Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. M44 OF 1997

BEFORE: THE HONOURABLE CHIEF JUSTICE
THE HONOURABLE MR. JUSTICE ELLIS
THE HONOURABLE MR. JUSTICE CLARKE

BETWEEN:	DR. DENNIS FORSYTHE	- APPLICANT
AND:	THE DIRECTOR OF PUBLIC PROSECUTIONS	- FIRST RESPONDENT
AND:	THE ATTORNEY GENERAL OF JAMAICA	- SECOND RESPONDENT

The Applicant in person
Miss Paula Llewellyn, Deputy Director of Public Prosecutions and Miss Carolyn Edwards for the First Respondent
Lennox Campbell, Senior Assistant Attorney General and Miss Avlana Johnson for the Second Respondent.

Heard: May 12, 13, 14, 16 and October 27, 1997.

WOLFE C.J.

On the 16th day of May, 1997, having heard the arguments, we dismissed the motion herein and made no order as to Costs. On that occasion we indicated that our reasons for dismissing the motion would be stated in writing. We now fulfill that promise.

Let me at the outset put to rest the fallacy which the applicant and his sympathisers have sought to convey to the public of Jamaica through the electronic and printed media of Jamaica.

This case is not about whether ganja is more or less harmful than tobacco or alcohol. Neither is this Court concerned with the possible economic benefits which could be derived from the legalizing of ganja.

In so far as this application is concerned, those matters are red herrings, drawn along the trail with the sole object of confusing the issues which arise for our determination.

These arguments are more properly advanced before the bar of Parliament in an endeavour to convince the legislators on the question of legalizing ganja.

The issue which arises to be resolved on this motion is the Constitutionality of the Dangerous Drugs Act. Does the act contravene the rights guaranteed to the applicant under section 21(1) of the Jamaica Constitution. Is the applicant being hindered in the enjoyment of his freedom of conscience to wit, in the practice of his religion as a Rastafarian.

Those are the issues with which the Court will concern itself. The Court will not be drawn into any emotional debate.

In this regard, the words of ***Lathana C.J. in South Australia v. The Commonwealth*** *(1942) 65 CLR 373,* are instructive.

> "Thus the controversy before the Court is a legal controversy, not a political controversy. It is not for this or any Court to prescribe policy or to seek to give effect to any views or opinions upon policy. We have nothing to do with the wisdom or expediency of legislation. Such questions are for Parliament and the people. It has been argued that the Acts now in question discriminate between States. The Court must consider and deal with such legal contention. But the Court is not authorised to consider whether the Acts are fair and just as between states - whether some States are being forced, by a political combination against them, to pay an undue share of Commonwealth expenditure or to provide money which other States ought fairly to provide. These are arguments to be used in Parliament and before the people. They raise questions of policy which it is not for the Courts to determine or even to consider."

In ***Attorney-General for Ontario v. Attorney General for Canada*** ***([1912] A.C. 571 AT P. 583),*** the Privy Council said:

> "So far as it is a matter of wisdom or policy, it is for the determination of the Parliament . . . It cannot be

too strongly put that with the wisdom or expediency or policy of an Act, lawfully passed, no court has a word to say . . ."

The applicant, a Sociologist, Holist, Author, Rastafarian and Attorney-at-Law, was arrested on December 1996 along with other persons, at his home in the parish of Saint Andrew, and charged for breaches of the Dangerous Drugs Act, contrary to section 7B, C & D.

Arising out of the charges preferred against him, he now moves the Supreme Court seeking Constitutional redress in that the said arrest and impending trial of the offences with which he is charged are in breach of his Constitutional rights. The Notice of Motion, as amended, by which he moves the Court is set out below:

> "TAKE NOTICE that the Full Supreme Court (for Constitutional Redress) will be moved on Monday the 12th day of May, 1997 at 10.00 o'clock in the forenoon or as soon thereafter as Counsel can be heard on the hearing of an Application on behalf of the Applicant under Section 21 and Section 25 of the Jamaican (Constitution) Order in council for a Declaration that the said Section 21 has been contravened in relation to him in that the arrest and pending trial and/or conviction of Dr. Dennis Forsythe on charges of Possession of Ganja and Chillum Pipe (two essentials of his Rastafarian Faith) under the Dangerous Drugs Act (Sections 7B, 7C and 7D) is in conflict with section 21 of the constitution and with his fundamental right to conscience and freedom of religion and to the extent of this inconsistency those sections of the Dangerous Drugs Act are void.
>
> The grounds upon which this Declaration are sought
>
> (i) That on the 14th December, 1996, the Applicant's home was searched upon information that the

Applicant was a Rastafarian and was likely to have Ganja in his possession and a small quantity of Ganja and a Chillum Pipe were indeed found following which the Applicant and a female friend and her daughter visiting his home were jointly charged for possession of same under the Dangerous Drugs Law (Sections 7B, 7C, 7D) and brought before the Resident Magistrate for the parish of Kingston and Saint Andrew on December 17, 1996: Proceedings have been adjourned by the Learned Magistrate pending the outcome of this Application.

