JAMAICA

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL No. 103/69

BEFORE: The Hon. Mr. Justice Shelley (Presiding)
The Hon. Mr. Justice Luckhoo J.A.
The Hon. Mr. Justice Fox J.A.

REG. vs. DONALD DUNCAN
and
JOAN DUNCAN

Mr. Hugh Small for Appellants

Mr. Ivan Farquharson for Crown

Heard: 15th April, 1970

FOX J.A.

This appeal was heard on the 15th April 1970, and was dismissed for reasons which we promised to put in writing, and which are set out hereunder. The appellants, husband and wife, were convicted in the Resident Magistrate's Court for the parish of Saint Ann for being in possession of a magazine, the importation of which was prohibited by The Undesirable Publications (Prohibition of Importation) Law Cap.397. On appeal, the substantial complaint of their counsel was that the evidence was not sufficient to show that, singly or jointly, they were in possession of the magazine. The prosecution established that when the home of the appellants was searched in their presence by senior police officers pursuant to the authority of a Search Warrant under the Law, a quantity of prohibited literature was found in various rooms in the house. There was also evidence that living in the house with the appellants were their infant children, a boarder, and a maid. At the close of the Crown's case, the appellants were called upon to answer that charge only which related to a magazine found amongst other books in a clothes closet of their bedroom. The closet also contained worn articles of male and female clothing. The defence rested on a submission of no case to answer. The learned Resident Magistrate was satisfied that

both appellants used the closet, and having regard to the fact that so many prohibited publications were found in the house, and to the silence of the appellants when the magazine was found and shown to them, he concluded that they must have known of its existence and were therefore in possession of it jointly.

Counsel contended before us that the evidence went no further than to show that the magazine was found in a house occupied by the appellants, and that on the authority of well accepted principles illustrated in the cases of R. vs. Mulvin Brown and another, [1965] 3 Gl. L.R. 1, and Resident Magistrate's Criminal Appeal 322/66 - R. v. Joseph and Edward Hutchison - 16th December, 1966 (unreported), this was not sufficient to fix them singly or jointly with possession.

These cases do affirm the proposition that mere occupation of a dwelling house <u>without more</u>, is not sufficient to invest the dwellers with possession of ganja found therein. No doubt the principle applies not only to dangerous drugs, but to any matter or article the possession of which is illegal. But the "something more" which, when added to the fact of occupancy may enable the inference of possession in the occupants, need not be substantial. It may be something "just a little more", as the case of R. v. Cavendish [1961] 2 All E.R. 856 shows. In that case a lorry driver took six drums of oil, which he should have delivered to a customer, to the appellant's yard where they were unloaded by an employee of the appellant. The appellant, who was away at the time, was questioned by the police on his return and at once denied that he knew anything about the matter. He was charged with receiving the oil knowing that it was stolen. In delivering the judgment of the Court of Appeal, Lord Parker C.J. indicated that the fact that seven empty drums had been taken away by the admittedly dishonest lorry driver, at the same time the drums of oil were delivered, "was certainly some evidence which made it more probable than not that the delivery was by arrangement with this appellant" (ibid 858). This was the "something more" which when considered in conjunction with the fact that the oil was found on his premises, proved recent possession of stolen oil in the appellant, and called for an explanation.

In our view, the learned Resident Magistrate correctly directed himself as to the matters to be considered in arriving at the conclusion that the appellants must have known of the existence of the magazine in their clothes closet - These matters are an entirely sufficient "something more" which enabled the inference that the magazine found in their home, was in the possession of the appellants. Their counsel suggested that the fact that they remained silent when the magazine was found, was altogether extrinsic to the question of possession, and was improperly taken into account by the learned Magistrate. We are unable to accept this suggestion. It is contrary to the thinking in R. v. Maragh, 6 W.L.R. 235, where the conclusion that ganja found in the shop of the appellant was in his possession, was said to be strengthened "by the fact that when this ganja was shown to the appellant he said nothing at all" (239 ibid); and in R.M. Criminal Appeal 181/63 - R. v. Vivian Simpson - 13th January, 1964 (unreported) - the failure of two accused to say anything when ganja was found in their house - was regarded as evidence from which the reasonable inference could be made that they knew of the existence, and were in possession of the drug. The reality and the common sense of the situation is that the finding of the magazine in the particular circumstances was an occasion on which some explanation or denial could reasonably have been expected from the appellants, and their silence at that time was conduct which the learned Magistrate could properly take into account in considering whether they had prior knowledge of its existence.