JAMAICA

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL No. 14/71

BEFORE: The Hon. Mr. Justice Fox, J.A., (Presiding).
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Hercules, J.A.

REGINA vs. SHIRLEY HAYE

and

BERESFORD HAMILTON - Unlawful Possession of Ganja

Horace Edwards Q.C. for appellant.

Courtney Orr for Crown.

January 25; March 10, 1972

FOX, J.A.

On the night of Friday 19th March, 1971 a number of policemen, including Detective Corporal Esric Grant and Sergeant Samuel Green were on duty at a road block on the main road at Gutters in the parish of Saint Elizabeth. At about 1.30 a.m. a motor car driven by Haye was stopped at the road block. Seated in the front with Haye was Hamilton, the admitted owner of the car. Seated in the back were Nation, Thompson, and Ashley. Detective Grant identified himself and informed the occupants of the car that a search was being made for illegal firearms, and in respect of breaches of the dangerous drugs law. The occupants were ordered from the car and placed facing the vehicle. On the floor of the back section of the car, Detective Grant found a travelling bag in which was a partially opened paper parcel containing vegetable matter resembling ganja. He asked the occupants who was the owner of the bag. No one answered. He pointed out the vegetable matter and told them that it was ganja. No one spoke. He attempted to open the trunk of the car. It was locked. He asked and Haye gave him keys. He opened the trunk with one of these keys. In the trunk was a large crocus bag, the mouth of which was open, revealing vegetable matter resembling ganja. Detective Grant asked the occupants of the car who was the owner of the bag. No one answered. He pointed out the vegetable matter and told them it was ganja. Again, all remained silent. He asked Haye who was the owner of the

car. Haye said Hamilton. Hamilton admitted this. Detective Grant then arrested all five occupants of the car for possession of ganja. Upon caution, each accused said nothing. Sergeant Green corroborated Detective Grant in all essential respects.

At the trial, all the vegetable matter found in the car was proven to be ganja; weighing $4\frac{1}{2}$ lbs in the crocus bag and $3\frac{3}{4}$ lbs in the travelling bag. At the end of the Crown's case, the magistrate ruled that there was no case against Nation, Thompson, and Ashley. They were discharged. Called upon to answer, Hamilton gave evidence on oath. He said he was an electrician living at Black River and working at Revere. At about 10.30 p.m. on 19th March, 1971, he was at Junction with Ashley, Nation and Haye. They were having a drink. Thompson asked for a drive to Tombstone. He was coming from Milk River and had the travelling bag and the crocus bag with him. Hamilton claimed that he did not know Thompson, but that Nation said that he did. Hamilton agreed to give Thompson a drive in the car. With his permission, Thompson put the crocus bag in the trunk and came into the back seat of the car with the travelling bag. They left Junction at about 11.15 p.m. He did not know what was in the bags until their contents were pointed out to him by the police at Gutters. Under cross-examination, Hamilton admitted that he had seen the bags when they were brought into his car by Thompson. He had seen ganja before. He was frightened and that was the reason why he had said nothing when the contents of the bags were pointed out to him. He had spent 15 minutes at Gutters. During this time he did not get a chance to say who owned the bags. He had spent 15 minutes in the Guard room at Santa Cruz. During this period he was not too frightened to speak, and had told Detective Grant that the bags belonged to Thompson. In his defence, Haye made an unsworn statement. He said that he had driven the car from Black River to Junction with Hamilton, Ashley and Nation. They had drinks there. Whilst they were on the Alpart road coming back, he saw a hand wave. Hamilton told him to stop. He asked Hamilton if he knew the man. Hamilton said no. Nation said he knew him. Haye said he asked Hamilton and Hamilton agreed to give the man a lift. Hamilton told the man to put the crocus bag in the trunk. The man came into the car with the travelling bag. Haye said that he did not know what was in the bags. By implication, the Magistrate was left to understand that the man in Haye's statement was Thompson.

On appeal, it was contended that the Crown had not discharged the burden of proving that the appellants were in possession of the ganja found in the car because it had not been established that the appellants, either singly or jointly, were in control of the bags or that they knew that they contained ganja. This contention is based upon the accepted law in this jurisdiction. In R.M. Criminal appeal 162 of 1970 Reg.v.Daniel Connell of 22nd October, 1971, (unreported) this was said at p.6

> "In relation to offences under the Dangerous Drugs Law, numerous decisions of this Court and the former Court of Appeal have affirmed that possession is a complex concept involving control and knowledge. To convict on a charge alleging possession of ganja, the Court must be satisfied that the accused was exercising control over the incriminating matter and 'had knowledge not only that he had the thing, but had knowledge also that the thing possessed was ganja.' (vide O'Connor C.J. in R. v. Cyrus Livingston (1952) 6 J.L.R. p.95 at p.98). In that case control was described as the 'fact of possession' - that is, the factual element in the complex concept of possession - and knowledge as the essential mental element in the commission of the offence which was not absolutely prohibited by the legislature so as to exclude mens rea as a constituent part of the crime. Since 1952, this basic position in which knowledge is an essential element of the offence, has been restated in case after case. It can be altered only by legislation or the pronouncement of a higher judicial authority."

