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The Enforceability of the Marijuana on the High Seas Act *United States v. James -- Robinson et al.*

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States customs policy, endorsed by American courts, could have a marked impact on the flow of foreign-made goods which are presently routed through United States territory in transit to a final foreign destination.

SARA R. ROBINSON

THE ENFORCEABILITY OF THE MARIJUANA
ON THE HIGH SEAS ACT

United States v. James—Robinson et al.
515 F.Supp. 1340 (S.D. Fla. 1981)

The United States indicted the foreign crewmen of a stateless vessel for the alleged violation of 21 U.S.C. § 955(a), popularly known as the "Marijuana on the High Seas Act."¹ The statute makes it unlawful for any person on board a vessel on the high seas subject to the jurisdiction of the United States to possess a controlled substance with the intent to distribute the substance.²

Defendants moved to dismiss the indictment on the grounds that the United States District Court lacked subject matter jurisdiction under the international law of jurisdiction. Defendants also argued that the statute was unconstitutionally vague. At the hearing on the motion to dismiss, the United States and the defendants stipulated to the facts to be used for the purposes of the hearing. It was agreed that the defendants were citizens of Colombia, and that the ship on which they were arrested was a vessel without nationality.³ It was also

1. *United States v. James-Robinson, et al.*, 515 F. Supp. 1340 (S.D. Fla. 1981).

2. 21 U.S.C. § 955(a) was intended to improve the Coast Guard's ability to enforce laws aimed at stopping illegal drug trafficking on the high seas. It provides criminal penalties for possession of controlled substances on the high seas, and fills that statutory void created when the Comprehensive Drug Abuse, Prevention, and Control Act of 1970, 21 U.S.C. § 846, inadvertently repealed the criminal provisions under which drug smugglers apprehended on the high seas had been prosecuted. Until the enactment of 21 U.S.C. § 955, prosecutors were forced to charge violators with either attempted unlawful importation or conspiracy, and the evidence necessary to support a conviction on these charges was frequently impossible to obtain. S. REP. NO. 96-855, 96th Cong., 2nd Sess. 2, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 2785-86.

3. The United States can claim jurisdiction over a stateless vessel in accordance with the Convention on the High Seas, Apr. 29, 1958, art. 6, para. 2, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, which provides that a ship sailing under the flag of two or more states, according to convenience, may not claim any of the nationalities with respect to any other state, and may be treated as a ship without a nationality.

agreed that the vessel was stopped by the U.S. Coast Guard on January 27, 1981, when she was more than 400 miles from the continental United States,⁴ and on a heading which would take her to Nassau. The United States agreed that it would not attempt to prove that the defendants intended to distribute a controlled substance in the United States, nor would it attempt to prove that the marijuana found on the vessel was to be off-loaded outside United States jurisdiction and then distributed within the United States.

The government argued that 21 U.S.C. § 955(a) allowed drug related arrests of foreign nations aboard stateless vessels on the high seas anywhere in the world, regardless of intent to distribute.⁵ Subject matter jurisdiction was properly conferred, the government argued, by the protective principle of international jurisdiction.⁶

Since the parties had agreed on the operative facts, the court determined that a decision could be made on the motion to dismiss without a trial of the general issue, and proceeded to grant the defendants' motion to dismiss. The court looked at principles of international jurisdiction and prior decisions based on a similar drug trafficking statute before reaching the decision that it did not have subject matter jurisdiction in these circumstances.

The Marijuana on the High Seas Act had been signed into law just four months prior to the seizure of defendants' vessel.⁷ The case was therefore one of first impression, in which the court was appropriately concerned with its own jurisdictional powers and authority, as well as the validity of the statute.

By basing its decision on the lack of proper subject matter jurisdiction, the court implied that it was a procedural problem alone which warranted the dismissal of the indictment. The protective prin-

4. The court noted that the ship was closer to the territory of at least seven other countries than to the United States. 515 F. Supp. at 1342 n.3.

