J A M A I C A

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL No. 119/1971

BEFORE: The Hon. Mr. Justice Luckhoo, P. (Ag.)
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

REGINA v. VINCENT WHYTE

W.K. Chin See for the appellant.

Miss J. Bennett for the Crown.

October 15, 1971; January 20, 1972

LUCKHOO, P. (Ag.):

The appellant Vincent Whyte was convicted on July 30, 1971 by the learned resident magistrate for the parish of Clarendon on an information charging him with unlawfully having in his possession on July 19, 1971 a fire extinguisher, contrary to s. 5 of the Unlawful Possession of Property Law, Cap. 401, and was fined $70 in default of 30 days at hard labour. He appeals against conviction on two main grounds, firstly, that it was not proved that he was found in possession of the fire extinguisher and secondly, that the arresting constable was not shown to have reasonable cause for suspecting that the fire extinguisher was stolen or unlawfully obtained.

The evidence adduced by the prosecution in support of the charge was as follows: On July 19, 1971, a company

/Alcoa Minerals, ...

Alcoa Minerals, was carrying out construction work at Halse Hall in Clarendon. At about 10.25 a.m. on that day George Rossi a security supervisor employed to that company was walking towards the company's main office when he noticed a K.I.W. Walcott trailer parked in the driveway of the car park in the construction compound. He saw the appellant in the compound close to the trailer. The appellant looked up and down in a suspicious manner, opened the bonnet of a motor car and touched something in there. The appellant then opened one of the doors of the car, looked up and down and opened the trunk at the back of the car. Rossi said hewent into the company's office and from a window in that building he watched the appellant's further movements. The appellant opened the door of the parked trailer and removed something from it. Rossi was unable to see what that object was because his view was obstructed by other vehicles. He saw the appellant put into the trunk of the car whatever he had removed from the trailer. He shut the trunk and drove off the trailer. Rossi went to the main entrance gate and made a report to sergeant of police Kenneth Lamey. Sgt. Lamey said that at about 10.30 a.m. on July 19, 1971 George Rossi came to him at the main entrance gate of the compound, and told him something in consequences of which he went to the car park in the construction compound. There Rossi pointed out a motor car. He (Lamey) then lifted the trunk of the car (which was closed but not locked) and saw a yellow fire extinguisher. He closed the trunk and went to Donald Freenaux, material controller of Walcott K.I.W. Joint Ventures at Halse Hall who was in charge of fire extinguishers at Walcott K.I.W. He spoke to Freenaux who returned with him to the car park. He opened the trunk of the car and showed Freenaux the fire extinguisher. Freenaux testified that he saw a fire

/extinguisher in .....

extinguisher in the trunk of car which he recognised from its colour and model to be of the same type his firm used and some of which he kept at Halse Hall. The fire extinguisher he saw appeared to be new. Sgt. Lamey said that at about 4.30 p.m. when the day's work had ended he went to the main gate and at about 4.45 p.m. he saw the car in question being driven by the appellant. Rossi was present. He stopped the appellant and asked him to open the trunk of the car. The appellant opened the trunk and the fire extinguisher which he had seen earlier that day was still there. Sgt. Lamey said that he asked the appellant how the extinguisher had got into the trunk and the appellant replied "I don't know how it got in there." Rossi then told the appellant "I see you put something in the car today man" to which the appellant replied "I really go out there but I didn't put anything in it." Sgt. Lamey testified that as a result of what Freenaux had told him earlier that day he was not satisfied that the appellant had come into possession of the extinguisher by lawful means. He said "I was suspicious for this and also because it appeared to be new." Sgt. Lamey arrested the appellant for unlawful possession of the fire extinguisher and cautioned him. The appellant made no statement.