(ii) that possession/use of Ganja and a Chillum Pipe being two almost omnipresent symbols of the Rastafarian Faith not be criminalised.

(iii) That a fundamental legal defence and issue is raised which is outside the Jurisdiction of the Resident Magistrate's Court viz that a superior law (The Jamaican Constitution) and a lower law (The Dangerous Drugs Law) are in obvious conflict and it becomes the right of the accused to seek redress in the Constitutional Court.

(iv) That without the Applicant's constitutional right as a Rastafarian to his Religion be acknowledged and so declared in this Court, the Applicant is by virtue of the said Dangerous Drugs Act guaranteed an unfair trial from the outset and is likely be branded or tainted a "criminal" upon conviction for possession/use.

(v) That the alleged contravention of a Fundamental Right conferred by the constitution by the State must be justicable in the manner provided for by the said Constitution.

(vi) That the said Resident Magistrate's Court finding the Applicant guilty under the Dangerous Drugs Act would constitute a breach and denial of his said Fundamental Right to Freedom of Conscience and Religion.

(vii) That the Applicant's possession and/or usage of Ganja and a Chillum Pipe being essentials of his

> Rastafarian Faith is covered by any liberal interpretation of Section 21 of the constitution, and to the extent that it is so covered the said provisions of the Dangerous Drugs Act relating to the personal use and possession of these items are in conflict with section 21.
> DATED the 9th day of April, 1997."

Laborious as it may be, I now set out in full the affidavit of the applicant, in support of the motion. I do so in an endeavour to assist any reader of this judgment to understand more fully the bases on which the applicant contends that his constitutional rights have been breached.

> "I, DENNIS FORSYTHE, being duly sworn make oath and say as follows:-
>
> 1. That I reside and have my true place of abode and postal address at 23 Summit Drive, Orange Grove, Kingston 8 in the parish of Saint Andrew and I am a Sociologist, Holist, Author, Rastafarian and Attorney-at-Law and I am 50 years old. (Exhibit A - List of major publications)
>
> 2. On 17th December, 1996, I and a friend and her child who were visitors to my home were jointly charged under the Dangerous Drugs Act (Sections 7B, 7C & 7D) for Possession of Ganja and a Chillum pipe and brought before the Resident Magistrate Court for the parish of Kingston and St. Andrew holden at Half Way Tree (Exhibit B - Sections 7B, 7C and 7D Dangerous Drugs Act).
>
> 3. The circumstance of the arrest was that on the preceding Saturday, December 14, 1996 at 9.00 a.m. I obtained custody of my son (then 1 year and 9 months) from his mother and was to take him back at 5.00 p.m. and then return for him the following morning at 9.00 a.m. Instead of returning him at 5:00 p.m., (in keeping with a Consent Order) I decided for very good reasons to keep him for the night because it was clear to me that he was sick and he needed the rest and care for the night. (Exhibit C - copy of Doctor's medical report on condition of child obtained soon after).

4. At 6.30 p.m. my son's mother accompanied by a Inspector Ayres of the Constant Spring Police came to my house and demanded that I hand over the child to the mother, and upon my refusal, with good reasons, the Inspector left but returned within half an hour in said company of the child's mother and a large contingent of armed Policemen and a Search Warrant, the Inspector said, under the Dangerous Drugs Act.

5. After ransacking my house they found in the most private and sacred part of my house a small quantity of Marijuana and a Chillum Pipe and upon this excuse or reason all three persons who were at my house were arrested, and my sick child "forced" away from me thereby (Exhibit D - My complaint to Police Commissioner).

6. That my Right of Privacy of my home was flagrantly infringed as well as my right as a "father" to protect my child.

7. That by being charged for Possession of ganja and a Chillum Pipe a serious assault on my Constitutional Right to Religion has taken place, being that I am a Rastafarian of known repute, one who have laboured for years in giving some needed guidance to the "Movement of Jah People" and I have already paid the "price" for this Identification (Exhibit E - Carl Stone's article on "The Forsythe Issue" is to be read in this light).

8. That Ganja and a Chillum Pipe are essential elements of the Rastafarian Religion and are also central to the Major Mystery Religions from ancient times till now and is used for unlocking the "power within", of opening the "Third Eye", and finding Jah-God thereby.
(Exhibit F - Chris Bennett's recent book, Marijuana in Magic & Religion Access Unlimited, Frazier Park, C.A. 1995.

