J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL No. 24/1974

BEFORE: The Hon. President (Ag.)
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Zacca, J.A. (Ag.)

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R. v. GEORGE CORCHO

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I. Ramsay for the appellant.

G. Andrade for the Crown.

September 25, 26, 27 &
November 29, 1974

LUCKHOO, P. (Ag.):

The appellant George Corcho was convicted on March 14, 1974 in the Resident Magistrate's Court for the parish of St. Andrew, on an information which charged that on September 5, 1973 he and Linda Corcho did unlawfully have in their possession ganja, contrary to s. 7(c) of the Dangerous Drugs Law, Cap. 90. The appellant was ordered to pay a fine of $1,000 in default 12 months' imprisonment at hard labour and in addition to serve a period of three years imprisonment at hard labour, those terms to run consecutively in the event of non-payment of the fine imposed. At the end of the case for the prosecution counsel for the Crown conceded that a prima facie case had not been made out against Linda Corcho and she was accordingly discharged. The appellant now appeals against his conviction on a number of grounds.

The case for the prosecution was to the following effect. The appellant and Linda Corcho are man and wife. Their matrimonial home is situate at 4, Arcadia Drive in the parish of St. Andrew. On September 5, 1973 Det. Insp. L. Spaulding who was in charge of the Narcotic Squad in Jamaica received certain information as a result of which he obtained on the same day a search warrant under the Dangerous Drugs Law, Cap. 90 to search the premises of the appellant and Linda Corcho situate at 4, Arcadia Drive for ganja. Later in the day Det. Insp. Spaulding sent some policemen to the premises at 4, Arcadia Drive and with Det. Const. O.D. Smith he went to club premises known as the Psychedelic Shack on East Avenue in Greenwich Town in the parish of St. Andrew some 4 - 5 miles from the appellant's premises at 4, Arcadia Drive where they found the appellant. The club was operated by the appellant. Spaulding told the appellant that he had a search warrant under the Dangerous Drugs Law to search his home at 4, Arcadia Drive and requested the appellant to accompany him there. The appellant was "frisked" that is patted to ascertain whether he was carrying a weapon. The appellant said "Mr. Spaulding you no have fe take me up there, we can have a private talk". He was thereupon immediately cautioned by Spaulding who told him that whatever he had to say must be said then and there because he had no intention of having a private talk with him. Spaulding asked the appellant where his wife was and the appellant replied that she had gone to the country. Spaulding then asked him if he had ganja stored at his home at Arcadia Drive and the appellant said "Mr. Spaulding you no know already". Spaulding took the appellant to the premises at 4, Arcadia Drive. Det. Const. Smith accompanied them there. At the Arcadia Drive premises Spaulding read the search warrant to the appellant and then went to a garage at the back of the main building. The garage door was closed but not locked. Spaulding opened the garage door and went inside the garage with the appellant and Det. Const. Smith. Some 52 brown paper packets were found scattered over one section of the garage floor. Spaulding opened these packets and saw dry vegetable matter resembling ganja, and which later on analysis by the Government Analysis turned out to be ganja. The appellant was again cautioned by Spaulding who pointing out the stuff to the

appellant said that he believed the packets contained ganja. The appellant made no reply. Spaulding observed two doors leading from the garage to two rooms. These doors were locked. He also observed a door leading from the garage to the kitchen of the main building. That door was open. Spaulding asked the appellant what was in the rooms and he replied "You know already sir". Spaulding asked the appellant for the keys to open the doors of the rooms and the appellant took from his left side trousers pocket two Union keys tied with a bit of cord and handed the keys to Spaulding. Spaulding opened one of those doors with one key and the other door with the other key. Each of the rooms neither of which had any other outlet or connection was found to contain a quantity of crocus bags and knitted plastic bags - a total of 69 in all - and these bags were opened by Spaulding in the appellant's presence. The bags contained vegetable matter which later on analysis by the Government Analyst turned out to be ganja. Spaulding pointed out the vegetable matter to the appellant and told him he believed it was ganja. The appellant made no reply. Spaulding next searched the main building but found no ganja there. Spaulding accompanied by the appellant then returned to the place outside the garage where Det. Const. Smith had taken the parcels and bags of vegetable matter found on the garage floor and in the two rooms. There he arrested the appellant and charged him with possession of ganja. He cautioned the appellant who thereafter said "Mr. Spaulding I only have myself to blame. I am a fool to mek you catch me. One thing I know there is a traitor in the camp, and it is someone near to me".

