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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 187/87

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

R. v. MARCOS SANTOS

Mrs. P. Levers for the Appellant

Miss Heather Dawn Hylton for the Crown

January 25 & February 18, 1988

FORTE, J.A.

On the 25th of January, 1988 we refused the application for leave to appeal and promised to put our reasons in writing. This we now do.

The appellant was convicted of possession of a salt of cocaine before a judge and jury in the Home Circuit Court on the 14th October, 1987. The facts out of which the conviction arose and upon which the prosecution relied are simple and brief. At about 11.15 a.m., on the 4th April, 1987 two police officers Det. Cpl. Ottie Williams and Sgt. Michael Brooks were at the Tinson Pen Aerodrome in St. Andrew, when a Brown Chevelle Malibu taxi motor car drove into the Aerodrome. In the taxi were, a Jamaican driver, and two foreigners, Perraro - who was seated in the front and the appellant who was seated in the back. The police officers approached the car, and identified themselves to the occupants. Det. Williams then noticed a brown travelling bag on the back seat beside the appellant. On seeing the bag he asked to whom the bag belonged and it was the prosecution's case that the appellant then said "it's mine." The other occupants of the car said nothing. He then

ordered them out of the car, searched the bag in their presence and found therein a sheet with the initial MBC containing a plastic bag with six transparent packages each containing white powdery substance which was later proved to be cocaine, amounting to a total weight of two pounds and four ounces. The strength of the cocaine in respect of each package was described by the Government Analyst as follows:

> "First one had 86.6 cocaine, second one had 95.6, third one had 82.3, fourth had 94.4, the fifth had 93.6 and the sixth had 83.4 cocaine hydrochloride."

Also in the bag, were (i) a black pouch containing a Brazillian passport, Immigration cards and an air-line ticket all in the name of the appellant; (ii) a brown paper bag containing $27,400 Jamaican dollars and (iii) two pairs of pants and three shirts. Det. Williams told the occupants that the powdery substance was cocaine. The driver of the taxi, the Jamaican, then said that he had taken the other two occupants of the taxi from the Mayfair Hotel to Tinson Pen and he didn't know anything about the cocaine. The appellant, and the other passenger, Perraro, said nothing.

The appellant in his defence, denied that he had possession of the bag in which the cocaine was found by Det. Williams. He averred that he was from Brazil and that he came to Jamaica on the 26th March as a tourist and on business. He had travelled to Jamaica with his friend Mr. Perraro whom he had met shortly before leaving Bogota to come to Jamaica. The black pouch and its contents belonged to him but he denied possession of the brown travelling bag which he said belonged to Perraro. He had previously given his personal documents to Perraro for safe-keeping as he had been told by Perraro that it was dangerous for him to keep all these private documents with him. The money found in the travelling bag,

he maintained, belonged to Perraro and himself. He had brought U.S$3,000.00 with him to Jamaica which he had asked Perraro to change. Perraro changed U.S. $6,000.00 in all, $3,000.00 for him (the applicant) and $3,000.00 for himself. He allowed Perraro to keep all the money as he (Perraro) was paying all the bills. The defence therefore amounted to a complete denial of possession either of the brown travelling bag or the cocaine which was found therein.

The gravamen of the complaints at the hearing of this application are contained in grounds 1 and 2 of the appellant's grounds for leave to appeal and for convenience, are set out hereunder:

> "1. That the learned trial judge erred in law in that he misdirected the jury on the vital issue of possession and its meaning in law under the Dangerous Drugs Act and that this improper direction amounted to misdirection in law.
>
> 2. That the learned trial judge failed to warn the jury that before drawing inferences of the guilt of the accused from circumstantial evidence that they should be sure that there was no co-existing inferences which they felt inclined to draw."

The meaning of possession under the Dangerous Drug Act was settled in the case of the D.P.P. v. Wishart Brooks (1974) 2 W.L.R. 413 which was an appeal from this Court to Her Majesty's Judicial Committee of the Privy Council. Lord Diplock in delivering the judgment of the Board explained it in simple and clear terms at p. 415 paragraph A.

> "In the ordinary use of the word 'possession' one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under one's physical control. This is obviously what was intended to be prohibited in the case of dangerous drugs, ... the only actus reus required to constitute an offence under section 7 (c) is that the dangerous drug should be physically in the custody or under the control of the accused."

The mens rea which is necessary is of course the knowledge that what one has under one's physical custody or control is the illegal drug for which one is charged, e.g., ganja or cocaine.

The learned trial judge was obviously aware of the dicta of Lord Diplock and in our view explained correctly, to the jury the meaning of possession and what was necessary for a finding of guilt. At page 9 of the summing-up he stated thus:

> "In ordinary use of the word 'possession', one has in one's possession whatever is to one's knowledge physically in one's custody or under one's physical control. The prosecution must satisfy you so that you can feel sure that this accused, to his own knowledge physically had the bag there in his custody or under his physical control and further that he had knowledge that the parcel in the bag contained cocaine, and the prosecution must prove and must satisfy you that it was cocaine in that parcel. So the prosecution must prove that cocaine was in the parcel, and that the accused man had knowledge that it was cocaine."

For these reasons we found no merit in ground 1 of the application.

The other complaint concerned the learned trial judge's directions in relation to inferences which the jury could draw, specifically in relation to the applicant's knowledge that the bag contained cocaine. These were circumstances where the brown travelling bag which he admitted to be his, was found on the back seat of the motor car beside the appellant, who was the only person occupying that seat.

In addition, the bag contained several items which were specifically identified as belonging to him. There was nothing in the evidence to connect the other occupants of the car with the bag except the allegations of the appellant which were obviously rejected by the jury. The learned trial judge was very careful in directing the jury on several occasions to acquit the appellant if they believed his evidence or if it left them in doubt as to his guilt. One such occasion appears at page 25 and is as follows:

> "If what he has told you, that he did not know that this thing was in the bag and the bag really not belonging to him, but it was Perraro's bag and Perraro was keeping all the things, then it would mean that the prosecution would not have proved the case. If you accept his evidence, then it means that you will have to find him not guilty. If what he has said has made you to be in reasonable doubt about whether it could be true or could be false, it would mean therefore, that the prosecution would not have proved the case so that you feel sure. The only way that you can convict him is if you accept the evidence given by the two police officers as to what was found in the bag and that it was the accused man who acknowledge that the bag was his; then from the mere fact of possession of the bag he had control, possession of the bag, then you can infer from that that the cocaine that was in it - he knew about and must have known that it was in the bag."

It is clear, that the jury rejected the appellant's allegation that the bag was in the possession of his travelling companion Perraro and that consequently it would be Perraro and not the appellant who was in possession of the cocaine. In those circumstances the only reasonable inference that the jury could have drawn from the evidence was that the appellant had knowledge of all the contents of the bag including the cocaine.

This was a case of relatively simple facts which was competently dealt with by the learned trial judge, the relevant issues were adequately dealt with and properly left to the jury who were thus well assisted in arriving at a just verdict.

We therefore refused the application for leave to appeal.