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JAMAICA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NO. 162 of 1970

BEFORE: The Hon. Mr. Justice Fox, Presiding

The Hon. Mr. Justice Smith, J.A.

The Hon. Mr. Justice Graham-Perkins, J.A.

REGINA vs. DANIEL CONNELL - Possession of Ganja

Mr. Ian Ramsay for Appellant

Mr. C.A. Harris for Crown.

SEPTEMBER 27, 28, 29, 30:
OCTOBER 22, 1971.

FOX, J.A.,

These are the reasons of the majority of the court for dismissing this appeal on 30th September, 1971.

The appellant is a fisherman living at Negril. He was convicted by Mr. Boyd Carey, Resident Magistrate for Saint James exercising jurisdiction in Westmoreland, for having ganja in his possession. The prosecution was based upon the evidence of detective corporal Isaac Ranglin of the Savanna-La-Mar C.I.D. and constable Errol Graham of the same station. Detective Ranglin was the leader of a police party, including constable Graham, which searched premises occupied by the appellant by authority of a warrant issued under the Dangerous Drugs Law. In the Crown's case the following facts emerged. On their arrival at the premises at about 5.30 a.m. on Sunday, 6th September, 1970, the police called out and awakened the appellant. He opened the door to a room. He was clad in pyjamas. The police read the warrant to him. The appellant said that he and his wife, Adella, occupied the room from which he had come. This room was one of two finished rooms in a house at the back of the premises. It was furnished. The other finished room had a locker only.

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The appellant said he occupied that house. He pointed out another house at the front of the premises and said that it was occupied by guests. Detective Ranglin first searched the front house. Constable Graham stayed at the door of the appellant's room. The appellant remained there with him. Under cross-examination, it was elicited from detective Ranglin that he found vegetable matter resembling ganja in the house occupied by the guests, and that these guests were 'hippies' who had absconded from the island prior to the trial.

Detective Ranglin then came to search the room occupied by the appellant and his wife. Accompanied by constable Graham and the appellant he entered the room. The police saw Adella lying on a double bed with a pillow at her head and another pillow on the bed. They also saw in the room male and female clothing and footwear, and a smaller bed which appeared to be unused. They searched and found 29 lbs of vegetable matter resembling ganja in varying quantities and at different points on the floor of the room. In a carton box under the bed were 12 cloth bags with 2 lbs, and a paper bag with 1 lb. At the head of the bed, under soiled male and female clothing were 2 boxes, one with 9¼ lbs, and another with 11 lbs, and a paper bag with 5¾ lbs. Detective Ranglin pointed out the vegetable matter to the appellant and his wife and told them that it was ganja. According to the detective, the appellant then said: "Ah don't bruk shop. Ah know I am in trouble now, but I not going kill myself." According to constable Graham, "nobody said anything" at that stage.

The appellant and his wife were arrested and jointly charged with possession of ganja. The vegetable matter found in the room was sent to the Government Analyst. He certified that ...

that it was ganja. Adella died two days after the search. At the trial, which was of the appellant alone, he was defended by a solicitor. The defence which was suggested in cross-examination of the police was that they had not found vegetable matter in the room occupied by the appellant and his wife, and that they were endeavouring to "turn the heat" on to the appellant by saying that he emerged from a room in which ganja was found. It was also suggested to the police and denied by them that there were six buildings on the premises and not two.

In his defence, the appellant gave evidence on oath. In chief he said at first that there were 6 buildings on the premises. He operated a guest house. He lived in a building with 3 sleeping rooms. The luncheon adjournment was then taken. On the resumption, the appellant continued his evidence-in-chief. He then said that there were two buildings only on the premises and that he occupied the back building in which were 4 sleeping rooms. One month before the police visit he had separated from his wife. He used to live with her in a room, but after the separation he moved to another room in the same building, and a boy named Roy, apparently a grandson, slept with his wife. Roy was in his wife's room when the police came. The police searched his room and found nothing. They then searched his wife's room and found ganja. He did not know and had never seen ganja before and was surprised at the discovery. He did not make the statement alleged by detective Ranglin.

