J A M A I C A

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL NO. 95/1971

Before: The Hon. Mr. Justice Luckhoo - Presiding
The Hon. Mr. Justice Edun
The Hon. Mr. Justice Hercules

R. v RICHARD NICHOLSON

Mr. I. Ramsay for the appellant
Mr. H. Downer for the Crown.

September 22, October 20, 1971

LUCKHOO, J.A.:

The sole point raised in this appeal is whether upon a charge of possession of ganja, contrary to s. 7(c) of the Dangerous Drugs Law, Cap. 90, it must be shown affirmatively that the defendant knew that the substance cannabis sativa which he had in his possession came from the pistillate plant.

The appellant Nicholson was convicted by a resident magistrate for the parish of St. Andrew on May 20, 1971, on such a charge. The evidence for the prosecution which the learned resident magistrate accepted need not be stated in any detail save to say that it disclosed that a police constable found a paper parcel containing vegetable matter in the appellant's possession in circumstances in which it could reasonably be inferred, as the learned resident magistrate did infer, that the appellant knew that the vegetable matter contained cannabis sativa. The analyst whose certificate was admitted in evidence certified that the vegetable matter contained ganja, the resin constituent characteristic of the pistillate plant cannabis sativa having been detected on examination and analysis. The appellant's denial that the parcel and its contents were found on him was rejected by the learned resident magistrate. There was no suggestion that the appellant could on visual inspection discover that the vegetable matter or any part thereof came

from the pistillate plant cannabis sativa.

On appeal Mr. Ian Ramsay Counsel for the appellant submitted that the evidence adduced on the part of the prosecution did not raise a prima facie case against the appellant in that it did not show that the appellant knew that the substance found in his possession, cannabis sativa, came from the pistillate plant. He, however, conceded that if it were held that the prosecution was not obliged to establish that fact the appellant's conviction could not be successfully challenged.

The foundation for Mr. Ramsay's submission rests on the decision of this Court in R. v. George Green (1969) 14 W.I.R. 204 to the effect that the term "Ganja" as defined in s.2 of the Dangerous Drugs Law, Cap. 90 is referable only to the pistillate plant known as cannabis sativa, and does not include any part of the staminate plant. Mr. Ramsay contended that on a charge of possession of ganja under s.7(c) of the Dangerous Drugs Law, Cap. 90, the prosecution must prove not only the mental element which is a constituent of "possession" but also the existence of mens rea in the accused which must relate to the exact nature and quality of the thing found in his possession. Support for that contention, Mr. Ramsay urged, was to be found in the judgment of the Court of Appeal in 1952 in R. v. Cyrus Livingston (1952) 6 J.L.R. 95 where it was recognised, as the headnote to the report of that case states, that "to ground a conviction under s.7(c) of the Dangerous Drugs Law, 1942, Law 22 of 1942" (now s.7(c) of Cap. 90) "for being in possession of ganja, the court must be satisfied, not only that the accused person had knowledge that he had the thing in question, but also that he had knowledge that the thing possessed was ganja." Merely to show that the accused person had knowledge that he had cannabis sativa was insufficient Mr. Ramsay argued; it must also be shown that he had knowledge that that substance came from the pistillate plant. Mr. Ramsay by way of contrast referred us to the case of Warner v. Metropolitan Police Commissioner (1968) 2 All E.R. 356, where, in respect of a charge of being in unauthorised possession of drugs, contrary to s.1 of the English Drugs (Prevention of Misuse) Act, 1964, it was held by a majority in the House of Lords that the offence charged was absolute and proof of mens rea was not required. He urged

that the approach taken by the Court of Appeal in R. v. Cyrus Livingston in recognising the existence of mens rea as a constituent of possession of ganja was to be preferred.

Mr. Downer for the Crown submitted that, accepting as correct the approach taken by the Court in R. v. Cyrus Livingston, the existence of mens rea might be inferred as that Court indicated from the fact of possession itself and pointed to the following passages in the judgment of the Court delivered by Sir Kenneth O'Connor, C.J., in that case -

