JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES CRIMINAL APPEAL NO: 57/87

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Wright, J.A.

R. v. DERRICK LATTY
HERNARD SMITH

P.J. Patterson, Q.C., & H. Williams for the Appellants

Ms. Sibble for the Crown

February 23, 24 & March 14, 1988

CAMPBELL, J.A.:

The appellants were convicted of Possession of Ganja and Dealing in Ganja under Section 7 (b) and (c) of the Dangerous Drugs Act on February 27, 1987.

The facts introduced in evidence on which the convictions are based are that Hernard Smith was seen by Detective Acting Corporal Donovan O'Connor and Detective Corporal Walker coming from the inside of house numbered 28 Biscayne Circle, Passage Fort, Portmore, Saint Catherine at about 1.00 p.m., on November 30, 1985. Smith was accosted by O'Connor and Walker at the front door of the house. O'Connor informed Smith of their mission which was to search for wanted men, guns and ammunition. Smith informed them that Derrick Latty was the owner of the house. A search was conducted in the house in the presence of Smith. Ganja was found in each of two clothes closets in the two rooms of the house. The ganja was in plastic parcels which were masked with masking tape. In one of the bedrooms there was a bed which had been made up, save for this bed there were no other furniture nor any clothing in the house. Smith when questioned about the ganja said "Officer, me nah go

"a jail for nobody, a fi Mr. Latty ganja, a him give me the key, fi open the door and say me fi clean up the yard, and nuh trouble nutten." He was asked where Latty lived and he informed the police officers where Latty could be contacted. Latty was contacted at the address given and brought by the police officers to 28 Biscayne Circle where he was shown the ganja and informed of what Smith had said in relation thereto. Latty made no response to this information. Smith was then asked by O'Connor in the presence of Latty to whom the ganja belonged. To this question Smith replied "A Mr. Latty ganja." Mr. Latty made no reply. Both Latty and Smith were arrested and charged inter alia with Possession of Ganja and Dealing in Ganja. They were individually cautioned. Smith said "Officer, a Mr. Latty ganja." Latty made no statement. A key to the house was recovered from Smith.

Donovan Bennett gave evidence that he lives two houses away from, but within sight of 28 Biscayne Circle, since January, 1985. He had observed both Latty and Smith frequently entering and departing from 28 Biscayne Circle separately and together. He had seen them go inside the house. He had sometimes seen them leave the house in the morning after having gone there the previous night. Between January 1985 and November 30, 1985 he had seen other persons come to the premises but always in the company of Latty and Smith. In the night prior to November 30, 1985 he had seen Latty at the premises but he did not see when he left. In the morning of November 30, 1985 he saw Smith at the premises but he had not seen him at the premises up to 10 p.m., the previous night when he retired to bed.

At the close of the case for the crown, Mr. Patterson submitted that the appellants ought not to be called upon to answer to the charges. His submission was not upheld. Both appellants gave evidence on oath and witnesses were called on behalf of Latty. The learned Resident Magistrate in convicting both appellants stated that she accepted the evidence of the prosecution witnesses and rejected the evidence of the appellants and the witnesses for the first appellant.

The appeal brought was on three grounds. Ground 3 was however abandoned and ground 2 which related more specifically to Smith was not argued with conviction and justifiably so, as there was really no merit therein. We will accordingly consider only ground 1 which paraphrased, is that at the close of the case for the prosecution there was no evidence or alternatively an insufficiency of evidence to establish occupation of the premises by either Latty or Smith or both. Alternatively even if occupation was established on the evidence, this was mere occupation which 'without more' is not sufficient to establish possession in the sense of physical custody and control of the ganja found therein.

Regarding the issue of occupation, we are in no doubt whatsoever that the evidence of the physical presence of Smith in the house, possessed with a key thereof, and the evidence of Bennett that both Smith and Latty were frequently at the premises entering the house, sometimes alone, sometimes together, and that they often overnighted there, and that no other person lived there, constituted sufficient evidence to establish occupation by both of them.