The sole ground of appeal was that the evidence in the case was insufficient to fix the appellant with possession of the ganja. Mr. Ramsay submitted firstly that in the light

of the evidence of the appellant the room in which the ganja was found was in reality occupied by his wife and not the appellant who could not therefore have been in control of the ganja so as to put him in possession of it. The immediate reply to this submission is that the evidence of the appellant was contradicted in substantial respects. The police did not see any sign of the separate occupancy of two rooms as he alleged. To the contrary, they found him and his wife living together in one room under circumstances which bore all the hall marks of joint occupancy. In addition, the police said that the appellant pointed out the room as one occupied by himself and his wife. They did not see a boy in the room. The presence of the boy was not suggested to them in cross-examination. Finally, the appellant was forced to admit under cross-examination that he kept his clothes and belongings in the room in which the ganja was found, and that he lived in that room.

The Magistrate did not state his findings of fact. Neither the law nor the practice in his court requires him to do so. This situation is unsatisfactory. This court has said so in numerous judgments. In this way it has called attention to the urgent need for reform. But the court has never attempted to coerce reform by taking up drastic positions. It has sought to cope with the existing realities - not the least of these being the extreme pressures under which business is likely to be conducted in magistrates' courts in the island - by endeavouring to ascertain from the printed evidence and the verdict of guilty what must, or could have been the magistrate's findings as to those facts which depend upon the truthfulness of the witnesses. For this purpose, the court assumes that the magistrate found all such facts which were in dispute at the

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trial, in favour of the Crown's case. If these findings of fact so ascertained, are justified by the evidence in that there is nothing glaringly improbable about the story they describe and which the magistrate accepted, or nothing to show that he disregarded or misunderstood an admitted fact which is material, the appeal is considered on the basis of these findings so ascertained. In such a situation, the court has never regarded itself as being entitled to take a contrary view of the evidence, and to substitute its own findings in place of those which could reasonably have been made by the magistrate.

In this appeal there is nothing to show that the magistrate failed to take full advantage of the opportunity which he had in seeing and hearing the witnesses. The story he believed is altogether probable. It was not shown to have been founded on misunderstanding or disregard of any material fact. Such a complaint was never attempted. This Court must therefore assume that the police evidence was believed, and that the facts found by the matistrate upon which the verdict of guilty was reached, are as disclosed in that evidence.

In his second and major submission, Mr. Ramsay assumed this position, but contended that even if the appellant and his wife were proved to have been in joint occupation of the room, from this fact of a mere joint occupancy it was impossible to conclude beyond reasonable doubt that the ganja was there with the knowledge of the appellant and his wife or of either. It could have been there with the knowledge of one or the other or of both. In this equivocal position - so continued the argument - possession in the appellant of the ganja found in the room had not been satisfactorily...

satisfactorily proved.

These submissions acknowledge the settled law in this jurisdiction. In relation to offences under the Dangerous Drugs Law, numerous decisions of this Court and the former Court of Appeal have affirmed that possession is a complex concept involving control and knowledge. To convict on a charge alleging possession of ganja, the Court must be satisfied that the accused was exercising control over the incriminating matter and "had knowledge not only that he had the thing, but had knowledge also that the thing possessed was ganja." (vide O'Connor C.J. in R. v. Cyrus Livingston (1952) 6 J.L.R. p.95 at p.98). In that case control was described as the "fact of possession" - that is, the factual element in the complex concept of possession - and knowledge as the essential mental element in the commission of the offence which was not absolutely prohibited by the legislature so as to exclude mens rea as a constituent part of the crime. Since 1952, this basic position in which knowledge is an essential element of the offence, has been restated in case after case. It can be altered only by legislation or the pronouncement of a higher judicial authority. But the position is susceptible to refinement. In 1969 this Court held in R. v. George Green (1969) 14 W.I.R. 204 that ganja as defined by the law was referable only to the pistillate plant known as cannabis sativa and did not include any part of the staminate plant. In a decision of this Court given this week R.M.Cr.A. No. 95/71 of 20th October, 1971, R. v. Richard Nicholson it was laid down that the legal burden of proving guilt which is always upon the Crown required it to establish no more than that the accused knew that he had the thing itself under his control. Upon proof of control and knowledge..