9. That I am well and suitably qualified also as an expert in my own right and by virtue of my training as a Humanist Sociologist at the London school of Economics (1965-1968) and at McGill University (1968-1972) by some of the finest intellects, and thus feel competent to speak on

the subject of Religion objectively, and of particular Religions, and of their inter-relationship to Social Order. (Exhibit G (a) Preface to Robert Staple's, Introduction to Black Sociology, McGraw Hill, 1976, which refers to the deponent; G(b) pages 376-380 of Metta Spencer's Textbook on Sociology called, Foundations of Modern Sociology. Note that a Sociologist readily understands the universalism of Religion and how one's religious preferences and choices are tied in with considerations of one's "Race", "colour" and "class"." (Exhibit H. Pages 114-117, (Lowenthal's West Indian Societies).

10. That for a period of some 6 years whilst a Professor of Sociology at Howard University, Department of Sociology, Washington D.C., and Sir George Williams University, Montreal, my major area of Teaching and Research was the area called "collective Behaviour and Social Movement": centering on what these are, how such collective behaviour forms like Rastafari are produced from these societies, how they develop over time, and how they often bring about changes in these societies and are in turn changed by the society.

11. That to date the most authoritative Study of Religion was that carried out by the French Sociologist Emile Durkheim whose monumental study The Elementary Form of the Religious Life (1898) gave Social Science its classes definition of Religions as "unified systems of beliefs and practices which Unite into a single moral Community ... all those who adhere to them", a definition that clearly applies to Rastafari.

12. That it was as a Sociologist using the method of "Participatory Observation" known as "Verstehen" that I studied Rastafarianism as a Religion and as a way of Life with its own Holistic Techniques of healing, including the use of Yoga, Herbs and Accupressure (Exhibit 1 - Brochure by Deponent outlining these Techniques).

13. That I am the Author and original Publisher of Rastafari: For the Healing of the Nation (1983) which was sent to the then Prime Minister of Jamaica as my "gift" to Jamaica on its 21st year of Independence. This is both an objective and subjective account of Rastafari. (Exhibit J - 1983 Gleaner review of my Book)

14. In 1996 Rastafari: For The Healing of the Nation was re-published in the United States by an American Publisher and the Daily Observer November 28, 1996 carried an article which stated:-

> "Dennis Forsythe's Rastafari: For the Healing of the Nation ...has become a run-a-way bestseller in North America book-stores, and is the most definitive work in print on rastafari as it deals with "the essential groundation of Rastrafarian Spirituality in the Ganja Sacrament" (Exhibit K - Barbara Makeda Hannah, Rastafari Nation Waking Up. The Daily Observer 28/11/1996.

15. That I exhibit my book Rastafari: For The Healing of the Nation as offering my testimony and account of Ganja. (Exhibit L)

16. That in 1993 I wrote and published The Law Against Ganja in Jamaica (Zaika Publications) and I sent a copy each to all the High Court Judges of Jamaica through the Bar Association as I felt then and still believe that Judges should be the first to be informed of the significant social movements and Research findings taking place in the Society of which they are a part. (Exhibit M - The Law Against Ganja in Jamaica).

17. That two months before my arrest, on October 15, 1996, myself in association with a cross section of Professionals and Rastafarians launched the "Legalize Ganja Campaign" at the Terra Nova Hotel with the object of "changing the laws of Jamaica relating to Ganja, and in particular to secure that no person should be punished under the law for the simple possession, use or cultivation of Ganja." (Exhibit N(a) - The Brochure of the Legalize Ganja Campaign and N (b) Gleaner Article explaining this alliance.)

The Daily Observer of October 16, 1996 quoted me as saying at the launching:-

> "I have used the herb for over a period of 20 years and have developed techniques of

> healing and health ... the Ganja Plant is a spiritual plant which took me to the consciousness of God."...
>
> "Herbs was the Energy, the Light that guided me in this journey inwards; it was the holy sacrament used to cleanse the inner sanctum of my body: there I found God, in the inner temple of my being."

18. Ganja is integral to my Religion as a Rastafarian and I should not be made a 'criminal' because of my Religion's definition of Ganja not as "drug" but as a "Plant" and be declared a "dangerous person," explicitly or impliedly, only because of my adoration and usage of Ganja as a Sacrament, regarding it as I do as the "body of Christ" and observing it in the same divine manner in which the Established Church observes the Eucharist, as depicted in John 6: 48-49. (Exhibit O - Barbara Makeda Hannah's, "The Holy herb," taken from her book, Rastafari: The New Creation).

19. Religious choices and definitions are essentially a private or subjective matter of Conscience i.e. Religion's home is in the conscience and "there is a right of private judgment i.e. there is no existing authority on earth competent to interfere with the liberty of the individual in reasoning and judging for themselves about the Bible and its contents, as they severally please." (JA. Mill, Essay on Liberty)

20. That I have a fundamental Right to Religion under our constitution and this Right is noticeably wide and permissive (Exhibit P - S. 21, Jamaican Constitution).

