JAMAICA

IN THE COURT OF APPEAL,

RESIDENT MAGISTRATE'S COURT CRIMINAL APPEAL NO. 42/97

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

REGINA vs. JACQUELINE CHENOWITH

Oswest Senior-Smith, instructed by Hamilton,
Wong Ken, Hemming and Green, for the appellant

David Fraser for the Crown

December 3. 1997 and February 2. 1998

BINGHAM, J.A.:

The appellant, an American citizen, was on the 11th August, 1997, charged before His Honour R. A. Williams (acting) in the Resident Magistrate's Court for the parish of St. Mary at Annotto Bay, with the offence of operating a villa at Oracabessa in the said parish without having in force a valid work permit, contrary to section 3(3)(a) of the Foreign Nationals and Commonwealth Citizens (Employment) Act (Act 48 of 1964). She pleaded guilty to the charge and was subsequently sentenced to pay a fine of $200 or in default of payment to serve three months imprisonment. The court also recommended that the appellant be deported from the island. It is from

that part of the sentence as concerns the recommendation for deportation and which formed the basis of her complaint before us that she now appeals.

Having heard the arguments of learned counsel, we allowed the appeal against sentence, in part, by removing from the order that portion which sought to include a recommendation that a deportation order be made against the appellant. What follows hereafter are our reasons for so doing.

The facts out of which the charge arose may be briefly summarised. The appellant arrived in the island on 13th June, 1996, and was granted a temporary stay as a visitor. While here she was seen on three occasions, extending over the period 13th September, 1996, to 7th August, 1997, working as the manager of "The Ocean Pearl Guest House" in Oracabessa. An immigration officer, one Corporal Dawkins, instructed her on the occasion of his first visit to the guest house in September, 1996, to obtain a work permit. By his second visit in July, 1997, she had not yet obtained a work permit. She was then observed instructing workers at the guest house. On the third visit in August, 1997, the appellant was not yet in possession of the work permit. She was arrested and charged for the offence. When cautioned, she said, "I will leave the country to avoid any trouble."

In mitigation of sentence learned counsel who appeared for the appellant before the learned Resident Magistrate, told the court that the appellant had been misled by the owner of the premises, one Shawn

Johnson, to believe that he had taken steps to obtain a work permit for her. Acting on this belief, she had invested a substantial sum of money in operating the guest house. It was subsequent to so doing that she realised that no application had in fact been made. She was then in the process of instructing an attorney to make the necessary application on her behalf when she was arrested and charged.

Two grounds of appeal were filed, viz.:

i. "That the Learned Trial Judge erred in recommending an Order for Deportation, which led to the Immigration Authorities actually deporting the Appellant without the required Ministerial Order.

ii. That the Order for Deportation was harsh and excessive in the circumstances."

In arguments advancing the complaint, learned counsel for the appellant submitted that there was nothing based on the conduct of the appellant while in the country to show that there was any wanton disregard on her part for the laws of Jamaica. Moreover, on a reading of the Aliens Act, and in particular the Second Schedule, there was nothing in the Act which contemplates deportation for an offence as charged under section 3(3)(a) of the Foreign Nationals and Commonwealth Citizens (Employment) Act. Learned counsel further submitted that recommendation for deportation pre-supposes situations which by their very nature are so serious as to tear at the very heart of the society.

Learned counsel for the Crown in response submitted that in all the circumstances of the case the recommendation for deportation was not manifestly harsh or oppressive. He contends that on the facts there was nothing to show that the appellant made any attempt to obtain a work permit.

We find that there is merit in the submissions as advanced by learned counsel for the appellant. The learned Resident Magistrate, in exercising his powers in making the recommendation, purported to act by virtue of paragraph 1 under the Second Schedule of the Aliens Act. For reason that such powers as are exercisable in this regard are contained in that Schedule, it may be appropriate to set out the entire Schedule. It reads as follows:

"SECOND SCHEDULE

Offences in respect of which a Court may recommend a Deportation Order

1. Any offence for which the Court has power to impose imprisonment without the option of a fine.

2. Any offence--

   a) under the Seditious Meetings Act;

   b) under the Riot Act;

   c) under any law for the time being in force relating to sedition or to seditious publications.

3. Any offence under the Libel and Slander Act.

4. Any offence under, or other breach of, the provisions of the Bankruptcy Act.

5. Any offence under section 38 or 44 of the Betting, Gaming and Lotteries Act.

6. Any offence under any enactment for the time being in force relating to the sale of drugs and poisons or relating to ganja or other dangerous drugs."

Section 3(3)(a) of the Foreign Nationals and Commonwealth Citizens (Employment) Act, under which the appellant was charged, provides that anyone who contravenes this section of the Act is liable on summary conviction before a Resident Magistrate to a fine not exceeding two hundred dollars or to imprisonment for a term not exceeding six months or to both such fine and imprisonment.

It is clear from an examination of both the nature of the offences set out in the Second Schedule to the Aliens Act, and the sanction imposed for breaches of section 3(3)(a) of the Foreign Nationals and Commonwealth Citizens (Employment) Act, that the offence of working without a work permit, the offence with which the appellant was charged, does not fall within that class of offences set out in the Schedule so as to attract the added sanction of a recommendation for a deportation order. Such offences are circumscribed by section 1 of the Second Schedule and related to "Offences for which the Court has power to impose imprisonment without the option of a fine". This would exclude offences under section

3(3)(a) for which the penalty is a fine and in default imprisonment, or, both a fine and imprisonment.

From the record there is nothing to indicate that in passing sentence the learned Resident Magistrate was of the view that the appellant acted in bad faith.

We are of the view, and hold that in imposing the added sanction of a recommendation for deportation, the learned Resident Magistrate acted without authority and accordingly that part of the sentence imposed cannot stand.

It was for these reasons, at the conclusion of the hearing we allowed the appeal in terms of the order set out at the commencement of this judgment.