of all the evidence, including his previous convictions and activities, found the witness Erickson to be "credible and reliable ... frank and forthright with the court ... a confidential informant... (and) ... an undercover agent..," as she was entitled to. Based on the authority of **R v. Beck** [1982] 1 All E.R. 807, inter alia, I agree with and adopt the reasoning of my brother Langrin, J.A. that there was no necessity for caution by the learned Resident Magistrate because Erickson was not a witness with an interest to

serve, nor one who in the circumstances needed any special attention. It is my view that this ground has no merit and accordingly fails.

Mr. Ramsay argued as ground 1, summarized, that the learned Resident Magistrate erred in finding that the appellants aided and abetted each other in obtaining, packaging and transporting ganja. He maintained that there was no evidence to support such a finding and in any event the informations on which the appellants were charged disclosed distinct offences committed on 13th November, 1991 and therefore any evidence of activity prior to such date was inadmissible and prejudicial to the appellant. Counsel for the appellants Roy, Ralph, Trevor (since deceased), Outar and Titus adopted the arguments of Mr. Ramsay.

In support of this ground Mr. Ramsay stated that the information should provide the necessary information so the appellant would know what case he would meet and therefore should state therein that he was charged with "aiding and abetting". The information not having so stated, any evidence led of occurrences on other dates was inadmissible thereby making the trial unfair. Mr. Pantry, relying on section 6 of the Justices of the Peace Jurisdiction Act argued that there was no requirement to state in detail that the appellants were prosecuted as aiders and abettors, which term includes counsellors and procurers. He stated that not all the appellants needed to be present on 13th November, 1991, because each appellant had different duties, in the organization of and the division of their labour, on prior dates. I agree with Mr. Pantry's submissions. Section 6 of the Justices of the Peace Jurisdiction Act reads:

> "Every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction, shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable, on conviction, to the same forfeiture and

> punishment as such principal offender is or shall be by law liable, and may be proceeded against and convicted either in the parish where such principal offender may be convicted, or in that in which such offence of aiding, abetting, counselling, or procuring may have been committed."

This point was previously argued and settled by this Court in **R v Craigie** (supra). Of the said section 6, Kerr, P. (Ag.) said at page 196:

> "In our view, these provisions are sufficiently wide to embrace persons, who in relation to felonies, being absent when the crime was perpetrated, would be accessories before the fact as well as those present aiding or encouraging by word and deed and would be principals in the second degree. The provisions, in our view, were clearly aimed at extending to summary offences the procedure, practice and punishment of such secondary parties as is the case in indictable misdemeanours - see the comparative provisions of Section 41 of the Criminal Justice Administration Act.
>
> We accept the following useful definition of "procure" in Section 8 of the Accessories and Abettors Act (England) which is ipsissima verba with Section 41 of the Jamaican Criminal Justice Administration Act as applicable to "procure" in Section 6 of the Justices of the Peace Jurisdiction Act (supra):
>
> > 'To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking appropriate steps to procure that happening. We think that there are plenty of instances in which a person may be said to procure the commission of a crime by another even though there is no sort of conspiracy between the two, even though there is no attempt at agreement or discussion as to the form which the offence should take' - **A.G.'s Reference** (No. 1 of 1975) 2 All E.R. 684 per cur. at p. 686'."

In addition, Section 64 of the said Act reads:

> "64.-(1) Every information, complaint, summons, warrant or other document laid, issued or made for the purpose of or in connection with any proceedings before examining Justices or a court of summary jurisdiction for an offence, shall be sufficient if it contains a statement of the specific offence with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.

> (2) The statement of the offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and, if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence."

In the instant case, the evidence of the meetings and discussions and abortive attempt to tranship the ganja, was sufficient to show that there was a plan in existence which culminated in the event on 13th September, 1991. The evidence sufficiently disclosed material from which the learned Resident Magistrate could find that each appellant had a distant role to play in the agreement to procure and tranship the ganja. All the appellants did not need to be present on the scene on the 13th September, 1991 in order to be found to be aiders and abettors (see also **National Coal Board v Gamble** [1959] 42 Cr. App. R 240).

