In the Grand Court of the Cayman Islands
Held at George Town on 20th July 1979
Before His Lordship, Sir John Summerfield, C.B.E., Q.C.

Cr. Appeal No. 11 of 1979

PHILIP J. SCIAMONTE

vs.

REGINA.

Mr. Marcus instructed by Mr. McField for petitioner
Mr. Ritch for respondent

JUDGMENT

The appellant was convicted of

(a) illegal possession of ammunition contrary to sections 15 (1) and 3 (b) (ii) of the Firearms Law 1964

(b) unlawful possession of ganja, and

(c) unlawful possession of a pipe used for the consumption of a controlled drug, the latter two being contrary to section 3(1) (i) (k) of the Misuse of Drugs Law 1973. He was fined on each count with prison sentences in default.

The conviction and sentence for illegal possession of ammunition are not in issue on this appeal which concerns only the convictions for offences against the Misuse of Drugs Law.

At about 5 p.m. on 6th December 1977, police officers searched premises under the control of the appellant. They searched his office and adjoining store room with negative results. The appellant was then asked to identify his room and he pointed to a door behind his office. He then tried the knob of the door and found it locked. He said he had not locked it before he had left earlier. Apparently the door did not need a key to lock it - only to open it. He went to get a key and returned stating that he could not find it. It was suggested by a police officer that they should pry open the lock. The appellant said he had a spare key. He and an officer then went to look for it. On his return the appellant said he could not find it and that he had one in the filing cabinet in the office.

He got it and opened the door and all went inside. There, on a wall shelf, the police officers found a black container with a screw top which was screwed off. Inside a plastic bag was found with vegetable matter resembling ganja. Under the plastic bag was found a small pipe and a small package of cigarette paper. There were ashes in the pipe. A police officer showed the plastic bag to the appellant and told him that it was ganja. The appellant said: "I guess it is". He was not asked if the contents of the plastic bag or the pipe were his. Later, after his arrest, the appellant said, at the police station, that he knew nothing about the ganja or pipe. He did, however, admit that the ammunition found in the same vicinity, shortly after the plastic bag was found, was his.

The vegetable matter and some of the contents of the pipe were identified by the Gazetted Chemist as "Marihuana (Cannabis)".

The real issue before the learned Magistrate, therefore, was whether the appellant knew that the container contained illicit matter or had reasonable grounds to believe or suspect that it did . The to-ing and fro-ing over the key could have been genuine because the key was mislaid and the alternate one overlooked in the stress of the moment or it could have been indicative of knowledge of unlawful goods in his room from which he was trying to divert attention - depending on how the tribunal of fact assessed that evidence in the light of the evidence as a whole (including the appellant's honest admissions to possession of the ammunition and denial of knowledge of the vegetable matter and pipe) and the demeanour of the relevant witnesses and any explanation given. Likewise, the response: "I guess it is" was capable of an innocent or adverse construction depending on the assessment of the tribunal of fact of all relevant factors it had the advantage of having before it but which an appellate tribunal does not.

The appellant gave evidence on oath again denying knowledge of the vegetable matter and pipe but admitting possession of the ammunition. He also called witnesses. One was a maid who spoke to cleaning the appellant's room on a regular basis and to the door of the room being sometimes open

and sometimes closed and to her access to the key and of the occasional visitors to the room. Another said that the office was on the main road and people went in and out of it. Another, an employee, explained how he had visited appellant's room and gave evidence of the location of the key he used when it was locked. He said it was sometimes left unlocked.

The learned Magistrate's approach to the case was to believe all the "relevant evidence as adduced by the Prosecution". He found the prosecution witnesses honest and reliable and stated that their credibility remained unimpeached even after very searching cross examination. As to the defence he said "I was neither impressed nor did I believe the testimony of of the defendant and his witnesses".

I respect the right of the trial magistrate to believe those witnesses he decides should be believed and to disbelieve those he decides should not be believed. He is not even obliged to give reasons for those findings although it is helpful if he does. But here the case did not turn on which side to believe. There was no conflict between the evidence of the appellant and that of the prosecution witnesses. Logically one could not disbelieve the appellant's evidence as a whole and accept that of the prosecution because to all intents and purposes the two versions were identical on all relevant facts. The only difference in substance related to the subjective element in the appellant's denial of knowledge of illicit contents of the container which, so far as the prosecution case was concerned, depended on the proper inference to be drawn from what amounted to an agreed set of facts. The issue was whether the inference to be drawn from those facts was sufficiently cogent to displace the appellant's assertion of absence of knowledge.

The learned magistrate went further and disbelieved the appellant's witnesses. In so far as they carried the case any further this does strike one as surprising in the absence of any reasons. Some of that evidence accords with the prosecution evidence, e.g. that the office abbutted the main road. It seems highly likely that the maid would have cleaned the appellant's room and would have known of the location of the key etc.

One of the witnesses disbelieved was not even challenged by the prosecution. Another was unchallenged as to his main testimony but was asked two questions the answers to which became part of the prosecution case.

One is loath to interfere with the finding of fact of such an experienced Magistrate. However, where, as it appears to me to be the case here, the whole approach to the conclusions on the essential elements of the case has been incorrect, those conclusions being those based on irreconcilable findings, I am reluctantly driven to the view that it would be unsafe to uphold the conviction. This court is unable to say what the findings would have been if the learned magistrate had approached the case on the basis that virtually all of the evidence of the appellant was to be believed and the only issue was what proper inference was to be drawn from the agreed facts in the light of the denial on oath of knowledge of the illicit contents of the container. That issue was never faced in that way.

Perhaps I should add that, in his reasons, the learned magistrate made no findings at all with regard to the pipe.

On examining the record several features have caught my attention which merit comment.

Both charges under the Misuse of Drugs Law charge "possession" (of the ganja and the pipe etc.). Section 3 (1) provides that the possession must be "without lawful excuse" or "without being authorised in that behalf" to constitute the offence. That element should therefore be set out in the charge before the charge discloses an offence. It was in the charge relating to the pipe but not in the charge relating to the ganja. No point was taken about this defect and it was not argued and so, presumably, the appellant was not prejudiced in any way by the defect which would, in any event, be cured by section 175 of the Criminal Procedure Code.

The point could have been taken, but was not, that the Government Chemist's report identified the offending material in this case as "Marihuana (Cannabis)". Nowhere in the First Schedule is any substance

by the name of marihuana mentioned. Neither is cannabis as such. It is open to argument whether a court could assume that the expression "marihuana" means ganja or cannabis sativa L. or that "cannabis" means cannabis sativa L. It would be advisable for the prosecution to ensure that the conclusions in the report of a Government Chemist relate directly to substances specified in the First Schedule before tendering them in evidence.

Finally it appears from the record that, after the close of the case for the defence, counsel for the prosecution addressed the court after the address for the defence. Although not fatal, this is in contravention of section 69 (2) of the Criminal Procedure Code.

None of the last three points have been determining factors in reaching the main decision in this case as they were not raised or argued. This appeal turns on whether it would be safe to uphold the conviction in the light of the approach to the fundamental issues in this case which I have discussed fully above. If it had been open to me to do so I would have ordered a retrial. As it is, this course does not appear to be available in a case of this nature.. Accordingly, for the reasons given I allow the appeal against both convictions for offences under the Misuse of Drugs Law. The convictions are quashed and the sentences are set aside.

SIR JOHN SUMMERFIELD
Chief Justice.
25th July, 1979.