21. That S.116 Constitution of the Commonwealth of Australia 1901 provided similarly that "the Commonwealth shall not make any law for establishing any religion ... or for prohibiting the free exercise of any religion." In Adelaide Company of Jehovah's Witnesses Inc. V. Commonwealth (1943) 67 CLR 116 at 123, Per Latham, CJ. noted: "It would be difficult if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religion which exist, or have existed in this world... Many religious conflicts

have been concerned with matter of ritual and observance. Section 116 must be regarded as operating in relation to all these aspects of religion, irrespective of varying opinions in the community as to the truth of particular religions. ... Some religions are regarded as evil by adherents of other creeds... Section 116 proclaims the Principle of toleration of all religions."

22. That a "Liberal" interpretation was also intended by our Constitution to be applied by our Judges when dealing with the Fundamental Rights bestowed by our written Constitution and in cases involving religious freedom this amplitude is even more warranted:

"Lord Wilberfore in Minister of Home Affairs v. Fisher (1970) stated that in dealing with a typical commonwealth Bill of Rights, the broad and ample style of these instruments lay down principles of width and generality in regard to the protection of fundamental rights and freedoms of the individual. The fact that the Constitutions have been influenced by the UN Universal Declaration of Human Rights and Freedom require that they be generously interpreted to give full recognition and effect to the fundamental rights and freedoms.
(Dr. Lloyd Barnett, "The Present Position regarding the enforcement of Human Rights in the Commonwealth." 2 W. ILJ (1980)

23. That Rastafarianism is now recognized the world over as a Religion and as a way of life and in the text-books on the subject it is invariably treated and discussed as a Religion, "syncretic" in nature. (Exhibit Q(a) - Books Published and Distributed by "One Drop Books" of New York) - Exhibit Q (b) is Prof. Rex Nettleford's Introduction to Joseph Owen's, Dread: The Rastafarians of Jamaica, offers an excellent discussion of their religiosity.

As far away as Japan Rastafari is recognized and has aroused interest. Yoshiko S. Nagashima was sponsored by the Japanese Ministry of Education to come to Jamaica between 1978-1980 and her study was published in 1984, A Study of the Socio-Religious Music of the Rastafarian Movement of Jamaica. (Exhibit Q (c) - Extracts).

24. In R. V Hines and King (1971) 17 WIR The Jamaican Court of Appeal recognized Rastafari as a Religion or "faith," and of King's fundamental right to swear in the name of Rastafari and in a form binding on his conscience.

25. Even the United Nations now "Recognizes" rastafari when on November 14, 1996, the UN approved the Consultative status of the International Rastafarian Development society as a Non-Government Organization with all the rights attendant to such Organizations. (Exhibit R - Sunday Observer November 24, 1996.

26. That the lumping of Ganja together in the same category with other "dangerous drugs" (like Cocaine and Heroin) under our present law is not "reasonably necessary to our democratic society" and is in fact objectively more harmful and disfunctional to our democratic society, being that: i). It sends a dangerous message to the young that Ganja and Cocaine are the same. ii) it makes crime profitable and criminal wealthy. iii) it turns ordinary citizens into criminals. iv) it provides major avenue for abuse of power and corruption in public life. v) it holds back the creative exploration and creative use of our natural resource. vi) generally it starkly negates our claim to full Democracy, Pluralism, Liberalism, Equality and Independence when a significant section of its people cannot freely and legally partake of the Rastafarian Religion in all of its aspects.

27. On the evidence available an unreformed Dangerous Drugs Act which discriminates against Rastafarians right to Religion is not "reasonably required" in the interests of (either) defence, public safety, public order, public morality or public health" and is an affront to Democracy in an Age of Liberalism.

28. That by defining all Marijuana possession and smoking as "criminal", including such activities carried on in the privacy of one's home, the Government is wasting police and prosecutional resources, clogging the courts and wasting public funds on an endeavour that is bound to fail, and by all evidence has failed, and must cause ordinary people to loose respect for the law thereby.

29. That a Law is valuable not because it is "the Law" but because there is "Right" in it; and laws should be like clothes; the Laws should be tailored to fit the people they are meant to serve.

30. That numerous studies and tests internationally have all but proven the relative harmlessness of Ganja, and numerous Official Reports and studies have concluded that Marijuana poses no risk to society and should not be criminalized, including:

(a) The National Academy of Sciences Analysis of Marijuana Policy (1982)
(b) The National Commission on Marijuana and Drug Abuse (The Shafer Report) 1973. Exhibit S - Eric Goode "Marijuana use and Crime," is an offshoot of this Report)
(c) The Canadian Government's Commission of Inquiry (Le Dain Report) 1970
(d) The British Advisory Committee on Drug Dependency(Wooton Report) 1968
(e) The La Guardia Report (1944)
(f) Britian's Monumental Indian Hemp drugs Commission (1893-4) known as the "classic study."