The learned resident magistrate considered that the evidence adduced by the prosecution raised a prima facie case against the appellant and he called upon the appellant to give an account to his satisfaction by what lawful means he came by the fire extinguisher. The appellant testified that there was something wrong with his motor car which was in the company's car park. On July 19, 1971, he drove the trailer to the car park in order to work on the car. He parked the trailer about

8 yards away from the car. He then lifted the bonnet of the car and worked on the car's gas pump. He corrected the fault. He denied taking anything from the trailer on that day. He specifically denied that he took the fire extinguisher from the trailer and placed it in the trunk of the car. He also denied opening the trunk of the car. He said he was astonished when on opening the trunk at Sgt. Lamey's request he saw the fire extinguisher in it. He only kept his spare wheel and jack in the trunk and kept his car tools under the seat of his car.

Counsel for the appellant Mr. Chin See submitted that on a charge of this nature the prosecution had to establish two elements:-

(1) that the accused was found in possession of the article;

(2) that the constable who arrested the accused had reasonable cause to suspect that the article was stolen or unlawfully obtained.

Mr. Chin See contended that the evidence adduced by the prosecution did not raise a prima facie case in that there was no sufficient proof of either of these elements constituting the offence charged. Miss Bennett for the Crown while agreeing with Mr. Chin See's submission as to the nature of the elements constituting the offence charged contended that this evidence did in fact raise a prima facie case which entitled the learned resident magistrate to call upon the appellant to give an account of his possession of the fire extinguisher and that as the appellant's testimony was a denial of possession which the learned resident magistrate obviously rejected, the latter was entitled to find the appellant guilty of the charge as laid.

The charge was in fact laid under s. 5 of the Unlawful Possession of Property Law, Cap. 401, which relates to the arrest and trial of a suspected person. A "suspected person" so far as is relevant to the instant matter is defined

/in s. 2 of .....

in s. 2 of Law as follows -

" 'suspected person' means any person who -

.....

(b) has in his possession or under his control in any place any thing ..... under such circumstances as shall reasonably cause any constable ..... to suspect that that that thing has been stolen or unlawfully obtained."

By s. 5 of the Law any constable may arrest a suspected person without a warrant. It will be seen from the abovementioned definition of a "suspected person" that for a person to fall within that category there must be evidence -

(i) that he was found in possession of the thing in question by a constable;

(ii) his possesion was under such circumstances as reasonably caused that constable to suspect that the thing was stolen or unlawfully obtained.

It will readily be appreciated that the definition of "suspected person" does not require that the constable shall suspect that the person in whose possession he finds the thing was the thief or unlawful obtainer. The circumstances under which he finds the thing in the person's possession must, however, suggest to him that the thing was stolen or unlawfully obtained by someone. Those circumstances may or may not include the conduct of the person in whose possession the thing is found. Whether the suspicion of the constable that the thing found was stolen or unlawfully obtained was reasonable or not is a matter for the resident magistrate.

The evidence adduced in this case on the part of the prosecution through Rossi, Freenaux and Sgt. Lamey was in my view sufficient to support the allegation that the fire extinguisher when found by Sgt. Lamey - a constable for the purposes of this Law - was in the possession of the appellant.

/The crucial .....

The crucial question is whether there was evidence of circumstances within the apprehension of Sgt. Lamey which could reasonably cause him to suspect that the fire extinguisher was stolen or unlawfully obtained, and not whether there was evidence of circumstances which could reasonably cause any one to suspect that the fire extinguisher was stolen or unlawfully obtained. As far as the evidence goes Sgt. Lamey first came into the picture when a report was made to him by Rossi at 10. 30 a.m. What was stated to Sgt. Lamey by Rossi is not known for neither Sgt. Lamey nor Rossi testified as to the content of the report. Apparently it was thought by the clerk of court who presented the case for the prosecution that the details of the report would be inadmissible in evidence as hearsay. That this is not so is well exemplified by the case of Subramanian v. R. (1956) 1 W.L.R. 970 where, as here, the state of mind of the testifier was relevant. However it must be borne in mind that on a charge of unlawful possession as it is necessary for the prosecution to adduce evidence of facts which might induce a certain state of mind in the hearer the details of the report would become admissible for that purpose only if the reporter testifies as to the facts upon which his report is based and so enable the learned resident magistrate to decide whether those facts have been established.

