J A M A I C A

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL No. 25/1971

BEFORE: The Hon. Mr. Justice Luckhoo, Presiding
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

REGINA v. WISHART BROOKS & GARY PALMER

Ian Ramsay, for the Appellant Brooks
Howard Hamilton and Patrick Atkinson, for the Appellant Palmer
Henderson Downer, for the Crown

2nd July 1971

GRAHAM-PERKINS, J.A.

On the 26th of May last we allowed this appeal against the conviction and sentence of the appellants on an information which charged them jointly with possession of ganja contrary to section 7(c) of Cap.90. We promised to put our reasons in writing and, accordingly, we set them out hereunder.

At the trial of the appellants before His Hon. Mr. Lloyd Ellis Resident Magistrate for Trelawny, the prosecution led evidence through three material witnesses. From the evidence-in-chief and cross-examination of these witnesses there emerged the following pictures: On the 7th October, 1970 Cpl. Lakeman, Constable Hemmings, Cpl. Wynter and other police officers set out in two cars from Rio Bueno for Braco in Trelawny arriving there at about 11.30 a.m. On reaching a point on the main road about one-quarter of a mile east of a point where a road leads from this main road to the Braco airstrip Cpl. Lakeman saw a Transit Ford Van X 559 parked on what appears to be a lay-bye some 20 yards ahead. Lakeman brought his car to a stop and he and Hemmings got out and, armed with guns, ran towards the parked van. As they did so, either four men (according to Lakeman and Hemmings), or two men (according to Wynter), came from the cab of the van and ran into some bushes. The appellant Brooks, on Lakeman's evidence, was one of those four men. According to Wynter, however, Brooks did not run from the van.- "Brooks was held around the steering wheel". However, when Lakeman reached the van he saw no one in it. He opened a door in the

body of the van and saw some eighteen crocus bags and one plastic bag from which emanated what he described as a strong odour. He could not determine, without opening the bags, what they contained. At first he thought he "was smelling dry bush", but later he thought the odour was that of ganja. It is of some importance to note here firstly, that Lakeman did not appear to have detected any particular odour until he opened the door of the body of the van, and secondly, that there was no means by which one could see anything inside the body of the van without opening the door. Shortly after the discovery of the bags in the van Hemmings, who had gone in search of the men, came up to the van holding the appellant Brooks. Lakeman questioned Brooks about his connection with the van. Brooks explained that a man named Reid, the owner of the van, had employed him to drive the van to Brown's Town, that on reaching there Reid took the van leaving him (Brooks) at Brown's Town, that Reid returned with it loaded as it was, and handed it back to him and told him to drive it to Braco. Brooks denied ownership of the bags, and any knowledge as to their contents. The appellant Palmer who was not identified as one of the men seen running from the van, was discovered to have been under the van when it was pushed from its position. He said, on being questioned by Lakeman, that he was hungry and had approached the men in the van "to beg something" but on seeing armed policemen approaching he sought refuge under the van.

The two appellants, together with the bags, were taken to the Falmouth police station where, in the presence of the appellants, Lakeman opened the bags. In each Cpl. Lakeman saw vegetable matter resembling ganja. He sealed the nineteen bags. He then arrested the appellants and charged them with possession of ganja. The bags were taken to the Government Analyst who took a sample of the contents of each. He certified that his examination revealed the contents of the bags to be ganja.

Lakeman, no doubt as a result of what the accused Brooks had told him, saw and spoke with the owner of the van. This person, Reid, was not called by the prosecution. This, then, was the case for the Crown. At this point, Mr. Ramsay for Brooks and Mr. Hamilton for Palmer submitted that no prima facie case had been made out to justify the learned Resident Magistrate in calling upon either appellant. In a somewhat lengthy ruling in writing the Resident Magistrate did not uphold the submission. For the sake of

completeness it is desirable to set out certain extracts from the Resident Magistrate's ruling:

(a) "It is true that there are discrepancies between the statements of the three policemen. But to my mind these discrepancies do not really affect the important fact that the two accused were on the scene where the van was found. Furthermore the fact that the accused were apprehended by the officers at the scene was not challenged. The men were apprehended after they were seen to run from the vehicle."

(b) "What if in deference to the principle I say that Brooks did run or did not run? Where would that leave the defence? That he did or did not run would not assist Brooks bearing in mind that he said he was the driver. I hold therefore that the evidence led by the Crown establishes that the two accused were in the van and were seen by the police. Now that I have come to the above conclusion a question of law now arises as to whether the accused were in possession of the ganja ..."

(c) "The submission was that to constitute possession ... three principles must be satisfied; exclusive control, animus possidendi, knowledge that there was possession of the thing and knowledge of what was possessed. ... It is now necessary to examine carefully whether these principles are satisfied."