There were three persons at the Arcadia Drive premises other than the appellant and the police when the search was carried out. The appellant told Spaulding that they were his workers and were not concerned with anything found on the premises. The parcels and bags with their contents were taken to Harmon Barracks where in the presence of the appellant the 52 parcels were placed in a carton which was then sealed. The bags were likewise sealed. On September 13, 1973, the sealed carton and bags were taken to the Government Analyst Dr. McLeod who retained the sealed carton and took samples from the bags. Dr. McLeod later examined the contents of the carton and the samples from the bags and in each case found the vegetable matter to be ganja. He had found the total quantity

of vegetable matter contained in the carton and the 69 bags to be 4,220 lbs. 2½ ozs.

Linda Corcho was arrested on September 6, 1973 and cautioned. She made no statement.

The case for the defence was to the following effect. The appellant and his wife Linda Corcho are the joint owners of premises at 4, Arcadia Drive and reside there. The appellant carries on a bar and club at East Avenue, Greenwich Town and Linda Corcho owns a bar, a grocery and a store in the parish of St. Mary as well as a store on Half Way Tree Road. On August 15, 1973, an employee at the appellant's club informed the appellant that there had been a robbery at the club. As a result on the following morning the appellant went to the club to make enquiries as to what had occurred. He was suffering from an ulcerated stomach and had a "Pneumonia cold". He stayed at the club until September 5, 1973 without returning to his home thinking that his presence at the club would prevent further robberies there. He had left his wife in charge of the house. The domestic staff there comprised two maids and a gardener. A Mrs. Cowie, a friend of his wife, and a lad called Pete also resided in the house. The keys for the house - there was more than one set of keys for the doors - two for each room door - would be kept in the doors and some in a drawer. The appellant did not carry any of the keys from the house with him when he went to stay at the club on August 16, 1973. There was more than one set of keys for the doors of the rooms which open into the garage. One set would normally be in the door and some keys in a drawer. As far as the appellant knew the maids would iron in those two rooms. They changed their clothes in those rooms. Sometimes his wife kept groceries there. She also kept in those rooms things she bought for her business place in the country until she was ready to go there. The gardener kept the lawn mower and other garden implements in those rooms. The appellant did not personally use those rooms. The garage door is never kept locked. At this club there are eight bedrooms in three cottages. He was occupying an apartment of 5 rooms at the club during the period of his stay there and had the services of the cook and other staff at the club. His wife would communicate with him by 'phone or would come to the club. On September 5, 1973, he was asleep when at about 10.30 a.m. Spaulding

aroused him by saying "George get up". He had on trousers and a merino. He was searched by Spaulding who pushed his hand into the right back trousers pocket and took out a handkerchief. From the left front trousers pocket Spaulding took some silver coins. Spaulding felt his two other pockets. There was nothing but the handkerchief and coins in his clothing. Spaulding told him "We find some ganja up at your yard". Spaulding asked "Whe you live?" The appellant said "Down here" meaning the club premises. Spaulding then said "You lie. Yu live at 4, Arcadia Drive." The appellant was then held by the back of the trousers, put into a motor car and driven to 4, Arcadia Drive. Spaulding took the appellant into the hall of the house. On observing some goods on the verandah Spaulding asked for the key. A policeman told Spaulding "No bother with that sir, tek him round so". Spaulding led them to the garage door which he opened. There was a half filled crocus bag on the garage floor with two keys on it. There were also some wrapped parcels on the ground nearby. Spaulding asked the appellant for the key to the door and the policeman said "See two keys yah sah" and handed Spaulding the two keys which he took from off the bag. Spaulding used the keys to open the store room doors. There were some crocus bags containing vegetable matter in both rooms which Spaulding pointed out to him. Spaulding took him into the house and searched all of the rooms. A truck which Spaulding had phoned for arrived and the parcels and bags were loaded into the truck. He was not told that he was arrested or charged but was nevertheless taken in the truck to Up Park Camp and thereafter to Constant Spring Police Station where he was searched and his money taken from him. He was then locked up. The appellant denied handing Spaulding any keys at the Arcadia Drive premises. He denied putting any ganja on those premises. He denied he was ever cautioned and he denied the statements attributed to him by Spaulding and Smith. In fact he denied that Smith was the policeman who was with Spaulding when the latter came to the club that day. The appellant alleged that during the previous year Spaulding had requested from him a loan of $1,000 which request he did not entertain. This allegation was never put to Spaulding in cross-examination for indeed the appellant admitted that he had never told anyone of it before stating this when cross-examined by counsel for the Crown as to

whether any possible motive existed for Spaulding testifying falsely against him.