The finding by the learned Resident Magistrate that "All the defendants ... aided and abetted each other..." was correct, in the circumstances of this case. This ground also fails.

As ground 2, Mr. Ramsay argued:

> "2. That the Learned Resident Magistrate erred in finding that the "Defendants were in joint possession of packages which they knew contained ganja" as
>
> (a) There was no evidence that the Appellant handled or took possession of or exercised any control over any such packages;
>
> (b) There was no evidence that there were packages within the jurisdiction containing ganja on the date stated in Information No. 7041 of 1991, to wit the 13th November, 1991."

In support of this ground he submitted that there was no evidence of physical custody or control by appellant Jonathan. There was no actus reus but only evidence of conversations with Erickson.

Mr. Pantry argued in reply that because of the several discussions and meetings coupled with the assistance by each appellant, in loading the aeroplane, monitoring the operations by radio, appellant Roy's travel to the United States of America, the learned Resident Magistrate had evidence of the participation of each appellant in different areas of the operation, by the division of their labour. The ganja which left Jamaica to Florida, was kept in custody until samples were taken by the Jamaican police and therefore that was evidence of a common enterprise involving all the appellants having knowledge and custody and control of the ganja which was in a common pool from which each appellant could draw.

Counsel for each of the other appellants adopted the arguments of Mr. Ramsay.

Possession, in the criminal law exists where one has in one's possession whatever is to one's own knowledge, physically in one's custody or under one's physical control (**D.P.P. v. Brooks** (1974) 12 JLR 1374). The evidence before the learned Resident Magistrate revealed the continuing dialogue between the appellant Outar brothers and the witness Erickson in respect of the provision by the former of ganja to be exported, the presence of appellants Jonathan, Roy, Ralph and Titus in the cow pen adjacent to the airstrip, on the early morning in November 1991, when the operation was aborted and their presence again on 13th November 1991 in the said cow pen, when the twenty-seven (27) packages were delivered, with appellant Roy being at the side of the aeroplane and the appellant Titus monitoring the operation by radio. The travel and arrival of appellant Roy in the United States of America and his

attempt to take delivery of the ganja there, is confirmation of his earlier participation. This, cumulatively, is evidence of a joint common enterprise which entitled the Resident Magistrate to find as she did that " All the defendants ... aided and abetted each other...", as I stated in dealing with ground 1 above.

The appellants on the facts of the case had physical control of the twenty-seven (27) bales of ganja and aided and abetted each other performing different functions in maintaining possession. I agree with Mr. Pantry that the appellants had the requisite knowledge and custody and control, being involved in a joint enterprise, the ganja being in a common pool from which each appellant could draw. There was ample evidence that the samples taken by Detective Henderson and handed over to the forensic analysts who found them to be ganja, were from the twenty-seven (27) packages in the possession of Shirley Rozzar. Rozzar had received the packages from the witness Lunsford who along with Pitts, the pilot, had seen the twenty-seven (27) packages placed on the aeroplane at Vernamfield. The fact of the joint possession by the appellants in their common enterprise to deliver the ganja was sufficient to fix them with knowledge of the contents of the said packages. I find no merit in this ground.

Ground 4 and 6 argued by Mr. Ramsay may be dealt with together. They read:

> "4. That the Learned Resident Magistrate erred in finding the Appellant guilty on the Information for Exporting Ganja as the evidence was that packages, later found in another jurisdiction, were allegedly put in the possession of the D.E.A. in Jamaica, and that it was the D.E.A. through agent Pitts who took the packages in an aircraft out of the jurisdiction, and into a foreign country.
>
> ...
>
> 6. That it is respectfully submitted that the charge of Trafficking must fail for want of evidence to support the charge in Information No. 7033 of 1991, that the Appellant and others

> "used a conveyance to wit an aircraft to traffic Ganja": That it is submitted that the evidence discloses that the only person who used an aircraft for the purpose of conveying ganja, were agents of the D.E.A."

