16.7.93

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

On 25th June 1993

SCA #140/93, #150/93 and $151/93

BETWEEN	DENTON POWERY JAMES DOUGLAS EBANKS ERLON DALTON EBANKS	APPELLANTS
AND	REGINA	RESPONDENT

Mrs P Levers and Mr Graham Hampson of
Paget-Brown Quin & Hampson for Powery

Mr J Furniss for James D Ebanks
Erlon Ebanks in person

Mr S Bulgin for the respondent

HARRE C.J. **JUDGMENT**

The three appellants appeal against their convictions for possession of ganja and possession with intent to supply.

On Monday, the 13th January 1992, the police went to Governor's Sound where they boarded a vessel called "Hustler". On board the found pieces of ganja and scattered seed. The occupant of the boat was cleaning the vessel at the time the police arrived. On board were certain items that had labels indicating that they were made in Jamaica. The police were later taken to a place called Sand Rock and discovered in bushes one five gallon bucket containing 10 pounds of ganja. The police arrested several persons, of whom Presley Degan, David Smith and Patterson Ebanks (whom I will call "Patterson" to distinguish him from others of the same surname) pleaded guilty and were sentenced prior to the trial of the three appellants. The appellants all pleaded not guilty and were convicted after trial. Degan, Smith and Patterson were crown witnesses. They were obviously accomplices and the learned magistrate

did remind himself of the danger of convicting on uncorroborated accomplice evidence. I shall have more to say about that later. At the appeals, Mrs. Levers on behalf of Powery argued seven grounds of appeal against conviction. They were adopted as to the accomplice evidence, with additional submissions, by Mr. Furniss on behalf of James D. Ebanks. Erlon D. Ebanks was not represented and made no oral submissions. He said that he would leave it to the Court. I will therefore deal first with the arguments of Mrs. Levers on behalf of Powery and in the order in which she presented them in her written submissions and orally. The references to Grounds are to the additional Grounds of Appeal put in on behalf of Powery.

GROUNDS 3 and 6

These were -

> "That the learned Senior Magistrate erred in law and/or misdirected himself on the law on the application of circumstantial evidence when he held that:
>
> > "It is for the most part circumstantial and it is for this Court to infer from the facts proved other facts necessary to complete the evidence of guilt or establish innocence."
>
> "The learned Senior Magistrate erred in law in that he drew inferences which were unsupported by the evidence presented by the Crown to bolster the Crown's case and seek jurisdiction to find the Appellant guilty.".

It was submitted that the learned magistrate, having stated accurately that it was for the court to infer from the facts proved other facts necessary to complete the evidence of guilt or establish innocence, went on to draw inferences based on pure speculation.

There is evidence from Degan that he had an expired pilot's licence and also that he was invited to go on the trip by Powery. Degan also said that Powery was at Governor's Harbour when he arrived there after being picked up at home at 8 p.m. by the car containing four other participants in this enterprise, and also at 9 p.m. when they set off on the vessel. Smith also said that he saw Powery as he was taking off on the fishing trip. There is also evidence of Powery's presence on the vessel's return. Degan described how they reached Grand Cayman about 4 a.m. on 13th January, arriving at North Sound about 6 a.m. "We then", he said "reached a little cove

approximately 3 miles from Morgan's Harbour. There we saw Denton Powery and Victor Swaby". Moreover, although Smith was not prepared to swear that Powery was present at the arrival near Morgan's Harbour but only that he heard a voice which sounded like Powery's, he did say that after the vessel was brought back to Governor's Harbour he was taken back to his home by Powery and Swaby.

I accept that the learned magistrate erred in finding that there was an unavoidable inference from the evidence that the co-owner of the vessel was in Jamaica for the purpose of organising the shipment of ganja. There is nothing in the evidence to support that.

But there evidence which the magistrate believed, having shown himself aware of the danger of convicting on the uncorroborated evidence of accomplices, that the boat went to Jamaica and picked up ganja, and that Powery was present both on its departure and return. The evidence is that Degan did not actually pilot the vessel. But he was on board on Powery's invitation and available to use his skills if it became necessary, whether or not he had been deceived initially as to the purpose of the trip.