In the absence of evidence as to what Rossi told Sgt. Lamey it is not known whether Sgt. Lamey was made aware of the conduct of the appellant as viewed by Rossi. The evidence of Rossi as to the appellant's conduct relevant though it is to the question of the appellant being found in possession of the fire extinguisher is only relevant to Sgt. Lamey's state of mind created by the latter's apprehension of the circumstances under which he found the appellant in possession of the fire extinguisher if the content of the report made by Rossi to Sgt. Lamey is known.

After Sgt. Lamey opened the trunk of the appellant's car and saw the fire extinguisher which appeared to him to be

/a new .....

a new one he spoke to Freenaux. Again it is not disclosed what Freenaux said to Sgt. Lamey. Indeed all that to which Freenaux testifies does not in anyway suggest that the fire extinguisher was stolen or unlawfully obtained. When therefore Sgt. Lamey said he was suspicious because of what Freenaux told him the resident magistrate was not in possession of any such material upon which he could decide that Sgt. Lamey's suspicion that the fire extinguisher was stolen or unlawfully obtained was in fact reasonable. The fact that the fire extinguisher was new carried this aspect of the matter no further. Again the denial by the appellant that he was in possession when he was confronted by Sgt. Lamey with the fire extinguisher lying in the trunk of the appellant's car carried the matter no further in the absence of evidence of what Rossi and Freenaux or either of them told Sgt. Lamey as it cannot be said that the appellant's denial together with such other circumstances as were proved to have been within the apprehension of Sgt. Lamey could reasonably have caused Sgt. Lamey to suspect that the fire extinguisher was stolen or unlawfully obtained.

The case for the prosecution therefore broke down on the proof of the second element of the charge laid and the appellant ought not to have been called upon to account for his possession of the fire extinguisher.

For these reasons I would allow the appeal, quash the conviction and set aside the sentence.

GRAHAM-PERKINS, J.A.:

The appellant was convicted in the Resident Magistrate's Court for the parish of Clarendon on an information which charged him with unlawful possession of a fire extinguisher, and sentenced to pay a fine of $70 and, in the alternative, to serve thirty days at hard labour.

Kenneth Lamey, a police sergeant, told the court that at about 10.30 a.m. on the 19th July, 1971, one George Rossi made a report to him at the main gate at the Alcoa Construction site at Halse Hall. In consequence of this report he accompanied Rossi to a car-park on the compound where he saw a motor car. He opened the trunk of this car and saw a yellow fire extinguisher. Shortly thereafter he spoke to one Donald Freenaux with whom he returned to the car. He showed Freenaux the extinguisher and Freenaux told him something. Later that day, at about 4.45 p.m., he and Rossi were at the main gate when he saw the appellant driving the same car through that gate. He stopped the appellant and informed him that he intended to search the car. At his direction the appellant opened the trunk. The extinguisher was there. Lamey asked the appellant how it came to be in his trunk, to which the appellant replied: "I don't know how it got in there." Rossi said to the appellant: "I see you put something in the car to-day man." To this the appellant retorted: "I really go out there but I didn't put anything in it." From this point Lamey's evidence continued: "As a result of what Freenaux had told me earlier that day I was not satisfied that he had come into possession of it by lawful means. I was suspicious for this and also because it appeared to be new."

Be it noted that a constable is not required to be satisfied that a possessor did not acquire possession

/by lawful .....

by lawful means. He is required to entertain no more than a reasonable suspicion as to the means of that acquisition. Logically the two propositions are not necessary identical.