The appellant produced in evidence two keys (Ex. 10) as being spare keys for the store rooms and as coming from his wife who he said kept the keys for the house, store rooms and garage. He also produced in evidence as coming from his wife Ex. 11 a key which is an exact duplicate of Ex. 1. When the locus in quo was visited at the instance of counsel for the appellant the keys Ex. 10 did indeed open the locked doors of the store rooms whereas the keys Ex. 1 which the prosecution alleged did open the locks on those doors on September 5, 1973 did not now open those doors. Obviously, and this was conceded on appeal, unless Ex. 1 were not the keys which opened those doors on September 5, 1973, during the intervening period the locks on those doors had been changed.

After a detailed examination of the evidence and legal submissions had been made by counsel on both sides during the course of their addresses the learned resident magistrate made findings in the following terms -

> "Court on review of all the evidence has come to the conclusion and feels sure that the witnesses for the prosecution are witnesses of truth and in particular finds the following facts.
>
> (1) That the statements allegedly made by the accused were in fact made by him.
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> (2) That Detective Inspector Spaulding made a preliminary search for weapons at the club in the manner described by him.
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> (3) That the keys were handed to Detective Spaulding by the accused at 4, Arcadia Drive - the accused having taken them from his trousers pocket. That these keys are in fact the keys Ex. 1 and that these keys did in fact open the door of the two store rooms.
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> (4) That 69 bags containing vegetable matter were found in and taken from the rooms.
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> (5) That 52 packets of vegetable matter were found on the floor of the garage.
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> The Court is of the opinion that the failure of Detective Inspector Spaulding in not having taken down the statement of the accused after arrest and caution amounts to a breach of rule 3 of the Judges Rules. The Court thinks

"that in determining whether its discretion whether or not to admit the statements should be exercised must depend on the circumstances of the case. This was a short statement given after caution and a statement given on the evidence which Court accepts - was given voluntarily. Court does not find that there was any intention on the part of Inspector Spaulding to deceive the accused and that there was no unfairness to the accused and has come to the conclusion that the statement despite the breach is admissible in evidence.

Possession: Court finds that the statements on a whole having regard to the context in which they were used - in particular the statement after caution - considered together with the production of the keys by the accused - amounts to a clear admission by the accused - not only that he knew what was in the rooms but that he was in possession of the bags in the rooms. This Court looks upon the 52 packets as merely a portion of the whole of the vegetable matter that was found and finds that mere ownership of the accused of the house does not without more put him in possession of these packets and whereas there is additional evidence to prove his possession of the 69 bags there in none to do so in relation to the 52 packets. In relation to the question of the expert evidence the Court comes to the conclusion that by his experience in relation to the testing of the plant cannabis sativa in the last 2½ years together with his qualification in Chemistry - provides him with the necessary expertise needed for determining whether or not a plant is the pistillate plant cannabis sativa etc. The Court therefore acts upon his evidence in coming to the conclusion that the vegetable matter found in this case was ganja as defined by law.

Court is sure that the accused was in possession of ganja."

On appeal it was firstly submitted by Mr. Ramsay for the appellant that the learned resident magistrate

(a) erred in attaching an exclusively guilty interpretation to the alleged and disputed statements of the appellant;

(b) failed to give proper effect to breaches of the Judges Rules which he found established; further and in the alternative, he misdirected himself as to the proper approach to be adopted if he found that breaches of the Judges Rules were committed in the particular circumstances of the case;

(c) wrongly failed to find, or alternatively omitted to specifically find that there was a breach of rule 2 of the Judges Rules,

and that accordingly the resident magistrate's discretion was not properly exercised in relation to any such breach. These submissions formed the first three grounds of appeal. As to (a) it was contended that the words attributed by the prosecution to the appellants were in each case ambiguous and did not afford the prosecution assistance in proof of the fact of possession of the vegetable matter found at his premises. We are unable to discover any ambiguity in the words so attributed to the appellant. In our view those words are unambiguous and mean exactly what they say. As to (b) and (c) it was conceded by Mr. Andrade for the Crown that there was a breach of rule 2 of the Judges Rules by the failure of Inspector Spaulding and of Det. Const. Smith or of either of them to record in writing the statements they alleged the appellant made prior to his arrest save and except the first statement "Mr. Spaulding you no have fe take me up there, we can have a private talk" which was not elicited as a result of any question put to the appellant. However, in view of the conclusion we have reached in relation to the question of the admissibility of the far more damaging statement alleged to have been made after arrest and caution it is not necessary to consider the effect of the omission of the learned resident magistrate specifically to find a breach of rule 2 of the Judges Rules. The learned resident magistrate found there was a breach of rule 3 of the Judges Rules in respect of the statement alleged to have been made by the appellant after caution and arrest -

