J A M A I C A

IN THE COURT OF APPEAL

R. M. CRIMINAL APPEAL No. 48 of 1973

BEFORE: The Hon. Mr. Justice Luckhoo, J.A.
The Hon. Mr. Justice Fox, J.A.
The Hon. Mr. Justice Hercules, J.A.

R. v. RUPERT MILLER & VIVIAN WRIGHT

Howard Hamilton for appellants.
Henderson Downer for Crown.

18th October, 23rd November &
20th December, 1973.

FOX, J.A.:

On November 23, 1973 the appeals were dismissed and the convictions and sentences were affirmed.

The Facts

There is nothing unusual about the evidence which the learned resident magistrate heard, and which led him to convict the two appellants for unlawful possession of ganja. However, questions concerning the burden and the standard of proof in criminal cases, and the capability of evidence in these respects were extensively canvassed before us on October 18, 1973. These questions required a careful consideration and the application of relevant legal principle to the facts of the case. The Court reserved its decision. This was given on November 23, 1973. We promised then to put reasons in writing at a later date. This we now do.

The Prosecution's case

On Tuesday night, January 9, 1973, corporal Crafton McCreath the officer then in charge of the San San police station, was on patrol duty on the main road at Drapers

/in the .....

in the San San area. He was in uniform. With him were special constable Kennie Harris also in uniform, and district constable Anderson, in plain clothes. The police party came to and entered a former main road, now disused, running below and nearer to the sea than the existing main road. Entry to, and exit from this disused road may be made at the two points where the disused road joins the existing road. As the police party went down the disused road, corporal McCreath saw three men. Two were sitting on a retaining wall on the seaward side of the road. The third man was standing on the road very close to the other two seated on the wall. On the approach of the police, the man standing looked around. McCreath put on his flash light. He saw that the man standing was the appellant Wright, and that one of the men sitting on the wall was the appellant Miller. McCreath knew Miller and Wright before. The other man sitting on the wall was a "white man", a "foreigner". McCreath also saw Miller immediately push a white parcel off the wall. It fell at the feet of the men, on the road side of the wall in a space forming a water outlet in the wall. At the same time, Wright walked off. McCreath held him and was taking him back to the other two men. By this time, Miller had gotten to his feet, and the "white man" had grabbed up a binocular and a radio from the ground and ran off. McCreath let go his hold of Wright and chased the "white man" for about 8 yards when he jumped over the wall and escaped. In the course of doing this he let fall the binocular and the radio. McCreath took them up and returned to where the parcel had fallen. McCreath saw both appellants running away. He picked up the parcel, opened it, and saw vegetable matter resembling ganja. He then ran in the direction in which the two appellants had gone. On reacing the main road he saw a parked Fiat motor car. He let the air out of the tyres, and searched for the two appellants without success. He took the parcel of vegetable matter to the police station.

/At about.....

At about 8.25 a.m. on the following day, he saw Miller changing a wheel of the Fiat car which was at the same spot it had been left the night before. McCreath asked Miller why he had run. Miller did not answer. McCreath took him to the station, showed him the paper parcel with the vegetable matter, told him that it was ganja, and that it was "the said parcel that he ran away levaing the night". Miller said he was at home last night. McCreath arrested and charged him for unlawful possession of ganja. Later that day, McCreath saw Wright at Prospect. He cautioned him and asked him "why he had run away from me at Drapers last night". At this stage, and at a later stage when he was taken to the police station by McCreath and shown the paper parcel and its contents, Wright made no statement. He also was arrested and charged by McCreath. The vegetable matter was subsequently taken to the government analyst and found to be ganja.

Special constable Kennie Harris corroborrated corporal McCreath in substantial respect. He too knew both appellants before. As the police approached, Harris saw the three men "all very close". Wright who was standing looked around. Harris also turned on the flash light which he had. He saw the paper parcel fall to the ground, but he could not say who "dropped it". He saw Miller and the "white man" get up from their seated position on the wall. The white man took up his "two things" and ran. McCreath chased him. The two appellants ran away. Harris rushed to where the parcel had fallen. The "white man" escaped. McCreath returned, picked up and opened the parcel. Harris saw that it contained vegetable matter resembling ganja.

Under cross-examination, McCreath agreed that fishing boats are docked on a public beach below the disused road, but he denied that he had seen Wright at the beach on the night of January 9, had asked him what he was doing there, and that Wright had said that he was going to sea. McCreath also rejected the

/suggestion that .....

suggestion that the only reason "I am calling Miller's name because I set up a watch to see who came for the car".