Freenaux, too, gave evidence. He told of having accompanied Lamey to the car-park, and of seeing a yellow fire extinguisher in the trunk of a car. He said he recognised it by its colour and model as the same type that his firm used, and that he kept some at Halse Hall. One does not know what Freenaux told Lamey other than what may, perhaps not unreasonably, be inferred from Freenaux' evidence. It may only be assumed, therefore, that Freenaux told Lamey that the extinguisher was one of the same colour and model as those used by his firm, and that he kept some at Halse Hall. This assumption does not necessarily offend the rule against hearsay since, among other things, what it is assumed Freenaux told Lamey could go to the latter's state of mind. What appears to be quite odd, however, is that no attempt appears to have been made by Freenaux or Lamey to ascertain whether the extinguisher was Freenaux' property. One possible reason for this apparent failure is that Freenaux may have been satisfied that it was not his. Equally odd is the apparent failure of Lamey to seek out the appellant immediately after receiving Rossi's report. In passing I observe that it is certainly not beyond the bounds of possibility that someone other than the appellant could, within the period of five minutes that elapsed between Rossi's journey to the gate to make his report to Lamey and his return with the latter to the car, have placed the extinguisher in the trunk. Lamey was able to open that trunk on two occasions presumably without a key. Whatever may have been the cause of the apparent lapses above-noted, suffice it to say that Lamey did nothing further until 4.45 p.m.

/Rossi gave .....

Rossi gave evidence to the effect that at about 10.25 a.m. he saw the appellant remove 'something' from a trailer and put it in the trunk of a car. He did not know what that something was. He made a report to Lamey.

It was on this background that the learned Resident Magistrate called on the appellant to account for his possession of the extinguisher. The substantial point of this appeal is whether the appellant, at the end of the evidence led by the prosecution, should have been called upon so to account. The answer here in turn necessarily depends on the further and very important question, namely: Was the appellant a 'suspected person' within the meaning of s.2 of the Unlawful Possession of Property Law, Cap. 401. So far as is relevant to this appeal that section defines a suspected person as a person who -

> "(b) has in his possession or under his control in any place any thing ..... under such circumstances as shall reasonably cause any constable or authorized person to suspect that that thing has been stolen or unlawfully obtained."

It is, in my view, of the utmost importance to appreciate that the suspicion to which the section is directed is one which must exist in the mind of the constable at the time that the possessor of the thing is found by the constable to be in possession thereof. The section is not directed to the state of mind of the resident magistrate or anyone else. Equally important it is to appreciate that that suspicion, objectively assessed, must be demonstrably reasonable in the view of the magistrate. It is the constable's state of mind, and the justification for its existence, that constitute the two essential prerequisites in respect of which the magistrate must arrive at a conclusion adverse to the person charged before that person can incur the consequence of being called upon to account.

/It is .....

It is clear, I think, that the moment of time when it may legitimately be said that the appellant was found to have the fire extinguisher in his possession by Lamey was when, at the latter's request, he opened the trunk of his car at the gate. Lamey described his state of mind at that time in the words above quoted. It is, in my view, of critical importance to note that that state of mind was not, on Lamey's own evidence, and perhaps for good reason, affected by anything that Rossi might have told him. As wooding, C.J., observed in Cedeno v. O'Brien (1964) 7 W.I.R. 192, at p. 195,

> "It is notorious, I am sure, that some people's suspicions are easily aroused. Any hint or conjecture, however tenuous will move the credulous to suspect although it be utterly devoid of reason to found a suspicion. Any attempt to alter the character of the statutory stipulation must therefore be firmly rejected."

However moved to suspicion Rossi's state of mind may have been it cannot follow that Lamey was similarly affected. Unhappily it is not known what Rossi told Lamey, and I am certainly not prepared to indulge in any dubious speculation thereon.

This case appears to have been conducted on the assumption that the report made by Rossi to Lamey was not admissible as an item of evidence if led through Lamey. This assumption, in my respectful view, was quite unwarranted and reflects a grave misunderstanding of the rule against hearsay. The rule has never been fully and judicially formulated, as far as I am aware, but all the authorities endorse the view that

> "Evidence of statements made to a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statements. It is not hearsay and is admissible when it is proposed

/to establish

> to establish by the evidence, not the truth of the statements, but the fact that they were made."

