

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CRIMINAL APPEAL NO. 12/06

**BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE MARSH, J.A. (Ag)**

**BETWEEN BERTRAM SEARS APPELLANT
A N D THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT**

Mr. David Batts, instructed by Livingston, Alexander, Levy for the appellant
Mr. Kent Pantry, Q.C. Director of Public Prosecutions and
Miss Natalie Brooks, Crown Counsel (Ag). for the Crown.

2nd, 4th October and December 18, 2006

HARRISON, P:

I have read in draft the judgment of Marsh J.A. (acting). I agree with his reasoning and conclusion and I have nothing further to add.

SMITH J.A.:

I also agree.

MARSH, JA (Ag):

On the 17th day of January, 2006, Bradley McKay appeared in the Resident Magistrate's Court for the parish of St. Elizabeth at Santa Cruz and pleaded guilty to several breaches of the Dangerous Drugs Act and Illegal Entry. He had also been charged with the offence of illegal landing, which was withdrawn by the Crown.

On the same day, the said 17th day of January, 2006, there was an application for forfeiture of a twin propeller Beechcraft Baron C55 Aircraft bearing markings N2723T owned by the appellant Bertram Sears. This aircraft had been seized and detained by the Police as the conveyance used during the investigations into Bradley McKay's case.

This application was set for hearing on the 23rd day of February, 2006.

On May 26, 2006 the learned Resident Magistrate having heard evidence and submissions made the following order:

"Application granted. Airplane forfeited to the Crown.
Stay of execution ordered for six weeks."

Notice and Grounds of Appeal were filed on the 5th June, 2006 in the Resident Magistrate's Court for St. Elizabeth.

By Petition, to the Governor General, the said application was referred to the Court of Appeal for rehearing pursuant to Section 29(1) of the Judicature (Appellate Jurisdiction) Act. That is how the matter came to be before us.

Section 24 (1) of the Dangerous Drugs Act states:

"(1) If any constable has reasonable cause to suspect that any conveyance is being used or has been used for the commission of any offence against this Act, he may without a warrant search and, if such search reveals evidence that the conveyance is being used or has been used for the commission of any offence as aforesaid, seize and detain such conveyance.

- (2) Where any conveyance is seized pursuant to this section and --
- (a) any person is convicted of an offence against this Act; and
 - (b) the Court is satisfied that –
 - (i) that person owns the conveyance used in the commission of the offence; or
 - (ii) the owner of the conveyance permitted it to be so used; or
 - (iii) the circumstances are otherwise such that it is just so to do;
- the Court shall, upon the application of the prosecution, order the forfeiture of the conveyance."

Section 24(6) of the Dangerous Drugs Act provides that:

"Any person having a claim to any conveyance seized under this section may appear before the Court on the hearing of the application and show cause why an order for forfeiture should not be made."

Bertram Sears, the appellant had appeared before the St. Elizabeth Resident Magistrate's Court at Santa Cruz. The order for forfeiture of the aforementioned aircraft was made by the learned Resident Magistrate for St. Elizabeth on May 26, 2006. It is against this order that he has appealed and he now seeks to have the said order overturned.

At the hearing of the application for forfeiture, the Appellant opposed the Crown's application. He testified and called witnesses in support. The appellant's contention is that the learned Resident

Magistrate erred in law and in fact and her decision should be overturned for these reasons:-

- (a) The Magistrate's findings are unsafe, unreasonable and unsupported by the evidence;
- (b) She erred in law and in fact as on the evidence it was not just to forfeit the Appellant's aircraft;
- (c) There is no basis in law for the forfeiture of the Appellant's aircraft.

Mr. David Batts who appeared for the appellant both at the hearing of the application for forfeiture and before us, made the following submissions in support of the appellant's effort to overturn the order of forfeiture made by the learned Resident Magistrate for St. Elizabeth:

The Resident Magistrate was in error to find :

- (i) that Bertram Sears did not act as a prudent, wise owner, as he had not done all that was reasonable and within his power to prevent his airplane being found in Jamaica with ganja;
- (ii) that by failing to take any steps to disable the aircraft, he was negligent;
- (iii) that Sears retained control of the aircraft and so was equally responsible for its security, that is, to take all precautions to prevent its removal by unauthorized persons.
- (iv) Bertram Sears had a responsibility to issue instructions to Mr. Ramsay as well as the Airport Authority as to who were

authorised to act as his agents in the removal of the aircraft. This obligation of his was not discharged by him.

