

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL NO. 122/1971

BEFORE: The Hon. Mr. Justice Luckhoo Ag. P.  
The Hon. Mr. Justice Fox, J.A.  
The Hon. Mr. Justice Graham-Perkins, J.A.

REG. v. NEVILLE MAXWELL  
EGBERT MAXWELL  
HEADLEY SWABY

- Possession of Ganja

Frank Phipps Q.C. and Earle DeLisser for Neville Maxwell  
and Headley Swaby.

Ian Ramsay for Egbert Maxwell.

Courtney Orr for Crown

Heard: 13th and 17th March, 1972

FOX, J.A.

On March 17, 1972 this court unanimously agreed to allow the appeals of Neville and Egbert Maxwell. By a majority (Luckhoo Ag. P. and Fox J.A; Graham-Perkins J.A. dissenting) the appeal of Headley Swaby was dismissed. These are the reasons of the Court for its decision.

At 5 a.m. on April 20, 1971, a party of police attached to the Mandeville C.I.D. and including detective inspector Shirley Smythe and detective corporal Winston Walker went to certain premises at Dobson in the parish of Manchester. At the front of these premises, there is a building containing a shop licensed to sell spirits which was operated by Valrie Swaby with the assistance of her husband, the appellant Headley Swaby. Within this building, and at the rear of the shop, are living quarters occupied by the appellant Swaby and his wife. About two chains behind this shop building, there is a dwelling house with a front varandah, and, as one faces the house, with three bedrooms on the left, and two on the right. Separating the bedrooms are a hall opening on to the varandah, and a dining

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room behind the hall.

Both buildings were surrounded by policemen. The shop was searched by detective superintendent Harvey who was in charge of the police party. This case is not concerned with the result of that search. Inspector Smythe and corporal Walker went to the dwelling house. Inspector Smythe knocked at the front door. It was opened by the appellant Egbert Maxwell. The inspector identified himself, told Egbert that he had a warrant under the dangerous drugs law to search the premises, and asked who else was in the house with him. Egbert said that in the front bed room on the left were his brother, the appellant Neville Maxwell, and Neville's girl friend. Egbert also pointed to the second bedroom on the left and said according to inspector Smythe "Headley Swaby in that room, you better talk to him." According to corporal Walker, Egbert said "Piper live inside there, you better talk to him." Swaby is called Piper.

Corporal Walker entered the second bed room. He saw Swaby lying on a mattress on the floor across an open doorway between that room and the one behind it. Corporal Walker told Swaby to get up. Swaby took his trousers and shirt from that door of the room which opened into the hall, put them on, and went with corporal Walker to the hall where Inspector Smythe had remained with Egbert Maxwell. Corporal Walker then went into the first bed room to the left, and there he saw the appellant Neville Maxwell and Elaine Lee lying in a bed. On the orders of the corporal, they too clothed themselves and went with him to the hall. Inspector Smythe read the search warrant and instructed corporal Walker to search the house. Accompanied by the inspector, the appellants and Elaine Lee, corporal Walker searched the rooms in the house. In the third bed room on the left, that is in the room behind the one in which Swaby had been found, the police discovered fifteen large compressed paper parcels and a crocus bag, all of which when opened were found to contain vegetable matter resembling ganja. The parcels varied in weight from 50 lbs. to 60 lbs. The crocus bag weighed 12 lbs. Corporal Walker told the appellants and Lee that the

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vegetable matter was ganja. According to inspector Smythe, Egbert Maxwell said, "Piper you see what happen now?" Swaby said "Ah not saying a thing." Lee said "and I dont know a thing about it - I come yah to sleep with my boy friend." Neville Maxwell said nothing. Corporal Walker arrested the appellants and Lee for unlawful possession of ganja and cautioned them. Swaby said; "As a man ah try dem inform pon them" (per inspector Smythe); "As a man a try dem inform pon you" (per corporal Walker.). The others said nothing. Upon examination subsequently by the Government Analyst, all the vegetable matter in the parcels and the bag was found to be ganja. The police also took charge of a compressor, two signal lamps and three pilot lamps which were in the room where the ganja was found.

The premises are owned by Pearl Maxwell, a widow living and carrying on business in Falmouth, Trelawny. She is the mother of Egbert and Neville Maxwell and Valrie Swaby. Her evidence for the defence was to this effect. During the lifetime of her husband, they carried on business in the shop and lived with their children in the house. Her husband died in 1964. She then ceased shop-keeping and went to live in Falmouth. Headley Swaby and Valrie were married in 1965 and started to live<sup>at</sup> and to keep the shop. She (Mrs. Maxwell) retained control of the house. She reserved for herself the front room on the left which opens<sup>on</sup> to the front varandah. Her son Neville had a key for the front door of this room, and used it with her permission. The room on the right was fully furnished and was used from time to time by her son Egbert who lived and worked at Old Harbour, Saint Catherine. On the 18th April, 1971, she rented to George Pittman, a foreigner; for two months for \$100, the two rooms on the left of the dining hall which are behind the front room reserved for herself. These two rooms are, of course, those in which the police found in one the ganja and in the other the appellant Swaby. Mrs. Maxwell said that having heard something at about 11 a.m. she went to her house at Dobson at 2 p.m. on April 26. She saw a jacket hanging on a nail behind the door of the room. In a pocket of this jacket, she saw papers.