31. That an objective comparison of Marijuana shows that it is responsible for less damage to society and the individual than are alcohol and cigarettes.

32. That there are other general categories of evidence impugning the purposefulness of these provisions of the Dangerous Drugs Act, viz:-

(i) Biographical accounts by rastafarians themselves and of others.
(ii) Widespread support by Writers, Journalists, Lawyers and the populace as a whole, as seen in the number of popular songs calling for Legalization of Ganja.
(iii) The growing size and expanding cultural influence of Rastafari and the realization that Rastafari poses no "threat" to Society but is rather an asset to Jamaica. Exhibit Q(b) is Professor Rex Nettleford's excellent Introduction to Rev. Joseph Owens, Dread: The

Rastafarians of Jamaica, provides an excellent summary of the religious significance of Rastafari.
(iv) Evidence of increased usage of Ganja inspite of an all-encompassing law and its "machiavellian" enforcement i.e. the Anti-Ganja Law has clearly failed in its objective.
(v) Comparative evidence showing that "Decriminalization" has occurred in several other democratic societies as a means to further Democracy - not to destroy Democracy.

33. That Studies in Jamaica confirm this general view. Vera Rubin's and Lambros Comitas study Ganja in Jamaica The Hague, Mouton, 1975: Found that though Ganja is smoked in Jamaica over a longer period in heavier quantities and with greater THC potency than in the USA, that this is "without deleterious social psychological consequences" as both ganja use and expected behaviour are culturally conditioned and controlled by well established tradition... Ganja in Jamaica serves to fulfill values of the work ethic... is an energizer. The use of Ganja appears to be a behaviour alternative to heavy consumption of alcohol by the working class."

Studies conducted by Dr. Ronald Lampart Jamaican Neurologist among the Coptic Rastas in the parish of St. Thomas in the 1970's also confirm this. (Exhibit T - Dr. Lampart's Views summarized, as reported in the Gleaner).

Other observers, not Rastafarians, have testified to lack of any evidence that Ganja leads to a violent state of mind. Kitzinger P.255, noted: "Although Ganja may contribute toward a mild state of euphoria, I never noticed any disturbance in behaviour, speech or thinking in those Rastas who were smoking it... One of my Rasta acquaintances, a very good artist, did much intricate and delicate pencil work while smoking it non-stop." (The Rastafarian Brethren in Kingston, Jamaica. Comparative Studies in Society and History) Rev. Joseph Owens, Dread: The Rastafarians of Jamaica noted at p 166: "I can also bear witness that never, in the innumerable smoking sessions in which I partook, did I observe any untoward effects of Ganja, much less any manifestations of violence."

34. That it is reasonable observation to make that the Anti-Ganja law is founded on Ignorance and Ideology,

nourished by superstition and misinformation and pervaded by a spirit of vindictive self righteousness that is a hindrance to the development of Democracy.

35. As a Sociologist I cannot conceive of any other single legal measure that would accomplish so much to promote Law and Order as the Decriminalization of the personal use of Ganja in Jamaica at this time in our history: And as a Jamaican and Rastafarian no other single event would restore my faith in the Jamaican's commitment to Democracy.

36. That Jamaica has a long cultural tradition of Ganja use and Jamaica would attract many more tourists if Dutch style "Coffee Shops" were to open up and there would be less need to smuggle Ganja to the U.S.A. if it can be enjoyed here without any harassment.

37. That having written a best seller on the subject matter and having followed the Rasta pathway for over twenty years I am placed now in jeopardy of being found guilty and being marked, stigmatized and suffer other consequences as a "criminal" under the Dangerous Drugs Act Sections 7B, 7C and 7D, which is clearly being used to spitefully repress practitioners of this Religion like myself. As it stands I have to break the Law and be a "Criminal" in order to practice my religion and this cannot be right in light of Section 21 of our Constitution.

38. That in the premises I humbly pray that this Honourable Court will grant a Declaration in Terms of the Notice of Motion filed herein."

A careful reading of the affidavit makes it very obvious, that essentially the applicant's challenge to the constitutionality of sections 7B, C & D of the Dangerous Drugs Act is based upon the premise that these provisions of the Act deny him the right to practice his religion, as a Rastafarian. The provisions, the applicant contends, are a denial of the constitutional right to freedom of

conscience as guaranteed in *section 21 (1) of The Jamaica (Constitution) Order in Council 1962*.

Section 21 (1) states:

> "Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance."