Mr. Ramsay argued that the act of taking the ganja out of the Island was the act of the D.E.A. agents who, themselves used the aircraft. They were not acting as the agents of the appellants, but were acting on their own behalf. Mr. Pantry, in reply stated that the appellants having agreed to and produced the twenty-seven (27) packages of ganja relied on the D.E.A. agents by arrangement to take the said ganja by aircraft to the United States of America there to effect delivery. The appellants, in conjunction with the D.E.A. agents caused the ganja to be taken from Jamaica.

Exporting ganja from Jamaica is an offence under the Dangerous Drugs Act. "Export", is defined in section 12 of the Act:

> "export" with its grammatical variations and cognate expressions, in relation to the Island, means to take or cause to be taken out of the Island by land, air, or water, otherwise than in transit;"

A person regarded as "trafficking" in ganja is one who "... uses any conveyance for carrying ganja..." (section 7B(c). In the case of **Attorney-General vs Tse Hung-Lit et al.** [1986] L.R.C. (Crim) 650, the Board of the Judicial Committee of the Privy Council quoted with approval the judgment of the High Court of Australia in **O'Sullivan vs. Truth and Sportsman Limited** (1957) 96 CLR 220, in which the question arose as to whether the publisher of a newspaper could be said to have committed the offence of to "...offer for sale, sell, or cause to be offered for sale...", a newspaper, where the act of selling was done by the ultimate news agent, to whom it had been distributed. The High Court of Australia, held, inter alia, at page 228:

> "This appears to mean that when it is made an offence by or under statute for one man to "cause" the doing of a prohibited act by another the provision is not to be understood as referring to any description of antecedent event or condition produced by the man which contributed to the determination of the will of the second man to do the prohibited act. Nor is it enough that in producing the antecedent event or condition the first man was actuated by the desire that the second should be led to do the prohibited act. The provision should be understood as opening up a less indefinite inquiry into the sequence of anterior events to which the forbidden result may be ascribed. It should be interpreted as confined to cases where the prohibited act is done on the actual authority, express or implied, of the party said to have caused it or in consequence of his exerting some capacity which he possesses in fact or law to control or influence the acts of the other. He must moreover contemplate or desire that the prohibited act will ensue."

In the instant case the appellants did not export the ganja, nor did they cause the ganja to be exported. They neither had "the actual authority..." nor "... the "capacity...to control or influence" the D.E.A. agents to cause the ganja to be exported. Moreso, in respect of the offence of "trafficking", the appellants did not use "... a conveyance to wit an aircraft to traffic ganja." The aeroplane was totally under the control of the D.E.A. agents, exclusively, devoid of any influence on the part of the appellants. In this respect also, the finding of the learned Resident Magistrate that "From the time the packages were put on the aircraft they were always in proper custody," is significant. From that instant, the criminal activities of the appellants ceased, and the ganja was reduced into the legal custody of the official authorities, that is, the Jamaican authorities by the agency of the D.E.A. agents. No offence of exporting or using a conveyance to carry ganja could thereafter have been committed. However, whereas it was not possible for the appellants to have been able to ever use the aircraft for the trafficking of ganja, nor did the D.E.A. agents at any time intend

them to so use it, it was not so with the exporting offence. The appellants had completed all the acts leading up to the final act of depositing the ganja in the aeroplane and could therefore have been guilty of an attempt to export ganja.

Section 50 of the Interpretation Act reads:

> "50. A provision which constitutes an offence shall, unless the contrary intention appears, be deemed to provide also that an attempt to commit such offence shall be an offence against such provision, punishable as if the offence itself had been committed."

I therefore agree with Mr. Ramsay's submission, in respect of ground 4 and 6 that the conviction of exporting ganja should be quashed. Instituted instead should be the offence of attempting to export ganja.