For the magistrate to draw the conclusion from this evidence that Powery "not only obtained the presence or the services of a licensed pilot aboard but was there to witness the vessel's departure. That on its return before the sun was up on Monday morning he was there to meet the boat" seems to me to be unexceptionable.

I now turn to the evidence of what happened in relation to what was unloaded and weighed on the boat's return. There is evidence about this from Degan and from Patterson, who was not on the trip. There is conflict between their evidence, but it is quite untenable to say that on Patterson's evidence Powery did not summon anybody to the scene of the weighing. Patterson says that he himself was asked by Powery to go somewhere and went with him to that scene in a car driven by Swaby. It is equally untenable to say that it is clear from Patterson's evidence that Powery did not summon Degan to

the weighing. What Patterson said about that was that Powery told him to get the scales out of the truck and when he got to the Dyke side with Powery and Swaby he saw Degan. There is no evidence from him one way or the other about how Degan got there. Nevertheless there is a conflict, which the magistrate did not resolve, between Patterson's evidence that he was picked up by Swaby and Powery at about 10 a.m. and they saw Degan when they got to the Dyke side and Degan's own evidence that he was taken to the Dyke side after being picked up by Patterson and Powery about 11:30.

I now look at the evidence about the weighing itself. Patterson said that Degan and Powery were weighing white buckets sealed with tape. Degan said it was Patterson who was weighing the contents of garbage bags and crocus sacks.

One or both are being untruthful about their own role.

Both agree, however, that Powery was present at the weighing and also had called for them earlier that morning and accompanied them to the weighing site. And Patterson testified that Powery told him to say that if the police came he was to tell them they went to look for a cow.

There was evidence from which, if he found it credible, the learned magistrate was entitled to find the following facts proved -

1. Powery was the co-owner of a boat.
2. He loaned the boat to persons who went on a trip to Jamaica to pick up ganja which began on the evening of 11th January 1992 and continued until the morning of the 13th.
3. He invited a person who had been a licensed pilot to go on that trip.
4. He was there to meet the boat on its return, not at its point of departure but at a little cove some three miles from Morgan's Harbour.
5. On the morning of the vessel's return, he was present at

the weighing of something which had been unloaded from the boat.

6. Degan, a person whom he had invited to go on the trip, and who had done so, and Patterson, who had not, were present at the weighing.
7. Powery was the only person present on both occasions when Degan and Patterson were picked up by car on the morning of 13th January.
8. Powery told Patterson that if asked by the police he should say that they had been looking for a cow.

From all those facts the magistrate was entitled to draw the conclusion that Powery was aware of the purpose of the expedition and an active participant in it.

But does it follow from that that he was guilty of the offence of possession of ganja with intent to supply? At what stage, if at all, did he have possession?

I agree with the analysis of the law put forward by Mrs. Levers on the basis of two English cases R v Searle (1971) CLR 592 and R v Bland (1988) CLR 41. Authority is also to be found in the judgment of the Cayman Islands Court of Appeal in R v Gibson 1988-9 CILR 336. The principle is now so oft repeated as to be trite but I venture to do so again.

1. The burden of proving possession, custody or control of that which contains the drug is on the prosecution. The standard of proof is the normal standard in criminal cases - beyond reasonable doubt.

2. Only when the prosecution has established a prima facie case in relation to possession, custody or control of the container does the question of knowledge of the contents arise and the onus shifts to the defendant to show on a balance of probabilities that he had not such knowledge.
3. When a no case submission is made the court only has, in view of the presumptions under S 7 of the Misuse of Drugs Law, to consider whether or not there is sufficient credible evidence to establish a prima facie case in relation to possession, custody or control of the container.

That is the legal basis on which Grounds one, two and five were argued together. They were these -

Ground one

"The Learned Senior Magistrate erred in law in not upholding the no case to answer submission made by defence on behalf of Denton Powery, the appellant."

Ground two

The Learned Senior Magistrate erred in law in holding that the appellant was at all material times in possession of the vessel "Hustler" in circumstances where on the evidence presented by the Crown, the appellant loaned the vessel to persons who were neither his servants nor agents.