The Applicant contends that he is a rastafarian and that rastafarianism is a religion. Further, he states that in the practice of his religion as a rastafarian, the use of ganja is necessary as the "herb" is a sacrament used in the worship of JAH. The smoking of the herb, says he, is no different from the elements of bread and wine used by the Catholic Church in its celebration of the Holy Eucharist. Continuing, the Applicant says that any law which forbids the use of the herb, ganja, in the worship of JAH RASTAFARI is in contravention of section 21 (1) and must be declared unconstitutional.

Section 21(6) of the Constitution provides as follows:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required -
>
> (a) in the interest of defence, public safety, public order, public morality or public health."

Mr. Forsythe submitted that the personal use of ganja and the possession of a chillum pipe do not contravene the provisions of the Dangerous Drugs Act, since they cannot properly be brought within the ambit of section 21 (6) (a) as being "reasonably required" in the "interest of defence, public safety, public order, public morality or public health".

This submission may best be referred to as barefaced in the light of the dictum of ***Lord Diplock in Director of Public Prosecutions v. Wishart Brooks [1974] 2 All E.R. 840 at 842.***

> "In the ordinary use of the word 'possession', one has in one's custody possession whatever is, to one's own knowledge, physically in one's custody or under one's physical control. This is obviously what was intended to be prohibited in case of dangerous drugs. Question (1) and the reason given for the answer, however, suggest that, in addition to the mental element of knowledge on the part of the accused, which the Court of Appeal had chosen to deal with separately in questions (2) and (3), the word 'possession' imported into this criminal statute as a necessary ingredient <u>of an offence against public health</u> the highly technical doctrines of the civil law about physical custody without ownership . . . . ."

It is clear from the above that Lord Diplock regarded the statute as being the interest of public health.

It is convenient at this stage to refer to the provisions of section 26(8) of the Constitution which enact as follows:

> "Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any provisions of this <u>chapter</u> and nothing done under authority of any such law shall be

> held to be done in contravention of any of these provisions."

The word "chapter" refers to Chapter III which deals with Fundamental Rights and Freedoms.

The Freedoms which are enshrined in the Constitution are not unbridled. They must be understood in the context of the wider society. It is for this very reason that the same Constitution which guarantees these rights permits Parliament to enact legislation, which is for the peace, order and good government of Jamaica.

It is in recognition of this principle that section 21 (6)(a) of the Constitution was enacted.

Notwithstanding the provisions of section 26 (8) Mr. Forsythe submitted that the Court is empowered to review the Dangerous Drugs Act and see if it offends the Constitution as regards the provisions contained in sections 7(a) (c) & (d) and to declare it is repugnant to section 21 (6)(a) if the Court so finds.

On what basis could the Court find the sections repugnant to the Constitution, when Lord Diplock speaking in the highest court of the land, opined that the enactments of the Dangerous Drugs Act were legislated in the interest of public health.

The Dangerous Drugs Act was first enacted in 1924. Rastafarianism emerged in Jamaica in or around the year 1930. It is therefore conceded by the applicant that Rastafarianism emerged in Jamaica against the background that the personal use of ganja was prohibited.

The enactments in the statute are not aimed against the practice by the applicant of his religion. He is free to practice his religion. The applicant's contention that he must be free to practice his religion unhindered is untenable. His understanding of the freedom of conscience is misguided. Taken to its logical conclusion, it would mean that the offering of human sacrifice in the practice of a religion would be unobjectionable. The offences against the Persons Act which forbids assaults or batteries upon persons would be considered unconstitutional.

Numerous references were made to articles dealing with the beneficial effects of ganja as well as to the basis for its use in the practice of rastafarianism. In this judgment they have not been cited or referred to. I must confess that they make interesting reading but for purpose of deciding the issue herein they are of no consequence. The reliance upon them by the applicant, demonstrates the confusion which exists in the applicant's mind. Again, I repeat, the issue is not the beneficial or deleterious effect of the "weed" but the constitutionality or unconstitutionality of the Dangerous Drugs Act, as it affects the personal use of the "weed" or more appropriately the "herb".

I have had the opportunity of reading in draft the judgments of the Honourable Chief Justice and Mr. Justice Clarke. The judgments reflect my thoughts on the submissions in the matter adequately.

There is however one case which I think is worthy of reference in this case. It is the case of Re Chickweche 1995 (4) S.A. 284 (Z.C.) and is a decision of the Zimbabwe Supreme Court.

In that case an attorney-at-law was refused admission to practice because his dreadlocks and mode of dress did not accord with the rules of practice pertaining to the admission of legal practitioners.

The attorney-at-law contended before the Court that his wearing of dreadlocks and his mode of dress were in keeping with his religion of Rastafarianism. The fact that he was refused admission to practice therefore contravened his constitutional right to religious freedom.

The Court held that since the refusal of admission to practice was based only on rules of practice, his constitutional right to religious freedom was in fact contravened.

The Court however made it quite clear that if the refusal to admit the applicant to practice were based on the authority of any law the refusal would be unchallengeable constitutionally.