> "Mr. Spaulding I only have myself to blame. I am a fool to mek you catch me. One thing I know there is a traitor in the camp, and it is someone near to me."

by reason of that statement not having been recorded in writing sufficiently soon after it had been made. (Spaulding had stated in cross-examination that he had on the following day made a record of that statement in the course of writing his own statement of the transaction). The learned resident magistrate exercised his discretion as he stated in his findings in the light of the circumstances of the case emphasising that it was a short statement consistent with the other evidence accepted by him and the statement was given voluntarily

and would not operate unfairly against the appellant. Mr. Ramsay referred us to the case of R. v. Collier: R. v. Stenning (1965) 3 All E.R. 136 where at p. 138 it was stated by the English Court of Criminal Appeal that breach of the Judges Rules renders evidence inadmissible unless the judge in his discretion otherwise decide. We think the true rule is, and Mr. Ramsay thinks it ought to be the true rule, that where evidence is otherwise admissible a breach of the Judges Rules does not render it inadmissible unless the judge in his discretion so decides. As was said by Lawrence, J. in R. v. Voisin (1918) 1 K.B. at p. 539 -

> "These rules have not the force of law; they are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these rules may be rejected as evidence by the judge presiding at the trial."

Mr. Ramsay urged that the requirement in rule 3 that a record be made in writing of a statement desired to be put in evidence is to ensure the genuineness of the statement as distinct from its voluntariness. We agree. So we think it important, as the learned resident magistrate obviously did, to have regard to the length of the statement and to its nature in the setting of the other evidence in the case accepted as true. It is not desirable to lay down, as Mr. Ramsay would wish us to do, any rule for the exercise of a judge's discretion in this regard. In every case the exercise of the judge's discretion must be based on the circumstances of the particular case. It is to be noted that in the instant case the reliability of the memory of the prosecution witnesses as to the words uttered by the appellant has not been the matter in issue. It was never suggested that the version given by the prosecution witnesses was inaccurate. What was suggested was that entirely different statements were made and that the prosecution witnesses were fabricating damaging evidence against the appellant. We see no reason to interfere with the exercise of the resident magistrate's discretion in relation to the statement made by the appellant after arrest and caution.

It was next submitted that the learned resident magistrate failed to appreciate or deduce the logical effects flowing from the proposition that in criminal law to ground the ingredients of exclusive control for the offence of possession (where occupatio is relied on), actual occupatio and not constructive occupatio is the test and that accordingly mere knowledge would be insufficient to ground possession where actual occupatio was not found. It was further submitted that the learned resident magistrate erred in making a finding beyond reasonable doubt that the appellant had produced keys to the store rooms on the premises and that in any event the learned resident magistrate appeared to have attached too much weight to the issue of the keys bearing in mind that possession of the keys in the circumstances of a house occupied by several person; and that where there was evidence of several sets of keys (at least two to each door) it merely went to the issue of access and was of very little weight as to the possession of the contents of the rooms. These submissions formed grounds 4 and 6 of the grounds of appeal.

It was urged that Spaulding could not have failed upon the preliminary search of the appellant's person at the club to discover the presence of the keys to the store rooms if they were indeed in his trousers pocket and that the learned resident magistrate ought not to have found that the appellant took the keys Ex. 1 from his trousers pocket and handed them to Spaulding when they were in the garage. Had the learned resident magistrate taken that view the statements attributed to the appellant could at the most have shown knowledge that ganja was stored at the premises and would thus have been insufficient to ground a charge of possession. As indicated in his findings the learned resident magistrate accepted Spaulding's testimony that he merely "frisked" the appellant - that is patted the appellant's person - at the club for the presence of a weapon and that in so doing Spaulding would not necessarily have discovered the presence of objects like two keys. We think that it was open to the learned resident magistrate to make the finding he did in this regard having regard not only to the probabilities of the case but also to the impression made upon him as to the veracity of the respective witnesses. Mr. Ramsay contended that even if the learned resident magistrate could

properly find that the appellant produced the keys Ex. 1 from his pocket that fact was not conclusive of control of the contents of the rooms unless it could be shown beyond reasonable doubt that no one else had access to that room or its contents. Mr. Ramsay urged that there must be doubt in the matter for 52 packets of ganja in a wrapped condition with material lying around were found in the garage and the question would arise - from what other source could the ganja in the 52 packets have come but from the locked rooms. Again, it was urged, there was no actual control by the appellant of the premises for he had been residing at the club during the previous three weeks and there were other persons residing at or present at the Arcadia Drive premises where other sets of keys including Ex. 11 (a duplicate of one of the keys tendered as Ex. 1) were kept.