Ground Five

The Learned Senior Magistrate erred in law and misdirected himself in that he made no distinction between the possession of the container and possession of the contents of the container and the necessarily accompanying mental element which should apply separately to the drug and the container.".

With regard to Grounds 1 and 2 I agree that it is going too far to say that mere ownership of a boat will always, without more, invest the owner with possession and give rise to a presumption under S. 7 of the Misuse of Drugs Law, however easily rebutted. But that is unimportant in view of the fact that if he was right in accepting the

prosecution evidence there was in fact much more - enough for a finding of a case to answer and indeed, in default of a plausible defence, of guilt on the charge of possession of ganja with intent to supply. I shall have more to say on that in relation to Ground 7. I do not think it can be said that Powery had possession of any drug while it was on the boat - since knowledge is an essential element of possession and he could have had no more that a hope or expectation at that stage. However, he must have had knowledge of what was being weighed on shore. In my judgment he had joint possession of the containers at that stage and it is fanciful to say that he could not have had knowledge and possession of contents which he did not see. In all the circumstances of this case the balance of probabilities was quite the other way. Even if that is wrong he aided, abetted, counselled or procured the offence of possession of ganja with intent to supply and was rightly found guilty as a principal.

Ground 4

This was -

> "That the learned Senior Magistrate erred in law in holding that "I find no co-existing circumstances which in any way weakens or destroys the inference that Denton Powery was not only concerned in the possession of the ganja, Exhibit 23, but was in control of and had custody thereof. Accordingly, I find him guilty as charged.' It is humbly submitted that the learned Senior Magisrate by this statement clearly indicates that he has misdirected and/or confused onus with the presumption that arises under The Misuse of Drugs Law. It is further submitted that no presumption arose in this case to relieve the Crown of the burden of proving that the Appellant had knowledge of the illegal activity and possession of the controlled drug."

In the passage in his judgment which is made the subject of this Ground of Appeal, I do not think the magistrate was confusing onus of proof and any presumption. I think he was saying that it was unnecessary to invoke any presumption. If so, I agree with him. It is implicit in what I have said that I do not think that the magistrate was wrong in relying to the extent he did on the evidence of accomplices. So I now turn to Ground 7.

Ground Seven

> "The Learned Senior Magistrate misdirected himself as to the law and/or misunderstood the law relating to accomplice evidence."

He did remind himself that accomplice evidence requires a trial judge to warn a jury that it is dangerous for them to convict on the uncorroborated evidence of accomplices. However, I was invited to regard the following passage in the magistrate's judgment as indicating confusion in his mind -

> "The danger lies not only in the likelihood that a Court of superior jurisdiction may overturn conviction, but in the possibility that a body of laymen, inexperienced in the assessment of evidence, may be deceived by the uncorroborated testimony of a mendacious witness who has in common parlance an axe to grind thereby resulting in the conviction of an innocent party".

In its immediate context that passage appears to refer to the danger of convicting on uncorroborated accomplice evidence. I prefer to take the view that the magistrate was referring albeit in an elliptical way to two dangers arising from a failure to warn the jury of that. First that the superior court may, for that technical omission, be constrained to overturn a verdict on a guilty man even though the accomplice evidence was truthful, and in fact corroborated, and secondly, in the opposite case, that an innocent man may be convicted.

I am more concerned about the following passage in the learned magistrate's judgment. Although he is clearly mindful of the fact that one accomplice cannot corroborate another, he says this -

> "--- their stories support each other in all material details. Although there does not appear to be anything in the law to enable such to be considered as corroboration, this de facto adds credibility to each witness' testimony".

Like Mrs. Levers, I find difficulty in distinguishing between that which corroborates and that which adds credibility, but I must differ from her in respect of the following passage in her written submissions.

> "May I now quote the case of Attorney General of Hong Kong v Wong Muk Ping 1987 AC 501 -
> It is for the jury to decide whether witnesses are credit worthy. If a witness is not then the testimony of the witness must be rejected. The essence of corroborative evidence is that one credit worthy witness confirms that of another

> credit worthy witness. The purpose of corroboration is not to give validity or credence to a witness whose evidence is deficient or suspect of credibility, but only to confirm and support that which is sufficient, and satisfactory and credible. The corroborative evidence will only fill its role if it, itself is completely credible evidence.".