This element of occupation did not in the case of Smith exist 'without more.' He had knowledge of the existence of the things in the two clothes closets which were not locked. He knew that they were ganja. He had knowledge of ownership since he said they belonged to Latty. He had the key to the house. His explanation of how he came by the key does not preclude him being in physical custody and control, that is to say, possession of the ganja in the house albeit on behalf of some person other than himself as the owner. There was thus a case for him to answer and his evidence in defence having been rejected his conviction is unassailable.

In the case of Latty and as the Resident Magistrate found, there was nothing other than his silence when told of what Smith had said and his further silence when accused to his face by Smith in the presence of, and following the prompting of the police officer.

Mr. Patterson submits that the situation posited by the facts, is covered by the principle contained in Dennis Hall v. R (1970) 12 J.L.R. 240 by virtue of which no adverse inference can be drawn from Latty's silence, consequently the aforesaid silence does not provide additional evidence to supplement the evidence of occupation so as to establish that Latty was in possession of the ganja found in the house.

To the contrary Miss Sibble said that Dennis Hall v. R (supra) is distinguishable from the present facts in relation to which the principle stated in Donald Parkes v. R (1976) 14 J.L.R. 260 is rather the applicable principle.

In Dennis Hall v. R (supra) the question for which an answer was sought was whether in a case where joint occupancy of a room or rooms is admitted or established, an adverse inference can be drawn from the silence of a person on being informed that a co-occupant has accused him of being the possessor of things found in the room or rooms in his absence, the possession of which constitutes a criminal offence. Their Lordships of the Privy Council per Lord Diplock in answering the question in the negative said thus at page 242:

> "It is a clear and widely known principle of the common law in Jamaica, as in England, that a person is entitled to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence. A fortiori he is under no obligation to comment when he is informed that someone else has accused him of an offence. It may be that in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer, but in their Lordships' view silence alone on being informed by a police officer

> "that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation."

The distinction which Miss Sibble sees between the facts in Dennis Hall v. R (supra) and the present case is that, in this case, Latty was not merely informed of an accusation made against him by Smith, the latter thereafter actually made the accusation in the presence and hearing of Latty. This she submits could provide "very exceptional circumstances" necessitating an explanation or disclaimer if an adverse inference is not to be drawn from Latty's silence. We infer that she was in effect submitting that, if in a case where a person was merely informed of an accusation such accusation may in very exceptional circumstances call for an explanation or disclaimer, a fortiori where the accusation is made in the presence and hearing of the accused, his silence is even more inexplicable except on the basis of admission of the facts constituting the accusation. Such appears to have been the view of this Court in R. v. Donald Parkes 12 J.L.R. 1509 where Luckhoo P., (Ag.) said at p. 1511:

> "Stress was laid upon the fact that the Privy Council's opinion in Hall v. R. related to the accused's silence when informed that someone else had accused him of an offence and that it was not a case where there was an accusation made direct to the accused person. We are of the view that this is indeed a valid point of distinction between Hall v. R and the instant case and that this case falls within the ambit of the passage appearing in Archbold's Criminal Pleading, Evidence and Practice (37th Edition) paragraph 1126 cited with approval by the Privy Council in Hall v. R. It was open to the jury to conclude that the applicant's silence in the face of the deceased's mother's accusation was conduct (albeit conduct of a negative kind) or demeanour which amounted to an acceptance of it."

The statement in Archbold's Criminal Pleading, Evidence and Practice referred to above which was cited with approval by the Privy Council reads as follows:

> "A statement made in the presence of an accused person, accusing him of a crime, upon an occasion which may be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated, save in so far as he accepts the statement so as to make it in effect his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether the words, action, conduct or demeanour at the time when the statement was made amount to an acceptance of it in whole or in part."

Lord Diplock in Dennis Hall v. R (supra) after reciting the above statement went on to say that:

> "This statement in their Lordship's view states the law accurately. It is a citation from the speech of Lord Atkinson in R. v. Christie (1914) A.C., at p. 554. But their Lordships do not consider that in the instant case the Court of Appeal applied it correctly. It is not suggested in the instant case that the appellant's acceptance of the suggestion of Daphne Thompson which was repeated to him by the police constable was shown by word or by any positive conduct, action or demeanour. All that is relied upon is his mere silence."