knowledge of this nature, an evidential burden, or, if the phrase is preferred, a "burden of adducing evidence" would shift to the defence to show, if it could, that the accused did not know that the matter under his control was ganja as defined by the law, or that a reasonable doubt existed as to this aspect of his knowledge. This leads to comment on a point emphasised in R. v. Cyrus Livingston (supra) which reflections on the subject of proof of knowledge frequently tend to oversight. At p.79 of the report of the judgment, O'Connor C.J. explained that guilty knowledge may be established by way of inference "from the fact of possession or from the surrounding circumstances or from both." The learned Chief Justice continued: "But it is,, nevertheless, a good defence if the defendant proves that he had no knowledge either that he had the thing at all, or of the fact that what he had was ganja." Admittedly this passage is unhappily worded in that, divorced from the context of the judgment as a whole, it seems to suggest that the legal burden of proving guilt which is upon the Crown until it is discharged by a verdict of guilty, could be displaced at some stage of the trial, and transferred to the defence. This could not have been meant. All that was intended no doubt was reference to that well recognised and lighter burden in the criminal law which, to use the apt words of Devlin J in Hill v. Baxter (1958) 1 Q.B. 277 at p.284,"the accused discharges by producing some evidence, but which does not relieve theprosecution of having to prove in the end all the facts necessary to establish guilt."

Three points may be extracted from the judgment

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of O'Connor, C.J.:-

(1) The Crown may discharge its legal burden of proving an accused guilty of having ganja in his possession by establishing facts from which it may be inferred beyond reasonable doubt that the accused was knowingly in control of ganja.

(2) The defence could inhibit this inference by showing other facts suggesting a contrary conclusion.

(3) The function of the Court was to weigh all the facts and arrive at a decision in accordance with the incidents of the burden and of the degree of proof in criminal cases.

It is helpful to have an accurate appreciation of this position, because it is an intelligible setting in which to assess the significance and the value of facts, including the fact of occupation of premises, in relation to proof of a charge of possession of ganja. In attempting such proof, the fact of occupation is relevant and admissible but, as numerous decisions affirm, by itself it is incapable of giving rise to a sure inference that the occupier was in possession of ganja found on his premises. Proof is required of other facts which when considered together with the fact of occupation may enable the inference of possession to be drawn. This is all that is involved in the statement to be found in some decisions that mere occupation of premises without more was insufficient to establish that the occupier was in possession of ganja found thereon. It is unfortunate that that statement should have obscured what is after all a simple, straightforward and legally valid proposition.

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In the light of what has been said so far, it is clear that Mr. Ramsay's second submission does not sufficiently recognize the realities in the evidence. This is not a case in which the Crown proved only the bare fact that the appellant was in joint occupation with his wife of premises in which ganja was found. Much more was established. The other facts, in addition to the fact of joint occupancy, are distinct. Firstly, the appellant and his wife were the only persons present when the police arrived, when the room was searched, and when the ganja was found. Their presence in these circumstances strengthens the inference of their exclusive control over the room and its contents which arose upon proof of their joint occupancy. Secondly, the room in which the ganja was found was not just a room in the house but the bedroom of the appellant and his wife. Thirdly, the police visit occurred at a time when husband and wife were still in bed. These two facts show either that the ganja was in the room before they retired to bed that night, or that it was brought there afterwards during the night. Either situation is incompatible with their ignorance of the presence of the ganja. Fourthly, the ganja was in containers distributed on the floor under and at the head of the bed. Fifthly, a relatively large quantity of ganja was found. These two last facts when considered in conjunction with the other facts enumerated above make it so extremely unlikely that the ganja could have been in the room without the knowledge of the occupants as to suggest the contrary. This unlikelihood of ignorance in the appellant and his wife of the existence of ganja in their bedroom, is underscored by a sixth fact, namely, the clumsy but apparently deliberate attempt...

attempt to conceal the ganja under soiled clothing. Mr. Ramsay suggested that this fact pointed to absence of knowledge in the husband. The suggestion is palpably without any reasonable base. The only sensible conclusion in all the circumstances is that the containers of ganja had been deliberately covered with clothing, and that husband and wife were jointly concerned with whatever effect this action was intended to achieve. A seventh fact is that the bedroom was shared, not by strangers, not by just good friends, but by a husband and wife. The magistrate must have rejected as untrue the appellant's statement that he had been estranged from his wife a month before the police visit and was, so to speak, a mere guest in her room; an estrangement in terms of wishful intention, but not in fact! The opportunity for falsehood, namely the passing of the wife before the trial, is too stark to have escaped the notice of the magistrate. More conclusively, the appellant's statement is inconsistent with the police evidence which was believed. Unquestionably therefore, the magistrate must have been satisfied that husband and wife were living in amity with each other. The natural and the reasonable inference from this finding is that husband and wife would have confided in each other concerning such an important matter, namely the ganja, the existence of which the one could not hope to conceal from the other by putting it on the floor under and at the head of the bed, amongst their footwear, their clothing, and the chamberpot which must have been for their joint convenience.