The first question therefore is whether the appellants had control of the ganja in the car. Hamilton as the owner, and Haye as the driver, could properly be regarded as having joint physical control of the car. This in turn gave rise to a very strong inference of fact that they were also in joint control of everything in the car including the ganja. The fact that three other persons were in the car with Hamilton and Haye did not weaken this inference. That fact enlarged the inference. For at the time of the police investigations at Gutters, no one said or did anything from which an inference of individual responsibility could have arisen. The police were presented with an entirely passive reaction on the part of the five occupants of the car. In this negative situation the only reasonable inference which is capable is that all five were in joint control of the ganja. For this reason, we agree with the contention of Mr. Edwards that the magistrate should not have discharged Nation, Thompson and Ashley at the close of the Crown's

case. Mr. Edwards described this as a tactical error. We think the mistake more fundamental. It was a failure in the magistrate to perceive that in the particular circumstances, the proper inference of fact which arose with respect to the purely physical situation of control was that all five persons were prima facie jointly concerned and answerable. All five should therefore have been called upon for a defence. But the fact that three were erroneously discharged does not mean that the other two were not properly called upon, or that the Crown's case against them was in any way weakened.

The next question is whether the requisite knowledge in the appellants had been established. As will be apparent from the passage quoted above in R. v. Connell - in Jamaica, the mental element in possession of dangerous drugs which the prosecution is required to prove is knowledge in the person exercising, or in a position to exercise control, not only of the existence of the substance, but also of its qualities. In short, the prosecution must prove guilty knowledge or mens rea in the accused. This is the extreme position recognized by Lord Pearce in Warner v. Metropolitan Police Commissioner /1968/ 2 All E.R. 356 at 388 as capable of opening to serious impairment the efficacy of a law intended to prevent by penal sanctions the unauthorised possession of dangerous drugs. It is a position significantly different from that which obtains in England where for the purpose of the Drugs (Prevention of Misuse) Act, 1964 "the term 'possession' is satisfied by a knowledge only of the existence of the thing itself and not its qualities," and where "ignorance or mistake as to its qualities is not an excuse" (Lord Pearce ibid). This difference in the concept of possession perhaps explains the difference of approach of the courts in both countries to the problem of proof. In Jamaica, guilty knowledge "may be inferred from the fact of possession or from the surrounding circumstances or from both." (R. v. Cyrus Livingston 6 J.L.R. 95, at p.99.) An evidential burden would then devolve upon the defendant to show "that he had no knowledge either that he had the thing at all, or of the fact that what he had was ganja."(p.99 ibid). He need do no more than raise up a doubt concerning the Crown's case. See also R. v. Richard Nicholson R.M. Cr. A. No. 95/71 of 20th October 1971 and R. v. Daniel Connell (ibid). This is the "half-way-house" - described by Lord Pearce in Warner at p.386, which that learned judge found irreconcilable with the speech of Viscount Sankey L.C. in Woolmington v. Director of

Public Prosecutions [1935] 1 All E.R. 1 at p.8 and which he was therefore compelled to conclude was not maintainable. Lord Reid however, in his judgment generally, and in his views on the question of the onus of proof particularly, (at p.367 ibid) would seem willing to give unrestrained approval to the law as it has been developed in this court. Lord Wilberforce also, whilst specifically eschewing any onus upon the accused to show innocent custody, was prepared to ascribe to the fact of physical control a significance not altogether dissimilar from that recognized in this court. In Sweet v. Parsley [1969] 1 All E.R. 347 Lord Reid saw no reason to alter anything which he had said in Warner v. Metropolitan Police Commissioner. In the course of his opinion that the appellant could not be concerned in the management of a house which was used for the purpose of smoking cannabis if she had no guilty knowledge of that purpose, Lord Reid said at p.351

> "The choice would be much more difficult if there were no other way open than either mens rea in the full sense or an absolute offence; for there are many kinds of case where putting on the prosecutor the full burden of proving mens rea creates great difficulties and may lead to many unjust acquittals. But there are at least two other possibilities. Parliament has not infrequently transferred the onus as regards mens rea to the accused, so that, once the necessary facts are proved, he must convince the jury that, on balance of probabilities, he is innocent of any criminal intention. I find it a little surprising that more use has not been made of this method; but one of the bad effects of the decision of this House in Woolmington v. Director of Public Prosecutions([1935] A.C.462) may have been to discourage its use. The other method would be in effect to substitute in appropriate classes of cases gross negligence for mens rea in the full sense as the mental element necessary to constitute the crime. It would often be much easier to infer that Parliament must have meant that gross negligence should be the necessary mental element than to infer that Parliament intended to create an absolute offence. A variant of this would be to accept the view of Cave, J., in R. v. Tolson([1886] All E.R. Rep. 26 at p.34.) This appears to have been done in Australia where authority appears to support what Dixon, J., said in Proudman v. Dayman ([1941] 67 C.L.R. 536 at p.540.)
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> > 'As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence.'