Mr. Ramsay argued as ground 8, that the sentence of three (3) years imprisonment for the offence of exporting ganja being the maximum, was excessive. It did not take into consideration the mitigating factor that the appellant had been encouraged and invited by the witness Erickson. He relied on **R v Birtles** [1969] 3 All E.R. 1131. Because of my view that the conviction of exporting ganja cannot stand, it is only necessary to deal with the arguments on this ground as far as it would concern a conviction of an attempt to export. In the first place there is no finding nor any evidence that the witness Erickson encouraged or incited the appellants to commit any offence. To that extent therefore, the ground fails. Secondly, in practice, the only restraint on sentence where a court finds that a person has been convicted of an attempt to commit an offence of which he is charged, is that the said court should not sentence him to a longer sentence than that which he could have been given if he had committed the full offence. The sentences of three (3) years up were properly imposed

and no circumstances exist to impel us to disturb them. For those reasons this ground also fails.

Miss Martin for the appellant Roy argued, as ground 6 that the visual identification at the airstrip and the voice identification outside Jamaica, of the said appellant "fell within a special category and thus required specific consideration in her findings of fact." The evidence discloses that the appellant Roy was known to the witness Erickson from 1988 and in 1991, they had several meetings and discussions after the initial meeting in April, 1991. It is my view that, in the circumstances, the learned Resident Magistrate was correct in her approach that identification was not in issue. There is no merit in this ground.

Miss Martin argued, as ground 7, in summary, that the learned Resident Magistrate in finding that the witness Erickson was "...credible and reliable", was in error, in that he having admitted that his name was "Robert Moore", his identity was false and his oath rendered null and void and he should have been re-sworn thereby off-setting his false oath and deceit. It seems to me that the learned Resident Magistrate was satisfied that the same individual who was in contact with the appellants as "Erickson" was in court giving evidence of that association. There was no suggestion that he was not the individual in Jamaica at the relevant time.

The fact that he gave evidence as "Erickson" in preference to "Mr. X" or any other name did not change his persona. To assume a name and identity for the purpose of the operation is a deception perpetrated on the appellants; to give evidence in an assumed name is not a change of the individual known to the appellants.. It was a question of fact for the learned Resident Magistrate before whom the witness admitted, albeit in cross-examination that his correct name was "Robert Moore", as to

whether or not he was a credible witness. The admission by the witness that the name "Erickson... was the name I use under the witness protection programme," was sufficiently explanatory and was accepted by the learned Resident Magistrate who found the witness to be "frank and forthright." The credibility of a witness is an issue for the tribunal of fact. The learned Resident Magistrate was entitled to make the finding she did in respect of the said witness. This ground also fails.

Mrs. Samuels-Brown for the appellant Ralph, also argued that no substance was identified in Jamaica as ganja to ground the offences and the fact that the said substance was removed from the jurisdiction and kept by foreign personnel the Jamaican court lost jurisdiction irreparably, over it, and a subsequent analysis and identification of the said substance was irrelevant. Mr. Pantry argued that jurisdiction is determined by the place where the offence took place and not where some of the evidence is obtained. There is evidence that the substance that was placed on the aeroplane was the said thing examined by the analyst in Jamaica and found to be ganja. I agree with Mr. Pantry. The evidence demonstrates that the twenty-seven (27) packages reduced into proper custody on the aircraft, was taken to and kept by the witness Shirley Rozzar until samples were taken by Detective Sergeant Henderson which samples were subsequently examined by the analyst in Jamaica and found to be ganja.

On the evidence and the findings all the offences were committed in Jamaica. The ganja is shown not to have been interfered with up to the time when its samples were analysed; the chain of custody was not broken. There is no rational basis nor principle of law to support the view that an exhibit taken out of the jurisdiction loses its

true nature, or is thereby affected as to its admissibility. There is no merit in this point; ground 6 therefore fails.

Counsel for the appellant Ralph, argued, as ground 8, the constitutionality of the conviction of dealing in ganja. I agree with the reasoning of the learned President on this issue, as reflected in his judgment and also agree that there is no merit in this ground.