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These were tendered in evidence and are:

- (a) certificate and record of birth of the city of Elizabeth, New Jersey of George Howard Pittman III.
- (b) bill of Holiday Inn, Montego Bay for \$17.09.
- (c) rental agreement dated April, 18th, 1971 of Budget - rent-a-car Jamaica Ltd. for V.W. car BY 932 to George H. Pittman showing car due back by 20th April, 1971.

Under cross-examination, both inspector Smythe and corporal Walker said that they had not seen this jacket in the room at the time of the search. Of course, what is recorded in the notes of evidence does not represent all that the witnesses said at the trial. It should be appreciated that by way of the advantage which he had in seeing and hearing the witnesses, it was essentially a matter for the magistrate to decide if he could, whether the jacket had been overlooked by the police, whether it had been placed in the room after the search, or whether Pearl Maxwell was lying when she said that she had discovered it in the room.

The appellants gave evidence on oath. Neville Maxwell said that when the police arrived, he was sleeping with Elaine Lee in the front room on the left. Egbert was in the front room on the right. They all accompanied the police in the search of the various rooms in the house. The door to the room in which the ganja was discovered was locked with a padlock. The police asked them for the key. They said they did not have it. The police kicked the door. The padlock "burst off". Upon entering the room, he saw for the first time the parcels of ganja, the compressor and the lamps. He had no prior knowledge of their existence in the room. He helped his mother in her restaurant at Falmouth. He also peddled her patties in Falmouth and Montego Bay. Five days before the police visit, he was helping his sister in her restaurant at Christiana. During this period he slept in the room of the house where the police found him. About eight days before the police search he saw George Pittman, an American, occupying the room in which the ganja

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was found. Pittman drove a V.W. motor car. On this aspect of the defence, evidence was given by Hopeton Ferron, the manager of the Budget Rent-a-car (Ja.) Ltd. of Montego Bay. He produced a copy of an agreement between the company and a George Pittman, (whom he did not see, however) for rental of a V.W. motor car lettered and numbered BY. 932. This was one of the cars taken from the premises on April, 26 by the police to the Mandeville police station. Neville denied that Headley Swaby was in the house when the police came. He said that Swaby was not present when the ganja was found, but was brought to the house subsequently by inspector Smythe.

Egbert Maxwell corroborated Neville in substantial respects. Egbert said that he worked and lived in Spanish Town. He slept at his sister's home in Christiana on April 24 and came to Dobson the following day. That night he slept in the room where he was found by the police. He knew nothing about the ganja. Swaby was not in the house that night and was not present when the ganja was found.

In his defence Swaby said on oath that he was in the living quarters at the back of the shop when the police arrived. Inspector Smythe read a Search Warrant to him, and searched the living quarters. Nothing was found. The inspector left him at the shop, returned five minutes later, took him to the house, showed him the parcels of ganja in a room, and asked him who owned them. He replied that he did not know. The inspector said "You dont and me find the four of you up here ah sleep." He denied making the statements attributed to him by the police. He too told the court of the occupancy of the room by George Pittman about three days before the police visit. Valrie Swaby confirmed the evidence of her husband in substantial respects. In an unsworn statement Elaine Lee said simply that she knew nothing about the matter. She must have been believed. The magistrate acquitted her.

The substantial complaint on appeal was that the evidence was insufficient to establish possession of the ganja in the appellants. We accepted the submissions which were made in support of this complaint with respect to Neville and Egbert Maxwell. Even if it could be said

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that they must have known of the existence of the ganja in the room, the evidence in relation to the question of their control over it was equivocal, and consequently incapable of fixing them with possession. This position was conceded by Mr. Orr.

The position of Swaby was altogether different. By virtue of the advantage which he had, and this court has not, of assessing the credibility of the witnesses, the magistrate must have resolved the violent conflict between the evidence supporting the Crown's case and that for the defence of Swaby, by believing the police officers. In the view of the majority of the court the circumstances under which Swaby was found in the house are capable of giving rise to a strong and distinct inference that he knew of the existence of ganja, and was at the time in control of it. We considered that the intrusion by the defence of the activities of the elusive American, Mr. Pittman could not affect this conclusion. In his evidence, Swaby said that there was an air strip at Silent Hill, about four miles from the shop. In all the circumstances, it was well within the competence of the magistrate to understand that the ganja was intended for transportation out of the island by air, and that Pittman was probably a central figure in this illegal traffic. Any conclusion which went beyond such an understanding would be a matter of sheer speculation. The inescapable inference from the police evidence is that Swaby was in the house that night in order to ensure the security of the ganja, and for that purpose was exercising an exclusive and an immediate control over it. In addition, the statement of Swaby upon caution after arrest is capable of being construed as an admission by him of his guilt.