An eigth fact is the reaction of the appellant when it was pointed out to him by detective Ranglin that the vegetable matter found in his bedroom was ganja. According to

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Constable Graham he said nothing. In a previous decision of this court, silence in these circumstances was said to "strengthen" the inference of possession. (R. v. Maragh (1964) 6 W.I.R. 235 at 239). In R. v. Monica Williams (R.M. Criminal Appeal 77/70 of 10th July, 1970, unreported) - also a case of possession of ganja - it was regarded as "conduct which the magistrate could properly take into account in determining the question of her guilt." In this latter case, it was thought appropriate and desirable to make it plain to occupiers upon whose premises ganja had been found pursuant to a search under a warrant that, although they were not obliged to say anything when told by the police that it was ganja, nevertheless, if they should fail to say something, they would have remained silent at the risk of adverse inferences being drawn against them. Silence in those circumstances would acquire an evidential and therefore rebuttable significance. An occupier of premises who was subsequently charged could destroy all adverse inferences by going into the witness box at his trial and giving a satisfactory explanation for his silence. It was considered that by propounding the law along these lines, the criminal processes were being assured of execution in accordance with the dictates of common sense, and citizens were being encouraged to discharge their duty to assist the reasonable investigations of the police. At the same time, there was satisfaction that this assurance and encouragement could be given without endangering fundamental rights, in particular, the privilege against self-incrimination.

In Dennis Hall v. R. Privy Council Appeal No. 12 of 1970 of 3rd November, 1970, - also a case of possession of ganja...

ganja, the Board reversed a decision of this court, and held that the silence of the appellant when told by the police that a co-defendant had said in his absence that the ganja belonged to him, was not "evidence upon which the Resident Magistrate was entitled to hold that the charge against the appellant was made out." The decision in this case is clearly distinguishable from that in R. v. Monica Williams where the ganja was actually found in the presence of the accused at various points in premises occupied exlcusively by her, and in substanital quantities in the course of a search under a warrant, and where the silence of the accused did not stand by itself as the single fact relied upon to prove guilt, but was a fact confirmatory of other incriminating facts. This is also the position in the instant case. Consequently, if the magistrate found that the appellant had said nothing when told that the vegetable matter discovered was ganja, his silence was one more fact tending to prove his guilty possession. The reasonable inferences to be drawn from all these additional facts enumerated above when considered with the fact of occupation, are really too distinct to be mistaken; the conclusion from these inferences of joint possession in the appellant and his wife of the ganja, too imperative to admit of any real doubt.

But the strength of the Crown's case did not depend only upon the drawing of adverse inferences against the appellant. There was also evidence of a statement he made which the magistrate could have regarded as an admission of guilt. This evidence was given by detective Ranglin. He said that the appellant did not remain silent when told that the vegetable matter was ganja, but said "Ah don't bruk shop. Ah...

"Ah know I am in trouble now but I not going kill myself." As a consequence of the advantage which the magistrate had of seeing and hearing the two policemen, he could have been satisfied that detective Ranglin was the more reliable of the two, and that constable Graham had suffered a lapse of memory at that stage of his testimony. In reviewing the magistrate's decision, this court is not entitled to assume that the magistrate disbelieved detective Ranglin. As a part of the onus upon the appellant to show that his conviction was wrong, it was his obligation to show, if he could, either that the detective's allegation was not, or was incapable of being, believed. On the material in the printed record, such a task could not have succeeded even if it had been attempted, which it was not. The statement attributed to the appellant could hardly have been concocted. It is the kind of remark which a person in his position could reasonably have been expected to make. We are therefore of the view that the probability is distinct that the appellant did make use of the words attributed to him. The only reasonable interpretation to attach to these words is that the appellant realised and admitted that he had been caught in possession of ganja, but that although he was in trouble, he was not disgraced as would have been the case if he had been caught breaking a shop; an event which might have caused him to kill himself. In other words, and briefly, in effect the appellant admitted that he was in possession of the ganja found by the police in his bedroom.

J.A.