That would be so because Section 19(5) of The Zimbabwean Constitution saves any purported contravention which is done under law.

Section 19(5) of the Zimbabwe Constitution is in pari materia with the Jamaican Constitution at S.21(6). I therefore adopt the

decision of the Zimbabwe Supreme Court and in applying it to this case, I find that that against which Mr. Forsythe complains was done under law and is saved by S.21(6) of the Jamaican Constitution. In the circumstances I too am constrained to dismiss Mr. Forsythe's Motion.

Ellis J.

CLARKE, J

The applicant, Dr. Dennis Forsythe, has been at all material times a practising member of the Rastafarian Faith. Just as is the case with eveyone else in this country, the Constitution of Jamaica protects his freedom of conscience. The Constitution ordains that "no person shall be hindered in the enjoyment of his freedom of conscience". This freedom includes "freedom of thought and religion ... and freedom either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance": section 21(1) of the Constitution of Jamaica.

Dr. Forsythe was arrested and charged on 14th December 1996 under sections 7B, 7C and 7D of the Dangerous Drugs Act (the Act) with the offences of dealing in ganja, possession of ganja and possession of chillum pipe for use in connection with the smoking of ganja, respectively. In his application before this Court under section 25 of the Constitution for a declaration that section 21 thereof has been contravened in relation to him, he maintained that the acts constituting the offences charged are part of the sacrament and essential practices of his Rastafarian Faith. In light of the unchallenged and compelling evidence in that latter regard I am prepared to hold that the practice of his religion involves the personal and sacramental use of ganja and chillum pipe.

Dr. Forsythe submitted that his arrest and impending trial on the said charges under sections 7B, 7C and 7D of the Act con-

flict with his fundamental right to inclusive freedom of conscience as enshrined in the Constitution. He urged this Court to hold that such a conflict or inconsistency exists, that it contravenes in relation to him the protective provisions of section 21(1) of the Constitution and that to that extent it renders the impugned sections of the Act void.

Section 21(6) of the Constitution declares that:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provisions which is reasonably required -
>
> (a) in the interests of defence, public safety, public order, public morality or public health ...
>
> (b) ..."

So, whilst the right to freedom of religion including the right to practise it is a fundamental right, it is not absolute. That is why courts of justice may uphold the constitutionality of laws or acts done under the authority of such laws restricting the right to religion or the right to practise it if such laws, in the judgment of the Courts, satisfy the criteria set forth in the subsection. Subject thereto and also to section 26(8), which will be examined later, the Courts must, on the other hand, be prepared to strike down as unconstitutional laws which infringe religious freedom, due regard being given to Parliament's power to make laws for the peace, order and good government of Jamaica. As regards that power, see section 48(1) of the Constitution.

Dr. Forsythe argued that sections 7B, 7C and 7D of the Act proscribing, as they do, the personal use of ganja, are not reasonably required in the interests of either defence, public safety, public order, public morality or public health, and are, accordingly, at variance with, and repugnant to, section 21(1) of the Constitution.

The saving provision of section 26(8) of the Constitution apart, the purpose and effect of the impugned legislation are relevant in determining the question as to its constitutionality: see **The Queen v. Big M Drug Mart Ltd.** (Others intervening) (1986) LRC 332 at 356. The Act was promulgated in 1948. It cannot be gainsaid that the purpose of the Act and its antecedent legislation dating back to 1924 was, as Mr. Campbell submitted, to protect the community from dangerous drugs in unregulated circumstances and thus promote public health and public safety. And it is to be observed that ganja has been characterised judicially at the highest level as a dangerous drug, the possession of which, the legislature obviously intended to prohibit in the sense of knowingly having in one's physical custody or under one's physical control: see **Director of Public Prosecutions v. Wishart Brooks** (1974) 21 W.I.R. 412 (P.C.).

The purpose of the Act, which exempts from its penal provisions medicinal preparations made from the ganja plant (Section 2), has been, in my judgment, neither religious nor sectarian. It remains a secular Act of general application aimed at promoting public health and public safety. The effect of the Act has been to render

any person in the community, whether or not a Rastafarian, liable to prosecution and conviction for contravening its penal provisions. The criminal sanction has nothing to do with religious or sectarian considerations. It also has nothing to do with coercing persons to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose or otherwise. On the contrary, it has everything to do with matters of health and public safety.