That passage comes from the judgment of Lord Morris of Borth-y-Gest in R v Hester 1973 AC 296. It was dealt with as follows in Attorney General v Wong Muk Ping -

> "More difficulty arises from the passage cited from the speech of Lord Morris of Borth-y-Gest in Reg. v. Hester [1973] A.C. 296, 315, particularly the last sentence. It is possible to read the sentence as supporting the proposition that corroborative evidence cannot "give validity or credence to evidence which is ... suspect." If this was indeed a proposition which Lord Morris of Borth-y-Gest intended to enunciate, it is one from which their Lordships feel constrained respectfully to dissent. It is precisely because the evidence of a witness in one of the categories which their Lordships for convenience have called "suspect witnesses" may be of questionable reliability for a variety of reasons, familiar to generations of judges but not immediately apparent to jurors, that juries must be warned of the danger of convicting on that evidence if not corroborated; in short because it is suspect evidence."

So the principle which it was sought to extract from that case was, in my view, very far from that which was stated in it. It must not be forgotten that the accomplice evidence is not the only evidence in this case. There is the police evidence as to what was found on the vessel, and concealed in the bush. On the evidence as a whole the magistrate having reminded himself of the danger concluded that the evidence of each accomplice was credible in its essential particulars in relation to the involvement of all the appellants.

For succinctness and clarity the following observation of a Resident Magistrate about a witness approved by the Court of Appeal of Jamaica in R v Gordon (CA 30/91) cannot be bettered. He said -

> "Having given myself these warnings I find as a witness I am prepared to rely on her uncorroborated evidence because I believe her".

There is another aspect of accomplice evidence which was raised and with which I must deal briefly.

Juries are constantly reminded that because they accept or

reject some part of a witness' evidence they do not have to accept or reject it all. Obviously that applies equally to a magistrate acting as judge of fact and law, and it applies no less to the evidence of accomplices than to that of any other witness.

So it is in my view wrong to say that the learned magistrate should be looking for veracity on all material aspects from accomplice evidence. Common sense must be applied to assessing the value of an accomplice's evidence no less than to any other. The magistrate in this case believed the evidence of each accomplice in its essential particulars, as he was entitled to to.

GROUND 8

> "The learned Magistrate erred in law in the procedure which was followed by him in ordering the forfeiture of property under the Misuse of Drugs Law"

This concerned the magistrate's ruling on his confiscation order which was said to be at the end of the trial record. Standing alone as a final order what is there would certainly have been defective. It does no more than conclude that there was a strong presumption that the appellant Powery had benefitted from drug trafficking.

But it is clear from the record that that was not the magistrate's final ruling Page. 56 (typed) of the record shows that it was delivered on the morning of the 22nd September, and before evidence was called on behalf of the appellant. That evidence was then heard and submissions made both on behalf of the Crown.

At that stage it seems to me that neither attorney was under any misapprehension as to the stage the matter had reached.

Mr. Roberts said this for the Crown -

> "Your Honour, following your ruling this morning, you have reached a stage where you felt that there was a presumption of benefit from drug trafficking. Since that time, we have heard from various people saying that they have employed Denton Powery over a period of time. Now, have they produced enough evidence to rebut on the balance of probability that there was no benefit from drug trafficking?

Because you have already reached the assumption that there was a benefit, and it is now upon the Defence to rebut that".

After the submissions by the Crown of which the above is a part the following exchange took place -

MRS LEVERS: Let me get this straight, Your Honour.

My learned friend is whispering that you have

already ruled, but if he will listen I will go on,

because at the end of the day you have to be

satisfied beyond a reasonable doubt.

> "...but subject to the assumptions which the court can make under s2(2) and (3) that property appearing to belong to the defendant or expenditure made by him was connected with drug trafficking if there is prima facie evidence to that effect which is not displaced by the defendant on the balance of probabilities...."
>
> What you have ruled now is that there is prima facie evidence based on the assumptions. Is the Court with me?
>
> THE COURT: Yes, go ahead.
>
> MRS. LEVERS: The next step, therefore, is for you to say now, has the defendant displaced those assumptions? And at the end -- at the prima facie level you can take account of the assumption, because you don't know the source of the income yet, not having heard from the defendant. But at this stage now, Your Honour, if you have a legitimate source of income, then can the Court now be convinced beyond a reasonable doubt that this is definitely the benefit of drug trafficking? The onus is on the Prosecution."