> "It is a principle of the common law that mens rea is an essential element in the commission of any offence against the common law. In the case of statutory offences there is a presumption that mens rea is an essential ingredient; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals. "It is of the utmost importance for the protection of the liberty of the subject that a Court should always bear in mind that unless a statute, either clearly or by necessary implication, rules out mens rea as a constituent part of the crime, the Court should not find a man guilty of an offence against the criminal law unless he has a guilty mind". (Reynolds v. G. H. Austin & Sons Ltd. (1951) 1 A.E.R. 606, 610, 611; Brend v. Wood (1946) 175 L. T. 306; Harding v. Price (1948) 1 A.E.R. 283; (1948) 1 K. B. 695). There are no such express words in the section under consideration: neither do we think that it is a necessary implication from the language used or from the subject matter, that possession of ganja is penalized if the person concerned does not know that what he has is ganja. The omission from the statute of any such word as "knowingly" does not mean that lack of knowledge cannot be a defence. That omission merely has the effect of shifting the burden of proof from the prosecution to the defence. The prosecution has not to prove that the defendant had guilty knowledge: that may be inferred from the fact of possession or from the surrounding circumstances or from both. But it is, nevertheless, a good defence if the defendant proves that he had no knowledge either that he had the thing at all, or of the fact that what he had was ganja (Sherras v. de Rutzen (1895) 1 Q.B. 918, 921; Harding v. Price (supra) at pp. 700, 703 and 704).
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> It is always open to the Legislature to make a prohibition absolute by express terms and to exclude the operation of mens rea as a constituent part of a crime; but, according

"to the canons of construction which the Court is bound, upon the authorities to apply, they have not done so in the subsection under review.

" Merely to say "we did not know that we had ganja" is not however, so easy a way out for persons found in possession of ganja as might at first sight appear. As was pointed out by Devlin J., in Roper v. Taylor's Central Garages (Exeter) Ltd. (1951) 2 T.L.R. 284 at page 288, there are two degrees of knowledge which are sufficient to establish mens rea in cases of this kind. The first is actual knowledge, which the magistrate may find because he infers it from the fact of possession, or from the nature of the acts done, or from both. The magistrate may find this even if the defendant gives evidence to the contrary. The magistrate may say "I do not believe him: I think that that was his state of mind". Or if the magistrate feels that the evidence falls short of actual knowledge, he has then to consider the second degree of knowledge, whether the defendant was, as it has been called, deliberately shutting his eyes to an obvious means of knowledge, whether he deliberately refrained from making enquiries the results of which he might not care to have. Either of these two degrees of knowledge would be sufficient to support a conviction, though mere neglect to make such enquiries as a reasonable and prudent person would make, would not be sufficient. (Roper v. Taylor's Central Garage (Exeter) Ltd. (supra) at pp. 288, 289, Evans v. Dell (1937) 53 T.L.R. 310, 313). "

Mr. Ramsay, however, contended that it was a circular argument to urge that the "fact of possession" could supply the ingredient of mens rea when the establishment of that fact itself (possession) required proof of a mental element in addition to a physical element. We are in agreement with the view taken by the Court of Appeal in R. v. Cyrus Livingston that mens rea is a necessary ingredient in proof of a charge of possession of ganja. Once the prosecution adduces evidence in proof (i) of the "fact of possession", that is that the accused person had the thing in question in his charge and control and knew that he had it, and (ii) that the thing is ganja, it may be inferred that he knew he had ganja. This inference if drawn is in the nature of a rebuttable or provisional presumption arising from the fact of possessionion of a substance the possession of which is prohibited and may be

displaced by any fact or circumstance inconsistent therewith whether such fact or circumstance arises on the case for the prosecution or for the defence. If displaced by reason of any fact or circumstance inconsistent therewith on the case for the prosecution then a prima facie case is not made out. Where a prima facie case is made out, the evidential burden shifts to the defence to displace the inference of knowledge in the accused person even though the legal burden of proof remains throughout on the prosecution.

Turning now to the facts of the instant case it may be inferred that the appellant knew that he had ganja from the "fact of possession" of the vegetable matter which turned out to be ganja. Indeed, for the reason earlier stated it might be inferred that the appellant knew that he had cannabis sativa and such an inference renders it so much more likely than not that the resident magistrate might infer from the "fact of possession" that the appellant knew he had ganja.

In the instant case, the appellant by the very nature of his defence made no attempt to show that he had no knowledge that he had the substance at all or that what he had was ganja. The existence of mens rea which arose by way of inference from the prosecution's case that the appellant had the substance (which turned out to be ganja) and that he knew it was cannabis sativa was therefore never displaced.

The matter might be looked at in this way. Assuming in the appellant's favour that he had no actual knowledge that the parcel contained some part of the pistillate plant cannabis sativa as would constitute ganja within the meaning of s.2 of Cap. 90, by the appellant taking into his possession the substance which he knew to be cannabis sativa and which turned out to contain ganja, without first ascertaining that it did not contain part of the pistillate plant, whether by expert advice or otherwise, it was open to the learned resident magistrate to conclude that the appellant deliberately shut his eyes to an obvious means of knowledge by refraining from making enquiries the result of which he did not care to have in which case there would have been proof of the necessary mens rea.

In these circumstances the conviction of the appellant cannot be said to have proceeded without proof of the necessary mens rea.

The appeal is accordingly dismissed and the conviction and sentence affirmed.

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