See Subramaniam v. Public Prosecutor, (1956) 1 W.L.R. 965. I concede that the rule as I have stated it is not complete in its formulation but it will suffice for the purposes of this case. In Subramaniam's case (supra) the appellant had been charged with being in possession of firearms without lawful excuse. His defence to this charge was that he was acting under duress in consequence of threats uttered by Malayan terrorists. The trial judge refused to allow him to state what had been said to him by the terrorists. He was convicted. The Privy Council advised that the conviction should be quashed because the reported statements were tendered as original evidence and should have been received as such. Lamey could have been properly led as to precisely what Rossi had told him and that reported statement would have been perfectly admissible as original evidence since all that would have been attempted thereby would have been to establish the fact that Rossi made a particular report in particular terms to Lamey. This was essentially relevant to a true assessment of Lamey's state of mind and the justification for its existence. The evidence so led would have involved no offence against the hearsay rule as its purpose would certainly not have been to establish the truth of the terms of that report. Its truth or falsity would have been irrelevant.

I cannot concede that the magistrate was entitled to assume that Rossi had told Lamey all that Rossi had himself given in evidence. Indeed, Rossi's evidence, as evidence of what he had seen, was, by itself, not, strictly speaking admissible. Evidence can never be admissible in vacuo. Its admissibility must be determined by its relevance to some issue before the court. There were two issues before the court in this case, to only one of which was a very small portion of

/Rossi's .....

Rossi's evidence relevant, i.e. the finding by Lamey of the appellant in possession of the fire extinguisher at the gate in Rossi's presence. The other issue was the state of mind of Lamey at that time. If Lamey had given in evidence the terms of the report made to him by Rossi, and if Lamey had said further that it was in consequence of what Rossi had told him that he entertained some suspicion which state of mind continued until 4.45 p.m. I apprehend that part of the evidence given by Rossi would have been admissible. But it would have been admissible for the particular purpose of supporting Lamey to the extent that the latter had said that Rossi had made a report to him in certain terms. It is Lamey's evidence that went to the second issue. As noted earlier Lamey did not attribute his suspicion to anything that Rossi might have told him. He was clear that two factors operated on his mind, namely, what Freenaux had said to him, and the fact that the extinguisher appeared to be new. There can be no doubt, I think, that this was in answer to a specific question: "Why did you suspect etc.?" Be it observed, too, that Freenaux did not say that the extinguishers he kept at Halse Hall were new, or that he was missing any, or any thing of that sort. In these circumstances it is, in my respectful view, impossible to assert that the presence of an apparently new extinguisher in the trunk of a car could, vis a vis Lamey, give rise to reasonable suspicion.

Where a witness identifies and catalogues the particular circumstances which create an element of suspicion in his mind can it be permissible for a magistrate to go behind those circumstances so identified and hold that there were other circumstances, not identified by the witness, which ought to have operated on his mind? I think not. A magistrate cannot usurp the position of the arresting constable; nor can he assign to the constable a particular state of mind and thereafter hold that the existence of that particular state of mind was justified. If it is open to a magistrate to find that

a particular state of mind can, in his view, be attributed to a particular set of circumstances notwithstanding that it is not proved by the witness concerned that those circumstances made any impact on him then it is not difficult to conclude that s. 2, which defines a 'suspected person' in very precise terms, is meaningless. The right to arrest given by s. 5 is not a right to arrest on mere suspicion simpliciter. It is a right to arrest a person who has, prior to his arrest, come within the category of a suspected person by reason of the circumstances of his possession of some article, which circumstances are known to, and identifiable by, the constable arresting, and which have the effect of producing in that constable's mind an element of reasonable suspicion as to the means of acquisition of that article. See Cedeno v. O'Brien (1964) 7 W.I.R. 192, where a not dissimilar problem is discussed, and where the court examined each of the four reasons identified by the appellant as the basis of his suspicion.

It is, in my view, manifest that the magistrate in this case was misled into thinking that such suspicions as may have been entertained by Rossi and Freenaux could be used to attribute to Lamey a state of mind of reasonable suspicion. This he clearly could not do.

For the reasons I have indicated I would allow this appeal, and set aside the conviction and sentence.