5. The government based its argument on the belief that the statute did not require an intent to distribute in the United States, an arrest in contiguous waters, or any other special circumstances from which to infer an intent to distribute. 515 F. Supp. at 1342.

6. The court discussed the five possible theories of jurisdiction under international law, and explained why the objective territorial, national, universal, and passive personality principles did not apply in this case. 515 F. Supp. at 1344 n.6. The government had based its argument on the protective principle of international jurisdiction, which allows a nation to take jurisdiction over a foreign national only when the foreign national's conduct has a potentially adverse effect on the state's security of its government functions. *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* §33 (1965).

7. Presidential Statement regarding *Illegal Drug Traffic on the High Seas* (on signing H.R. 2538 into Law), 16 *WEEKLY COMP. PRES. DOC.* 1722 (Sept. 13, 1980).

principle of international jurisdiction requires that before a nation can assume such jurisdiction and provide penalties for any conduct outside its territorial limits it must show that the prohibited conduct threatens its security as a state or the operation of its governmental functions.⁸ Since the government failed to show, or even allege, an intent to distribute the marijuana in the United States, and, indeed, stipulated that it would not attempt to do so, it could not be inferred that the defendants' activities would have any adverse effect on national security or governmental functions in the United States. Without such a showing, a nation cannot proscribe conduct outside its territorial limits on the basis of the protective principle of international jurisdiction.

The legislative history of the Marijuana on the High Seas Act as related by the court illustrates that the Department of Justice had reservations about the propriety of jurisdiction under the proposed bill if no showing of intent to distribute in the United States were required. A suggestion was made that the bill be amended to include such a requirement, but ultimately no change was made. The absence of such a requirement contributed to the dismissal of the present indictment. If the Act had specifically required an allegation of intent to distribute the controlled substance in the United States, such an allegation could be taken to imply an adverse effect on national security and sovereignty, and the protective principle of international jurisdiction would clearly apply.

The court also considered cases which had interpreted a similar statute, the Comprehensive Drug Abuse, Prevention, and Control Act of 1970,⁹ to decide whether the intent to distribute in the United States must be shown in order to maintain jurisdiction under international law principles. It found that those cases narrowed the Act's interpretation to require such a showing.

It would appear from the court's analysis of the jurisdictional principles of international law, the legislative history of the statute, and judicial interpretations of a similar statute, that the deficiency of the indictment was purely procedural. If the government had added to the indictment an allegation of intent to distribute in the United States, the indictment would not have been dismissed. The indictment failed to allege all the necessary elements of an offense. This case is an

8. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 33 (1965).

9. 21 U.S.C. § 846. The Marijuana on the High Seas Act was passed in part to provide criminal penalties for drug traffickers which had been repealed by this statute. See note 2 *supra*.

instructive warning to future prosecutors indicting under the Marijuana on the High Seas Act.

It is possible that the difficulty with subject matter jurisdiction runs deeper than is apparent. In its conclusion, the court pointed out that the sufficiency of future indictments which properly allege the intent to distribute has yet to be determined. By limiting its decision to this set of facts and this specific indictment, the court did not determine what facts will constitute a nexus with the United States such that an intent to distribute may be inferred. The court did not to speculate on when the intent requirement is properly met:

There could be a different result if the controlled substance in question is found near U.S. territory, or if the shipment is bound for the United States, or if the foreign defendants know or intend that their illegal cargo will be distributed in this country. Subject matter jurisdiction *may* exist in those circumstances [emphasis added].¹⁰

What can be clearly adduced from the decision is that there must be an allegation and subsequent proof of a "deductable connection" between the conduct of the defendants and the United States. Until there is a clear judicial determination of what specific activities will cause the required "adverse effect" on the interests and security of the United States, government prosecutors will be working on a trial and error basis, trying to find that magic combination of facts which constitute a "deductable connection." Without such a determination, or without an amendment to the Marijuana on the High Seas Act which clarifies what the elements of a violation are, there may be no effective prosecutions under an act designed to increase the likelihood of convictions of drug traffickers on the high seas.

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10. 515 F. Supp. at 1346.