(d) "Lakeman stated that the accused Brooks said 'a man named Reid employed me to drive the van to Brown's Town. Reaching Brown's Town Reid took the van and left me at Brown's Town. Reid came back with it loaded as it was handed it back to me and told me to drive to Braco'. The defence has not denied making that statement - in fact proved by the Crown. In the circumstances was Brooks in possession of the loaded van? It is of some moment that Brooks was not an ordinary porter. He was the driver of a vehicle and was in occupation of that vehicle from Brown's Town to Braco. He was seen in the van. I cannot see a man in control of a van as its driver for such a distance and in occupation of that van described as only being in mere custody. In other words, it is my opinion that Brooks cannot be said to be a subordinate in the sense the defence seeks to put forward. I do not accept Palmer's story that he was merely seeking food. I believe that he was in occupation with Brooks and two others who were not apprehended."

(e) "I hold that Brooks driving the van from Brown's Town and both himself and Palmer occupying the van for that distance is 'the more' required to ground possession in both accused ... Having decided that the accused were in possession did they have knowledge that what they possessed was ganja? Was there mens rea? On this point the case of R. v. Livingston is very instructive. In that case it was held that there are two degrees of knowledge which are enough to establish mens rea in a case of this kind. Actual knowledge which may be inferred from the fact of possession or from things done or from both. The second degree of knowledge, i.e. where the defendant deliberately shut his eyes to an obvious means of knowledge. I have no hesitation in this case in finding that the accused had actual knowledge that they had ganja. I come to that conclusion in deference to a statement in the Livingston case - 'There was enough ganja to fill half the sack ... It would be remarkable if such a quantity of ganja passed unnoticed when handled even in the dark'. In the instant case it is not half a sack of ganja but nineteen bags and so the cited statement in my opinion is most applicable to the case."

The record discloses that "Defence calls no witnesses but makes a statement from the dock". Brooks made an unsworn statement in which he said "What I told Lakeman was true. I did not run from the van. Lakeman held me around the steering wheel."

Palmer, too, made an unsworn statement. He said "I was not in the van. I went to beg something and when I saw the men coming with guns I went under the van side to hide."

At the close of the case for the defence the record discloses that the learned Resident Magistrate said "I do not accept the stories put forward by the accused. I believe the police statements of Lakeman and Hemmings."

It is now necessary to examine the above quoted extracts in order to determine firstly, the precise factual situation which the learned Resident Magistrate found to be established by the evidence, and secondly, how he related the law to that factual situation. We observe, parenthetically, that his ruling on the no case submission quite clearly involved a certainty and finality of resolution of all issues in favour of the prosecution. Unquestionably, this must have effectively precluded

him from forming any balanced and impartial assessment of the unsworn statements of the appellants. That this is so, appears from his "finding" noted above: "I do not accept the stories put forward by the accused. I believe the police statements of Lakeman and Hemmings". But having accepted Lakeman's evidence as to the admission by Brooks this evidence would have been receivable to establish the truth of what Brooks said. It is not easy to understand, therefore, what the Magistrate meant when he said that he did not accept the "story" put forward by Brooks. Neither Mr. Ramsay nor Mr. Hamilton invited us to consider this aspect of the case.

Extracts (a), (b) and (e): These extracts make it clear that the learned Resident Magistrate reached the conclusion that both appellants travelled in the van from Brown's Town to Braco. As far as the appellant Palmer is concerned there is clearly not a scintilla of evidence from which the Magistrate could have drawn any such conclusion. This conclusion must have been born of the wildest speculation. As to Brooks the conclusion was perfectly legitimate. Although Brooks did not, in so many words, say that he had driven the van from Brown's Town to Braco the inference that he had done so was inescapable.

Extract (d): The Magistrate is here saying that he finds it to be the fact that Brooks told Lakeman at Braco exactly what Lakeman quoted Brooks as having said. Indeed Brooks maintained in his unsworn statement that what he had said to Lakeman was true. The Magistrate finds further, apparently on the basis of what Brooks admittedly said to Lakeman, and on the further basis of his finding that Palmer had travelled with Brooks from Brown's Town to Braco, that the relationship of Brooks and Palmer to the van was a relationship involving something more than "mere custody". It is by no means clear to what fact the Magistrate was adding this "something more". Whatever the relationship was, it was, however, by his finding, limited to the van. So that up to this point it may be said that he has found both Brooks and Palmer to have been in occupation of the van.

Extract (e): It is not a little difficult to follow the reasoning of the Magistrate here. Having found that the "occupation" of the van by Brooks and Palmer over the distance between Brown's Town and Braco was "the something more" required to fix them with "possession", he posed the question: "Did they have knowledge that what they possessed was ganja?"

His further question: "Was there mens rea?" must be taken to be a re-statement of the first question in different terms. He then turned to R. v. Livingston, 6 J.L.R. 95, for the answer. But certainly it was imperative for him, before seeking an answer to the question as to mens rea, to find whether the appellants, or either of them, were in possession of the 19 bags of ganja in the van. We will assume, nevertheless, that he did so find. He arrived at that conclusion in this way: The accused were in occupation of the van. They had actual knowledge of some fact. This actual knowledge was to be inferred from the "fact" of occupation.