Mr. Harrison, counsel for the appellant Randal Titus, argued in addition, that the visual identification by the witness Erickson of the appellant Titus was poor and the learned Resident Magistrate not having warned herself, the conviction is wrong and should be set aside. It is my view that the nature of the evidence is that the said witness saw this appellant on two occasions, that is, on the 11th and the 13th day of November, 1991, for several hours on each occasion, some of those hours being during daylight, and knew him by name. Identification was not in issue. I also agree with the reasoning of the learned President in this regard and this ground also fails.

For the reasons I have expressed above, these appeals should be allowed in respect of the offences of trafficking in, dealing in, and exporting ganja and the convictions and sentences thereon set aside. A conviction of attempting to export ganja should be instituted and a sentence of three (3) years imprisonment at hard labour imposed thereon, in respect of each appellant. The appeals in respect of the convictions of possession of ganja should be dismissed.

LANGRIN, J.A.

These appeals raise two important questions for consideration:

(1) Did the evidence establish Erickson's involvement to be part of a joint co-operation between the Jamaican Police and the United States Drug Enforcement Agency?

(2) Did the witness Erickson have an interest to serve (Accomplice vel non)?

As indicated in the judgment of the President, he would allow the appeals on the ground that the witness Erickson and the D.E.A Agents were participants and the Resident Magistrate failed to warn herself of the danger of convicting on the uncorroborated evidence of these witnesses before she proceeded to conviction. It is on this aspect of the case that I find myself unable to agree with the Learned President. We agree on the questions of the constitutionality of the reverse onus, the dock identification and the duplication of sentences. The points which I have to deal with are those arising under 1 and 2 above.

There is ample evidence on which the learned trial judge could find that Erickson and the D.E.A. agents were acting in cooperation with the local police.

In August, 1981, Special D.E.A. Agent Paul Pitts was given certain information and instructions. As a result he came to Jamaica on the 12th September, 1991 to assist the local authorities and run the office in Jamaica. The following day D.E.A. Agent Harris and Pitts met with two members of the Jamaican Police in Kingston. Later that morning Pitts met Erickson and they both met with Roy Outar. After a discussion Pitts, Erickson and Outar all drove to the airstrip. On their way back to Kingston they again met with Special Agent Harris and the two Constables and related what had happened to them. On the 14th September, 1991, Agent Pitts returned to the United States.

Erickson while in Jamaica spoke with the Outars and shortly after spoke to D.E.A Agent Harris. Erickson said, "I called Burns because he was the person to appropriate my action with

the D.E.A and the Jamaican Authorities". He also said he made a verbal report to Sergeant Henderson after the plane took off and he made a report in the USA to the Jamaican Police.

During the course of the operation he assumed the name of Erickson and the Jamaican Police was aware of this including the Senior Superintendent in charge of the case. His correct name was Robert Moore.

Errol Graham, Detective Corporal stationed at Narcotics Division testified that he was on special duty on November 13, 1991 at about 4:40 a.m. at Vernamfield. He went to Norman Manley International Airport on instructions and after leaving there he met with a confidential informant.

On the totality of the evidence it is clear that the Jamaican Police were involved in the operation. I am firmly of the view that Erickson and the D.E.A Agents were agents provocateur. I accept the submission of Mr. Pantry, Q.C. that Erickson was a confidential informant acting in the capacity of agent provocateur who is a police spy or undercover agent used to gather evidence which by the very nature of the operation would be difficult or impossible to obtain without such undercover activity.

In ***R v Bickley*** [1909] 2 Cr. App. R 53 it was held that the evidence of a police spy or an agent provocateur is not that of an accomplice and does not require corroboration. Kerr J.A. relying on the above case in ***R v Craigie et al*** [1986] 23 J.L.R. 172 at page 184 had this to say:

> "We accept as correct, the statement that a person who participated in an offence simply for the purpose of obtaining evidence is not an accomplice for the purpose of the rule requiring corroboration".