Mrs. Levers then made submissions about various transactions on which there had been evidence, with the clear intention of displacing the assumptions.

It was only following all that the magistrate delivered his final judgment. His opening words show precisely his view of the position at that time. They were these -

> " Now earlier today, the Court ruled that there was a presumption that the defendant benefited from drug trafficking. The defendant thereafter called several witnesses in an effort to rebut the presumption. Of course, the Defence, as in all cases, has only got to prove their case on the balance of probability."

It was only after doing that that the magistrate concluded that the amounts the appellant, Powery, earned during the period could never have covered the expenditure during the period, and therefore found that he had benefited from the proceeds of trafficking

in drugs and went on to assess quantum.

Reading R v Dickens, (1990) 2 AER 626, an English Court of Appeal case concerned with the very similar provisions of the Drug Trafficking Offences Act 1986 it seems to me that that procedure was correct. I now read from the judgment of Lord Lane in that case (p 629-30).

> "... if there is prima facie evidence that any property has been held by the defendant since his conviction or was transferred to him since the beginning of the relevant period, the judge may make the assumption that it was a payment or reward in connection with his drug trafficking.
>
> Likewise with expenditure, once there is prima facie evidence of expenditure by the defendant since the beginning of the relevant period, the judge can assume that it was met out of payments received by him from drug trafficking.
>
> Those assumptions can be displaced if they are 'shown to be incorrect in the defendant's case'. In other words, if after the matter has been fully heard the defendant shows on the balance of probabilities that in respect of each item of property and expenditure the assumptions are in his case incorrect, they can no longer be relied on as evidence that that item of property or expenditure was part of the defendant's proceeds of drug trafficking.
>
> In so far as any of them survive they will, together with any evidence which the judge may accept, assist the judge to decide whether he is satisfied so as to feel sure that the prosecution have made out their case. Thus the initial heavy burden on the prosecution is greatly lightened by the potential assumptions.".

It was submitted that the Crown led no evidence of a satisfactory kind to enable the court to make the assumptions. They should have made enquiries as to the source of the money and led evidence of sums without obvious means of employment. I think that is wrong. All the Crown has to show in order to bring in the assumptions in prima facie evidence of property held by the defendant since his conviction or transferred to him during the relevant period.

There was no procedural error by the magistrate as alleged in Ground 8.

As to James Douglas Ebanks and Erlon Dalton Ebanks there is little to add. The magistrate believed the evidence of Degan and Smith which I have considered already, and which put them both on the

boat on the trip to Jamaica with James D Ebanks as the captain. He disbelieved the alibi evidence. I cannot say that in that he erred, and in consequence the verdict he arrived at was inevitable in relation to these two appellants.

As to sentence, the evidence as to what was loaded in Jamaica indicates a quantity greater than the 10 lbs recovered. It was a carefully planned import operation in which both Powery and James Ebanks played leading roles according to their respective abilities. James D. Ebanks was indeed "almost as culpable" as Powery. He got the same prison sentence but a smaller fine - $1000 - and no forfeiture or confiscation of assets.

Erlon Ebanks received a shorter sentence of imprisonment, reflecting the view of the magistrate that his was a subordinate role.

The sentences were -

> On Denton Powery 3 years imprisonment, a fine of $5000 with 6 months imprisonment in default, forfeiture of the vessel Hustler" and a confiscation order
> James D EBanks 3 years imprisonment, a fine of $1000 with 4 months imprisonment in default.
> Erlon D Ebanks 18 months imprisonment, a fine of $1000 with 4 months imprisonment in default.

The sentences are severe but not manifestly harsh or excessive. I am not prepared to interfere.

So the sentence against conviction and sentence are, in each case, dismissed.

G. E. Harre
Chief Justice

16th July 1993.