- (v) Further, the learned Resident Magistrate found that Mr. Ramsay's integrity was being questioned by appellant Bertram Sears, but he had failed to show that he had taken any steps to check the integrity or honesty of Mr. Ramsay. The onus of monitoring the progress of repairs and ensuring that the airplane did not leave the airport for any illegal venture was on Bertram Sears. By his not making personal checks on the airplane between the 12th to 19th day of September, 2005, this indicated a lack of prudence on his part.

The learned Resident Magistrate also found that when in his affidavit the appellant deponed that he had returned to the Bahamas on the 19th day of September, he was not telling the truth. This was a deliberate attempt to mislead the Court into believing that at the time the airplane left the Bahamas he was not in that country and therefore could take no steps to have prevented its removal. She also found that the Appellant Bertram Sears had failed to act as a prudent and wise owner by not doing more to prevent the aircraft's removal. Further the test that the learned Resident Magistrate applied was a test of

"reasonableness" when the only question to be answered was whether it was "otherwise just" to forfeit the aircraft.

Mr. Kent Pantry, Q.C. Director of Public Prosecutions responded to the appellant's submissions. He contended that the learned Resident Magistrate, in order to determine if forfeiture is to be made, was duty bound to examine all the circumstances as to the storage of the aircraft and of its subsequent arrival in Jamaica transporting ganja. It was not the Crown's contention that the appellant was the person who came to Jamaica in the aircraft. His application must be based on what steps were taken to ensure that the aircraft did not get into the hands of narco-traffickers. The aircraft had been grounded by the authorities in both the United States of America and the Bahamas. The F.A.A. had grounded the aircraft first in Miami and yet it was later flown to the Bahamas. This was known to Bertram Sears so he was aware that the plane could be flown. He had been out of the Bahamas the week before the airplane came to Jamaica. He had strenuously denied this and it was only when he was shown his passport, in cross-examination that he admitted that although he had deposed to having returned to the Bahamas on the 19th of September, 2005, he had in fact returned to the Bahamas on the 14th of September, 2005.

The learned Resident Magistrate was therefore entitled on that basis to make a finding that this was intended to be a lie told to mislead

the Court. Appellant had failed to return to Mr. Ramsay, the aircraft repair technician, until 19th September, 2005 to check on the aircraft. This behaviour of the appellant could have been considered very suspicious by the learned Resident Magistrate and in fact she did so find. Mr. Pantry further submitted that since appellant had ordered Ramsay to order parts and repair the aircraft, his failure to go to see if the parts had been placed on the aircraft was both negligence and imprudence on the appellant's part.

This Court is asked to look at the mischief that Section 24 of the Dangerous Drugs Act is designed to prevent. It is to prevent the owner of a conveyance leaving the said conveyance about, oblivious of whether it could be used by anyone else for illegal activities. A prudent owner in the circumstances of the appellant should have taken steps to disable the aircraft. This appellant never did. The findings of both of fact and of law made by the learned Resident Magistrate, based on the authorities and the evidence before her were correct.

We noted that the only evidence adduced on the application for forfeiture was that provided by Bertram Sears and his witness viva voce and by affidavit. In the case of : ***In The Matter of an Application of Phillip Bender for the Revocation of an Order of Forfeiture made in respect of Cessna Aircraft 141, Registered N4699N Serial No. 0084*** (1980) 17 J.L.R. 233, similarly, only the evidence of the applicant and his witness was

adduced. The prosecution filed no counter affidavits nor called any evidence that Bertram Sears was a party to or had any knowledge of the use to which his aircraft was put when it transported ganja to Jamaica and was seized and detained on the 16th day of September, 2005. The learned Resident Magistrate therefore made her findings of fact based on the omissions of the appellant in his dealings with his aircraft after it was placed in the custody of Wayne Ramsay, Aviation Maintenance Technician duly certified in the United States of America and the Bahamas.