The Defence

Both appellants gave evidence on oath. Wright said he was a bartender and an occasional fisherman. He kept his boat on the beach at Drapers. On the night of January 9, He went to the beach at about 9 p.m. with the intention of going to the sea to fish. He discovered a leak in his boat. He patched the leak and returned home. The patch would take about two hours to dry. He still proposed to go fishing that night. He set out from his home at about 11 p.m. to walk the half mile to the beach.. He travelled by the disused road. He saw three men on the road. He passed close to them. He did not know any of these men. Miller was not one of them. He knew Miller very well. When he was going to the beach at 9 p.m. he saw Miller's car locked up and parked on the main road, but he did not see Miller then or at any time that night, He saw corporal McCreath in civilian clothes and special constable Kennie in uniform. He knew them before. With them was a third man whom he did not know. Wright said he asked these men what they were doing there. They asked him what he was doing there. He said he was going to sea. The three men walked pass him and went up the road. The friend whom he expected to accompany him to sea did not turn up and so he returned to his home and remained there for the rest of that night. On his way home on the second occasion, he did not see the three men he had passed sitting on the wall. Neither did he see McCreath and the other police men again that night. McCreath did not hold him. He was not one of the three men by the wall. He did not run away from the police. On the following day McCreath accosted him at Prospect and took him to the station. There McCreath asked him "where is the white man" and showed him the parcel of vegetable matter and said he was going to charge him with possession of ganja. He said he did not know which "white man" McCreath was taking about, and knew nothing about the ganja.

/Miller said .....

Miller said he was an electrician living at Port Antonio. On January 9, he had driven his Fiat motor car to the Nonsuch cave where he had done some work during the day. On his way home, the engine of his car shut off at about 9.50 p.m. near to the Drapers beach. He checked the engine, discovered that the ignition coil was defective, realized that he could not fix it and so he locked up his car and went home having obtained a drive from a passing motorist. On the following day he returned to his car and found the two front tyres flat. He replaced the defective coil with another one and was in the process of attending to the tyres when corporal McCreath drove up in a jeep and took him at pistol point to the San San police station. There corporal McCreath showed him a parcel and its contents and asked him if he knew it. He replied in the negative. McCreath said, "This look like the same ganja I took from the white man last night". McCreath took him to Port Antonio and locked him up. Miller denied that he was on the disused road on the night of January 9 with Wright, (whom he knew well) and with a "white man", He did not see Wright that night. At 11.15 p.m. he was at home.

The complaint on appeal

The submissions before us repeated the contention which had been made at the trial that the evidence was not sufficient to fix the appellants directly, either severally or jointly, with the possession of the ganja. The evidence was equivocal it was also said, in that even if it were assumed to be capable of an inference that the ganja was exclusively or jointly in the possession of one or more than one of the three men, it was incapable of showing with that certainty required by the standard of proof in criminal cases, the particular man, who was, or the particular men who were in fact so in exclusive or joint possession.

/The Law.....

The Law

The burden upon the crown to prove the guilt of an accused must be carefully distinguished from the evidential burden of adducing evidence. The burden of proving guilt is always upon the crown. It is frequently referred to as the general burden of proof. It is discharged only when a verdict of guilty has been pronounced. The evidential burden, on the other hand, consists of an obligation to produce evidence to raise up a particular issue. The evidential burden may shift, and during a criminal trial may at one or more stages rest upon the crown, and at other stages rest upon the accused. With this difference an accused is never required to go so far as to make out a case. As a general rule, and well known and rare statutory exceptions aside, when an evidential burden rests upon an accused, it is sufficient for him to adduce such evidence as would, if uncontradicted, leave a reasonable tribunal in reasonable doubt as to whether his contention might not be right. As Lord Sankey said in Woolmington v. D.P.P. (1935) A.C. 462, at 481, "If, at the end of and on the whole of the case, there is a reasonable doubt created by the evidence given by the prosecution or the prisoner (concerning the charge) the prosecution has not made out the case and the prisoner is entitled to an acquittal."