The learned author of Cross on Evidence 6th Edition at page 217 stated:

> "An agent provocateur or spy is not an accomplice however much of his activities may be deplored."

See also ***Sneddon v Stevenson*** [1967] 2 All E.R. 1277.

Mr. Ramsay Q.C. placed considerable reliance on ***Yip Chui-Cheung v R*** [1994] 2 All E.R. 924. The headnote reads as follows:

> "The appellant met one **N** in Thailand and arranged that he would act as a courier to carry five kilos of heroine from Hong Kong to Australia. **N** was to fly to Hong Kong under an assumed name, where he would be met by the appellant and he was then to fly on to Australia with five kilos of heroine supplied by the appellant, for which he was to be paid $US16,000. In fact, unknown to the appellant, **N** was an undercover drug enforcement officer of the United States and the Hong Kong and Australian authorities were prepared to permit him to carry the drugs from Hong Kong to Australia in the hope of breaking the drug ring of which the appellant was a member. However, on the subsequent advice of the Hong Kong authorities the plan was not carried through and **N** did not fly to Hong Kong. The appellant was nevertheless arrested in Hong Kong and charged with conspiring with **N** to traffic in heroine. At this trial the judge directed the jury that if they found that **N** intended to export the heroine out of Hong Kong he was in law a co-conspirator and they could convict the appellant of a conspiracy with him. The appellant was convicted and sentenced to 15 years' imprisonment. He appealed to the Court of Appeal of Hong Kong which dismissed his appeal. He appealed to the Privy Council, contending that **N** could not in law be co-conspirator because he lacked the necessary ***mens rea*** for the offence and therefore there could be no conspiracy.
>
> **Held** – There was no general defence of superior orders or of Crown or Executive fiat in English or Hong Kong criminal law and the Executive had no power to authorise a breach of the law. Accordingly, the fact that **N** would not have been prosecuted if he carried out the plan to carry the drugs from Hong Kong to Australia as intended did not mean that he did not intend to commit the criminal offence of trafficking in drugs by exporting heroin from Hong Kong, albeit as part of a wider scheme to combat drug dealing. **N** intended to commit that offence by carrying the heroin through the customs and on to the aeroplane bound for

> Australia. It followed that there had been a conspiracy and that the appellant had been properly convicted. The appeal would therefore be dismissed (see p.928 d to j, post) ***R v Anderson*** [1985] 2 All ER 961 distinguished."

This was a case dealing with the offence of conspiracy and it was necessary to prove the essential elements of that offence. The issue was whether the co-conspirators had the ***mens rea*** *to* commit the offence. The court observed that the crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with the intention of carrying it out. For the offence of conspiracy it was essential to determine whether the undercover agent intended to carry out the unlawful act. The court found that this particular agent intended to carry it out. In fact he would have flown to Hong Kong in accordance with the agreement but it so happened his flight was delayed and he missed the rescheduled flight. It could be said therefore that he had the ***mens rea*** to be a conspirator because he had the requisite intention to carry out the act. The elements required for the offence of conspiracy were therefore established. It is significant to note that their Lordships did not take the matter any further. No mention was made as to whether such an undercover agent would be called an accomplice, and nothing was said about whether the evidence of such an agent would require corroboration. The Board was simply looking to see whether the elements for conspiracy were established. Technically, they were established and having regard to the proposition that the Executive has no power to authorise a breach of the law it would mean that the undercover agent did commit the crime, albeit as part of a wider scheme to combat drug dealing.

It is my view, however, that if their Lordships' Board had considered that 'wider scheme' they would have probably come to the conclusion that such an undercover agent notwithstanding his intention to carry out the act as well as the fact that this would constitute a crime, the agent could not be classed an accomplice in the true sense of the word. Neither was he a genuine conspirator.