> It may be that none of these methods is wholly satisfactory, but at least the public scandal of convicting on a serious charge persons who are in no way blameworthy would be avoided."

Lord Pearce repeated the misgivings engendered by the opinion of Lord Sankey L.C. in Woolmington v. Director of Public Prosecutions as to the possibility of taking the "sensible half way house" of permitting the defendant to negative guilty knowledge in some "so-called absolute offences", and said, in effect, that he would "be happy to be persuaded" that his misgivings were insubstantial.

It is obvious that with respect to the concept of, and to the proof of the mental element in possession, the law in England and in this jurisdiction has evolved along divergent lines. Ordinarily, this court would not hesitate to be guided by a decision of the Court of Appeal or the House of Lords, but having regard to the difference of judicial opinion in England in this area of the law, and taking into account the length of time, - over twenty years - during which the principles laid down in R. v. Cyrus Livingston have been followed in this country, this court has taken the view that reconciliation of the position in Jamaica with that in England, if such a reconciliation is to be effected - must be left to a decision of the Judicial Committee or an enactment of the legislature.

Applying the settled law in this jurisdiction to the facts of this case, it is apparent that there is abundant material from which the magistrate could have inferred that mens rea in the appellants existed. Firstly, the magistrate must have felt entirely sure that they were jointly in physical control of all the ganja found in the car. This, as we have shown, was a conclusion well within the competence of the evidence adduced by the prosecution. From this fact of physical control, the magistrate was entitled to infer guilty knowledge in both appellants. This inference is strengthened by the consistent reaction of silence which the appellants maintained, on the Crown's case, right up to the time of arrest. As a matter of sheer common sense, it is reasonable to think that if the appellants were in no way concerned with the ganja in the car, if they were not aware of its existence, or if knowing that there was something in the bags, they were nevertheless ignorant of the fact that it was ganja, they would have uttered some disclaimer the moment the discovery was brought to their attention by the police. It is fanciful to suggest as Mr. Edwards suggested that shock and fright had so paralysed their vocal and mental faculties as to render them speechless.

This court has not shrunk from giving legal effect to this common sense position. It has said that silence in these circumstances strengthens the inference of possession - R. v. Maragh /1964/ 6 W.I.R. 235, 239; is "conduct which the magistrate may properly take into account in determining the question of guilt" - R.v. Monica Williams (R.M. Cr. Appeal 77/70 of 10th July 1970 unreported); acquires an "evidential and therefore rebuttable significance" - R. v. Connell. Prima facie therefore, the evidence in the Crown's case was capable of supporting a finding that the appellants were knowingly in control and therefore in possession of the ganja in the car.

In an endeavour to destroy the adverse inference which rendered that evidence so capable, the appellants testified; Hamilton on oath, and Haye by way of an unsworn statement. The first observation to make in connection with this testimony is that it would have been entirely competent for the magistrate to disbelieve and therefore reject it on the basis of the advantage which he had in seeing and hearing them. From their demeanour he could have concluded that they were entirely unworthy of credit. This court could not reverse such an assessment because not having seen and heard the witnesses, it is not in a position to judge their truthfulness. But the demeanour of the appellants was not the only mode available to the magistrate of forming adverse conclusions as to their credit. He could have had regard to the way in which their defence was conducted. He could not have failed to notice that at no stage of the cross-examination of the two policemen was the slightest inkling given of the substance of the defence which both eventually advanced, namely that the ganja had been brought into the car by Thompson. It would be extremely surprising if the magistrate had not wondered at the tender solicitude both appellants had shown towards an individual who in repayment for their kindness in giving him a lift, had placed them in a position of jeopardy; and whom, as they both claimed, they did not know before that night. Reflecting in this manner the magistrate could not have avoided the gravest doubts as to the truthfulness of the appellants. Other doubts, equally substantial, stem from the circumstance that only at the end of his cross-examination, did Hamilton divulge that on the way from Gutters to Santa Cruz station he had told a constable who was the owner of the bags, and that, in the Guard room at Santa Cruz, he had informed detective Grant that the owner was Thompson. This was at no time suggested to detective Grant. There is everything to indicate that under the pressure

of cross-examination Hamilton had deliberately lied. The doubts concerning Haye are more straightforward but no less devastating. He told no constable that Thompson had brought the ganja in the car. Even at his trial this was left to be inferred.

In the light of these considerations, we were satisfied that neither in his assessment of the evidence, nor in his application of the relevant law was the magistrate shown to have been in error in finding both appellants guilty. For this reason we dismissed the appeals and affirmed the convictions and sentences.