To this end the Act, as Mr. Campbell pointed out, refers to and relies on, international conventions for its efficacy and to keep it abreast of changes and the learning in respect of the drugs that are subject to it. Section 2 of the Act refers to the "Geneva Convention (No. 1)" signed on 19th February 1925 and to the Hague Convention signed at the Hague on 23rd January 1912. The section also refers to and defines "Geneva Convention (No. 2)" as the convention signed at Geneva on behalf of His Majesty on 13th July 1931 for limiting the manufacture, and regulating the distribution, of dangerous drugs. Section 10(4) instances the importance of such Conventions to the Act: The subsection provides machinery pursuant to Article 8 of the Geneva Convention (No. 1) whereby by reason of a finding with respect to a particular narcotic drug and the communication of that finding to the parties to the Convention, such a drug may, upon the declaration to that effect by the responsible Minister, be removed from the area of criminal sanction. There is no evidence that the Minister has made any such declaration.

So, in its purpose and effect, the impugned legislation satisfies the provisions of section 21(6)(a) of the Constitution because such legislation is, in my judgment, reasonably required in the interests of public health and public safety. On that basis alone the motion must be dismissed.

There is another basis for dismissal. The said legislation fits within the compass of another and embracing constitutional provision within Chapter III with respect to laws in force immediately before the total promulgation of the Constitution on the appointed day, that is, 6th August 1962. Section 26(8) which falls within Chapter III stipulates as follows:

> "Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions".

Dr. Forsythe submitted that by virtue of section 4(1) of the Jamaica Constitution Order in Council 1962 and section 2 of the Constitution, section 26(8) of the Constitution means that laws in force immediately before the appointed day are saved from unconstitutionality only to the extent that they are not repugnant to the Constitution.

Now, the provisions of Chapter III with which section 26(8) is concerned and forms a part, deal with the fundamental rights and freedoms of the individual. Section 26(8) plainly declares that any law in force immediately before the apppointed day shall not be held to be inconsistent with any of the provisions of

Chapter III and that nothing done under the authority of any such law shall be held to contravene any of the provisions of that Chapter. So, the subsection says, in effect, that such laws are not to be held to be repugnant to any of the provisions of Chapter III.

In my judgment, neither section 4(1) of the Jamaica Constitution Order in Council 1962 nor section 2 of the Constitution, nor both taken together, have qualified in any shape or form the plain words of section 26(8) of the Constitution. Section 4(1) of the Order in Council simply provides a transition whereby laws existing immediately before the appointed day are to be thereafter construed with such adaptations and modifications as are necessary to make them conform with the provisions of the Order. This is illustrated in section 4(2) of the Order where, for instance, unless the context otherwise requires, "references to the Governor shall, in relation to any period beginning on or after the appointed day, be construed as references to the Governor General". And, be it noted, that by the Constitution (Variation of Existing Instruments) Order, 1964 made under section 4(5) of the said Order in Council the Governor General has already made by way of transition, adaptations and modifications in statutes which continue in force on and after the appointed day as has appeared to him to have been necessary or expedient by reason of the provisions of the Order in Council.

Section 2 of the Constitution embodies the general rule that the provisions of the Constitution shall prevail over other law,

that is to say, if any law is inconsistent with the Constitution it shall to the extent of that inconsistency be void. Yet, there are judicial pronouncements of binding authority that bear upon an exception to the general rule embodied in section 2. This exception occurs in Chapter III. "This Chapter ... proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subject to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed": **D.P.P. v. Nasralla** (1967) 10 W.I.R. 299 at 303I and 304A, per Lord Devlin (P.C.). It is the said section 26(8), found in Chapter III, that creates an exception to the general rule if the law alleged to be inconsistent with the Constitution is one that was in force immediately before the appointed day and the alleged inconsistency is with a provision of the Constitution that is contained in Chapter III: **Eaton Baker and Another v. R** (1975) 23 W.I.R. 463, 469 E&F, per Lord Diplock (P.C.). The Dangerous Drugs Act is such a law; section 21(1) of the Constitution is such a provision.

As was similarly said by Lord Diplock in **Eaton Baker and Another v. R. (supra)** when dealing with the question as to the constitutionality on the ground of inconsistency of another impugned legislation (section 29 of the Juveniles Act) with

another protective provision in Chapter III (section 20(7)), it is too clear in the case before this Court to admit of plausible argument to the contrary that even if sections 7B, 7C, and 7D of the Act had on their true construction, been inconsistent with section 21(1) of the Constitution they would nevertheless have been saved from invalidity by section 26(8).

So, despite his valiant and, I believe, sincere attempt before this Court, Dr. Forsythe has failed to show that the impugned legislation is unconstitutional. At the end of the day what that attempt reveals is this: that the motion is no higher than a claim for "constitutional exemption" from otherwise valid legislation which offends his religious beliefs and practices: see **The Queen v. Big M Drug Mart (Others Intervening)** (supra) at 345. The irrefutable answer is that sections 7B, 7C and 7D of the Act cannot be held to be inconsistent with section 21(1) of the Constitution.

For the foregoing reasons I agree with my Lord, the Chief Justice and my Lord, Ellis, that the motion be dismissed.