As Mr. Andrade for the Crown pointed out it was a question of fact for the learned resident magistrate to decide whether or not in truth the appellant at no time within the previous period of 3 weeks even visited or resided at the Arcadia Drive premises. Apart from the question of occupation of the house there was also the evidence which the learned resident magistrate accepted that the appellant produced the keys Ex. 1 from his person when asked for keys to open the store rooms as well as the evidence of his statements to Spaulding which altogether indicated that not only did the appellant know that ganja was stored at the Arcadia Drive premises but also that he was in control of the ganja either jointly or severally. In our view the submissions made on behalf of the appellant in grounds 4 & 6 fail.

Ground 5 of the grounds of appeal was abandoned at the hearing of the appeal.

It was next submitted that the information laid against the appellant as the evidence subsequently disclosed and in terms of the findings of the learned resident magistrate is bad for duplicity in that it included two separate offences for possession of which the appellant might have been convicted (a) possession of 52 packets of wrapped ganja found on the floor of the garage and (b) possession of 69 bags of ganja found in the store rooms. This formed ground 7 of the grounds of appeal.

It was contended that in effect the learned resident magistrate acquitted the appellant of possession of the 52 packets of wrapped ganja and found him guilty of possession of 69 bags of ganja on the same information. We will express no opinion as to whether the learned resident magistrate was right in holding that it was not proved that the appellant was in possession also of the 52 packets of wrapped ganja. Suffice it to say that no argument was addressed to us on that aspect of the matter. In our view the information charged one offence of possession of ganja and the learned resident magistrate found that part only of a quantity of ganja found on the premises was proved to be in the possession of the appellant. To apply the words of Widgery, C.J. in Jemmison v. Priddle (1972) 56 Cr. App. R. at p. 234 - "it is legitimate to charge in a single information one activity even though that activity may involve more than one act." It may be observed that no objection was raised in this regard at the hearing before the learned resident magistrate. In our view this ground of appeal is without merit.

The last ground of appeal taken was that the learned resident magistrate was wrong in holding that the Government Analyst was an expert in anything but Chemistry and that he had the necessary qualification to give a deliberative opinion on the plant cannabis sativa; alternatively, that the learned resident magistrate found that the Government Analyst was an expert in one plant only - cannabis - sativa - which proposition is, ex facie, impossible, there being no established basis for comparison. The basis of this submission is that it was necessary for the prosecution to prove beyond reasonable doubt that the vegetable matter found in the possession of the appellant came from the pistillate plant known as cannabis sativa from which the resin had not been extracted. It was conceded by Mr. Ramsay that the Government Analyst, Dr. McLeod, by virtue of his degree of Doctor of Philosophy in Chemistry was well equipped to be accepted by the learned resident magistrate as an expert in that branch of science and therefore competent to express an opinion that the resin had not been extracted from the vegetable matter he examined. Mr. Ramsay, however, contended that as Dr. McLeod did not hold a degree in the science of Botany, had not undertaken any course of special study in that subject and had no experience with plants in general

he was not competent to express an opinion as to the identity of the vegetable matter being of the plant cannabis sativa. Dr. McLeod had testified that he was able to identify the plant cannabis sativa by virtue of having done studies on the botanical aspect of cannabis sativa though he had not done studies in depth in relation to other plants. He said he had done some exploration of the botanical aspects of the plant cannabis sativa and had done comparative studies on that plant as against other plants though not in depth. Having had recourse to information over the past 2½ years or more and having had pratical experience in identifying about 11,000 cannabis sativa plants he considered himself an expert in the identification of that plant.

The question is whether there was evidence upon which the learned resident magistrate could hold that the subject was one upon which Dr. McLeod's competency to form an opinion was acquired by experience. We think that there was such evidence and that it was competent for the learned resident magistrate to accept and to act upon Dr. McLeod's evidence that the 69 bags contained ganja as defined by s. 2 of the Dangerous Drugs Law, Cap. 90. Incidentally, the defence did not seek to contradict Dr. McLeod's opinion by itself adducing expert evidence.

In the result the appeal is dismissed and the conviction and sentence affirmed.