The words of Earle J in the case of ***R v Dowling*** Cox Criminal Law cases Vol. III (1848-50) 509 at 516, are helpful. In summing up to the jury, the learned judge said:

> "If he only lent himself to the scheme for the purpose of convicting the guilty, he was a good witness, and his testimony did not require confirmation as that of an accomplice would do . He was not an accomplice for he did not enter the conspiracy with the mind of a co-conspirator, but with the intention of betraying it to the Police, with whom he was in communication. At the same time from the fact of his joining the confederacy for the purpose of betrayal and that he had used considerable deceit by his own account in carrying out that intent the jury would do well to receive his evidence with caution."

Based on the foregoing analysis, I think the instant case is easily distinguished.

I now turn to the second question. Did the witness Erickson have an interest to serve? (Accomplice vel non).

Erickson testified that he became an informant because he was indicted. He offered his services to the D.E.A, FBI and Custom Services and they all accepted him. They offered him nothing in return and he was never given anything. Under cross-examination by Mr. Ramsay at the trial he said, "My fate was to be decided by the judge and the judge alone." When he came to Jamaica in April, 1991, he had already agreed to be an informant. Having been convicted for crime he committed abroad he was then awaiting sentence. He was subsequently sentenced to 7 years imprisonment.

In acting as undercover agent for the D.E.A, it was argued that he could possibly be expecting favours in relation to his own sentencing thus having an interest of his own to serve.

In ***Prater*** (1960) 44 Cr. App. R. 83 it was noted that whether the witness can be labelled an accomplice or not, where he may be a witness with an interest to serve it is desirable that the warning against uncorroborated evidence be given.

However in ***Stannard (1964)*** 48 Cr. App. R. 81 in referring to ***Prater*** , Winn J. noted that such a rule is no more than a rule of practice and certainly not a rule of law.

In ***R v Beck*** (1982) 1 All E.R. 807 at p. 813 it was stated that the phrase in ***Prater*** that:

> "It is desirable that in cases where a person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given."

is related to cases where witnesses maybe participants or involved in the crime charged.

Acknor , L.J in ***R v Beck*** (supra) further stated at pg. 813:

> "While we in no way wish to detract from the obligation upon a Judge to advise a jury to proceed with caution where there is material to suggest that a witness' evidence may be tainted by an improper motive, and the strength of that advice must vary according to the facts of the case, we cannot accept that there is any obligation to give the accomplice warning with all that entails, where it is common ground that there is no basis for suggesting that the witness is a participant or in any way involved in the crime the subject matter of the trial."

The Court was simply making a distinction between a caution and a full accomplice warning and stating that the latter was only necessary where the witness is in any way involved in the crime which is the subject matter of the trial.

Erickson's alleged improper motive has nothing to do with the subject matter of the trial and so will not warrant the accomplice warning.

The question which remains to be determined is whether a caution would be required having regard to the facts of this case? Erickson who was awaiting sentence in a foreign jurisdiction stated clearly that his fate was in the hands of the Judge. In the light of that fact the Resident Magistrate did not seem to consider the need for such a caution. Instead she embraced Erickson as a forthright and frank witness. Against that background coupled with the fact that the D.E.A authorities do not control sentence which is a matter solely in the

jurisdiction of the Court, it is my view that this is not a case in which the Resident Magistrate should state any caution in her findings.

I have since read the judgment of my brother Harrison, J.A. in respect of the other grounds argued on behalf of the appellants and I agree with his reasons and conclusions therein.

I would allow the appeals in respect of the offences of trafficking in, dealing in and exporting ganja and set aside the convictions and sentences thereon and substitute a conviction of attempting to export ganja and a sentence of three years imprisonment at hard labour imposed therein.

RATTRAY, P.

The appeals are allowed in respect of the offences of trafficking in, dealing in and exporting ganja and the convictions and sentences therein set aside.

By a majority, a conviction for the offence of attempting to export ganja is substituted and a sentence of three (3) years imprisonment imposed thereon in respect of each appellant.

By a majority, the appeals are dismissed in respect of convictions for possession of ganja and sentences affirmed.

Sentences to run concurrently.