Against the background of the learned Resident Magistrate's findings must be placed the following uncontraverted evidence. There is no evidence that Bertram Sears was involved directly or obliquely in the finding in Jamaica of the airplane with ganja on it.

The aircraft having been grounded, was placed in the custody of Wayne Ramsay, president of Ramsco Aviation Ltd. a company which operates from a hangar at the Nassau International Airport and which specializes in repair work to aircraft. It was in need of repairs and was in a condition where flight of it would be dangerous. A sticker indicating that the aircraft was grounded had been placed on it. The aircraft had been purchased by appellant Bertram Sears by loan funds for use of the appellant in his medical practice in the archipelagic Bahamas and his

pharmaceutical business which necessitated regular travel to the United States from the Bahamas.

The airplane was registered in the corporate name Bertram Sears Inc. The Appellant was, from testimonials appended to his affidavit, a person of impeccable character in the Bahamas. The question of cardinal importance for this Court to consider is whether it would be "otherwise just" to revoke this order for forfeiture of the Cessna belonging to the appellant. As Kerr J.A. stated in the **Bender** case (supra): "In considering whether the Appellant acted reasonably, regards must be had to matters that ought reasonably to be in contemplation."

The learned Resident Magistrate has identified the question she had to consider, having made her findings of facts, to be "whether he did all that was reasonable and within his power to prevent his airplane from being found in Jamaica with ganja". She concluded that the answer was no and found that the Crown had established that it was just and reasonable to have forfeited the aircraft in accordance with Section 24(i) (ii) of the Dangerous Drugs Act.

The appellant had entrusted his aircraft to a legally operating company at the Nassau International Airport to have repairs done to it after it had been grounded by the relevant authorities in Miami and Nassau. The plane was in need of parts which were hard to source even in the United States and was awaiting the finding of these parts for them

to be placed on the aircraft. There was a sticker in place indicating that the plane should not be flown. He had taken the keys for the airplane from everyone when it was grounded. However, when the airplane became missing from the Nassau airport, Mr. Ramsay had one of the keys and appellant kept the other. It was after September 19, 2005 that he retrieved the keys from Mr. Ramsay. The appellant had been in touch by telephone with the repairer up to a week or so before the September 19, 2005, when he became aware that the airplane had been removed from the International Airport in Nassau, Bahamas where it had been awaiting repairs.

The finding of fact that he had not taken steps to disable the plane, and had not done enough to prevent the removal of the plane from the airport, as a prudent and wise owner, would seem more akin to speculation than to the facts. The aircraft was in the custody of a reputable (it operated openly and legally) company. It was reasonable, in my view to have believed as the appellant seemed to have done that the airplane in the custody of the repairer, located as it was in a hanger at an international airport would be secure from the hands of miscreants, likely to use it for illegal activity.

Nothing on the evidence before the learned Resident Magistrate could have propelled her to the conclusion that the prosecution had "established that it is just and reasonable to forfeit the aircraft." The

appellant believed in all the circumstances, as a reasonably prudent man would be expected to do, that his aircraft being in the custody of a company legally carrying on the business of aircraft repairs at an international airport, would be secure. Nothing in the evidence before the Resident Magistrate showed that the appellant could have contemplated that the aircraft, if flown would necessarily be used to transport ganja.

In the circumstances, a revocation of the order for forfeiture made by the learned Resident Magistrate for St. Elizabeth on the 25th day of May, 2006 is otherwise just. The order of forfeiture is therefore revoked. A condition of this revocation of the order for forfeiture is that the costs and charges incurred for the detention and security of the aircraft be paid by the appellant for the period 16th September, 2005 to the date of the release of the aircraft, being such date as payment is made or tendered.

HARRISON, P:

ORDER

The appeal is allowed. The order for forfeiture is revoked. The costs and charges incurred for the detention and security of the aircraft for the period 16th September, 2005 to the date of the release of the aircraft are to be paid by the appellant on the day of such release.