It was after so delivering himself that Lord Diplock stated the principle earlier recited herein.

Thus Miss Sibble, it would appear, cannot find support in the statement of Luckhoo P., (Ag.) above cited because such statement to be in harmony with Dennis Hall v. R (supra) has to be limited to a situation where the accused and the accuser are speaking on even terms as was the case before the Court of Appeal.

The case of Donald Parkes v. R (1976) 14 J.L.R. was an appeal to the Privy Council from our Court of Appeal. The question which their Lordships were asked to determine was whether the circumstances of an

ordinary individual being accused of an offence by another ordinary individual in the absence of the police or some other person involved directly in the investigation of that offence is one in which the accused may be expected reasonably to deny the accusation or give some explanation thereof, failing which an adverse inference may be drawn from his mere silence. Their Lordships answered this in the affirmative and in doing so they adverted to the principle stated in Dennis Hall v. R (supra) already recited herein and proceeded thereafter at p. 262 as follows:

> "As appears from this passage itself, it was concerned with a case where the person by whom the accusation was communicated to the accused was a police constable whom he knew was engaged in investigating a drug offence. There was no evidence of the accused's demeanour or conduct when the accusation was made other than the mere fact that he failed to reply to the constable. The passage cited had been preceded by a quotation from a speech of Lord Atkinson in R. v. Christie (1914) A.C., at p. 554 in which it was said that when a statement is made in the presence of an accused person:
>
> 'he may accept the statement by word or conduct, action or demeanour and it is the function of the jury which tries the case to determine whether his words, action, conduct or demeanour at the time when the statement was made amount to an acceptance of it in the whole or in part'.
>
> In the instance case, there is no question of an accusation being made by or in the presence of a police officer or any other person in authority or charged with the investigation of crime. It was a spontaneous charge made by a mother about an injury done to her daughter. In circumstances such as these, their Lordships agree with the Court of Appeal of Jamaica that the direction given by Cave J., in R. v. Mitchell (1892), 17 Cox, C.C. at p. 508 (to which their Lordships have supplied the emphasis) is applicable:

> " 'Now the whole admissibility of the statements of this kind rests upon the consideration that if a charge is made against a person in that person's presence it is reasonable to expect that he or she will immediately deny it, and that the absence of such a denial is some evidence of an admission on the part of the person charged and of the truth of the charge. Undoubtedly, where persons are speaking on even terms, and a charge is made and the person charged says nothing, and expresses no indignation, and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true.'
>
> Here Mrs. Graham and the accused were speaking on even terms. Furthermore, as the Chief Justice pointed out to the jury, the accused's reaction to the twice repeated accusation was not one of mere silence. He drew his knife and attempted to stab Mrs. Graham in order to escape when she threatened to detain him while the police were sent for."

It is made abundantly clear in Donald Parkes v. R (supra) that the only circumstance in which mere silence can give rise to the inference of an admission of the truth of a charge, is where the accuser and the accused are so circumstanced that no police officer or other person in authority charged with the investigation of the crime is, to the knowledge of either of the parties, present, or within hearing distance and the accusation is spontaneous, that is to say, not made for and on behalf, and on the promptings of a police officer or other person in authority aforesaid.

In the present case the accusation made by Smith was in the presence of police officers who were actively engaged in investigating the likely drug charges. On the principle in Dennis Hall v. R (supra) as further developed by the dicta of Lord Diplock in Donald Parkes v. R (supra) no adverse inference can be drawn from the silence of Latty. Since this was not evidence which could be relied on and the principle in Donald Parkes v. R (supra) was not applicable, there was no evidence

which together with the joint occupancy of the premises could establish possession of the ganja in the house. The learned Resident Magistrate accordingly erred in law in not upholding the submission on behalf of Latty that he ought not to be called upon to make answer to the charges.

It was for the above reasons that on February 24, 1988 we allowed the appeal of Derrick Latty quashed the convictions and set aside the sentences while at the same time dismissing the appeal of Hernard Smith and confirming the convictions and the aforesaid sentences.