Initially, therefore, the evidential burden is upon the crown to raise what is called a prima facie case. This requires more than a scintilla of evidence R. v. Smith (1865), 34 L.J.M.C. 153. But whether or not a prima facie case has been established depends "not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict." Practice Note (1962) 1 All E.R. 448. Consequently, in ruling in favour of the crown upon a submission of no case to answer, the judge is not required to be convinced beyond reasonable doubt, but only to be satisfied that the evidence offers proof of the prisoner's guilt

/on a .....

on a preponderance of probability. As Napier, C.J. puts it in the South Australian case of Wilson v. Buttery (1926) S.A.S.R. 150 at 154.

> "For the purpose of raising up a prima facie case ..... we cannot find that there is any distinction between civil and criminal cases ..... at this stage and for this purpose the question is not are the facts proved by the prosecution capable of any reasonable construction consistent with innocence? But this, do they establish a substantial balance of probability in favour of the inference which the prosecution seeks to draw."

Conclusion

Applying these considerations to the facts of the prosecution's case, I can see no difficulty in the way of the magistrate drawing a probable inference that all three men knew that the parcel contained ganja, that they were exercising a joint dominion and control over the parcel, and that they were therefore probably in joint possession of the ganja. For this reason, I am unable to accept the submission of counsel for the appellants to the contrary. I consider that at the close of the crown's case an evidential burden rested upon the appellants. This does not mean, of course, that if they had not given evidence, the magistrate was bound to convict them. He might have remained unconvinced of their guilt beyond reasonable doubt, in which event, he would acquit them. He could, also, have become satisfied of their guilt beyond reasonable doubt because their failure to testify had converted the prima facie case made out against them into a conclusive one.

This is the critical consideration which the magistrate could very properly have had in mind when evaluating the effect of the evidence given by the appellants. Inasmuch as they did not admit the encounter with the police on the disused road, did not attempt to give an explanation of their presence, and did not seek to controvert the discription of their conduct on the approach of the police, the magistrate was bound to observe that the conclusion to

/which the .....

which the prima facie case tended, as distinct from the prima facie case itself, was not challenged. The position taken up by the appellants in their defence is analagous to that assumed by an accused who does not explain his possession of stolen goods, but denies that possession. If that denial is rejected, the suggestion of guilt towards which the possession of stolen goods may tend has been unaffected by the evidence for the defence, and the court must then consider how far it is prepared to carry the suggestion of guilt, and come to its verdict in the light of the general burden of proof which the law places upon the crown.

The position is the same here. The magistrate must have rejected the appellants' account of their activities that night, and have been satisfied with the truthfulness of the police evidence. He would then have been required to judge whether the police evidence reached that degree of cogency demanded in a criminal case before an accused person is found guilty. "That degree", said Lord Denning in Miller v. Minister of Pensions (1947) 2 All E.R. 372 at 373, "is well settled." Lord Denning continued: "It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice."

In my consideration, the suggestion that the evidence is incapable of showing the particular man who was, or the particular men who were in exclusive or joint possession of the ganja falls within the category of "fanciful possibilities" envisaged by Lord Denning. On the evidence, any number of positions are possible. Some were described in the submissions before us. Typical of these

/is the .....

is the position where the ganja could have been brought to the scene by one of the appellants for sale to the "white man", the other appellant being a mere onlooker. In my opinion, giving due weight to the advantage which he had in seeing and hearing the witnesses, the magistrate was in a position to discard speculations of this nature as mere possibilities which were not in the least probable.

The critical question before the magistrate was whether on the evidence he could make a sure inference that both appellants were in joint possession of the ganja. In this respect he was entitled to consider that there was nothing in the behaviour of the three men which affected the basic inference of probable joint possession. The action of Miller in pushing the parcel off the wall does not necessarily achieve this result because of the instinctive and equivocal character of that act, and also having regard to the flight of all three men. A position of exclusive possession in one or the other of the men might have been described, for example, if one man had taken up the parcel and had run away, or had attempted to conceal it on his person, and if the others had held their ground and given an exculpatory explanation of their presence. Other factual situations can be imagined sufficient to alter the picture of joint possession which is described by three men converged around a parcel of ganja at night along a disused road who run away on the approach of the police leaving the incriminating material behind. But no such factual situation emerged.

In my view therefore, the magistrate could properly have drawn the sure inference from the evidence before him that both appellants were in joint possession of the ganja. For this reason, I agreed that the appeals should be dismissed.

/Luckhoo, J.A.:.....

LUCKHOO, J.A.:

I have read the judgment of Fox, J.A. and am in susbstantial agreement with the views he has expressed therein. I also agree with the conclusion he has reached.