As to the statement by Brocks the Magistrate appears from his findings to have treated this as an admission that Brooks drove a loaded van from Brown's Town to Braco, and no more. He does not appear to have addressed his mind to the implications of this statement. We say this because he makes it clear that his inference of "actual knowledge" was founded on the "fact of possession". It would follow, therefore, on his findings, that he identified occupation of the van with possession of the bags in the van. There were two possible implications contained in Brooks' statement to Lakeman. Firstly, that he was aware when he left Brown's Town that the van was loaded. On this interpretation it would have been necessary for the Magistrate to consider the relevant circumstances with a view to drawing certain inferences. For example, did Brooks, apart from being aware that he was being asked to drive a loaded van, know what the load comprised? If he did not know, did he have an opportunity to ascertain the nature of this load to which he deliberately shut his eyes? Or, again, did he merely neglect to make such enquiries as a reasonable and prudent man would make? The other possible implication is that Brooks first became aware of the nature of the load, as distinct from the fact of the load, when he saw the bags in the body of the van at Braco. His statement could, in this case, have been interpreted to mean: "I have, on Reid's instructions, driven this van, loaded as it is now, from Brown's Town. I was aware that it was loaded but I did not know that the load comprised these bags, nor did I know what these bags contained." In this connection it is not without significance that Reid, the owner of the van, and whose name was given to Cpl. Lakeman immediately upon the apprehension of Brooks,

was not called as a witness by the prosecution. Brooks' statement was found by the Magistrate to have been made, and indeed remained unchallenged by the prosecution.

We arrive, nonetheless, at this point. The factual situation as found by the Magistrate is as follows: Brooks and Palmer set out from Brown's Town in a loaded van which Brooks drove to Braco on the instructions of Reid. From this fact Brooks and Palmer are found to be in occupation of the van. And from this fact of occupation over that distance Brooks and Palmer are found to be in possession of the 19 bags found in the van.

Since the Magistrate relied on R. v. Livingston (supra) for an answer to the question that he had posed for himself it becomes necessary to ascertain precisely what that case decided with regard to this question. The two relevant questions which the Court of Appeal sought to answer in Livingston's case were:

(a) Does possession in section 7(c) of the Dangerous Drugs Law require that a defendant, before he can be convicted, must be shown to have had knowledge that he had the thing in question?

(b) If so, must a defendant, before he can be convicted, be further shown to have had knowledge that the thing which he had was ganja?

In the Court's view the answer to both questions was in the affirmative because it concluded that the prohibition contained in the section was not absolute. In resolving the question whether there was evidence of knowledge in the appellant in that case upon which the Magistrate could properly have found him guilty, the Court said (at p. 100):

> "The defendant, so he says, was paid one shilling and sixpence for its carriage. There was nearly enough ganja to fill half the sack. It was first put inside the bus and later was moved on to the top of the bus by the appellant where it travelled with a bed and a mattress. It would be remarkable if such a quantity of ganja passed unnoticed when handled, even in the dark."

It is this passage that, in the Magistrate's opinion, in the instant case, was "most applicable to the case". From that passage, however, it is demonstrably clear that the crucial fact was that the accused had handled the bag containing the ganja. Unless, in the Court's view, he had x-ray vision, how else could the appellant be said to have had the means of

knowledge necessary. There was, however, in the instant case, no evidence of any facts from which the Magistrate could infer that either Brooks or Palmer had laid hands on any of the bags in the van. We fail, therefore, to see the applicability to this case of the passage above quoted.

The authority of Livingston's case, so far as it enunciates the principles above stated, has never been doubted in Jamaica. Indeed, it has been consistently followed by this Court and its predecessor ever since the decision was handed down nearly twenty years ago. What has been questioned, and repeatedly so, is the application of the principles enunciated therein to the facts as found. That, however, is not our concern.

From the factual situation as found by the Magistrate it is not easy to understand his conclusion that Brooks and Palmer, or either of them, had actual knowledge of the contents of the bags. It may be that Brooks at any rate did, but it cannot, in our view, be put any higher than that. Equally consistent with that factual situation is the mere neglect of Brooks to enquire of Reid as to the nature of the load he was being asked to take in the van. Such neglect in the view of the Court in Livingston's case (see p.99), as indeed in the view of this Court, would not be sufficient to fix either Brooks or Palmer with the requisite knowledge.

But the matter does not end there. An even more vital question to be examined is whether in the circumstances of this case Brooks can be said to have acquired possession of the 19 bags of ganja, whatever may be the conclusion as to the relationship between Brooks and the van. For the purpose of finding an answer to this question we will assume, without deciding, that Brooks acquired possession of the van when Reid "handed" it to him at Brown's Town. Did he thereby acquire possession of the bags and their contents? Mr. Downer conceded quite properly in our view that he could not attempt to support the conviction of Palmer. But in relation to Brooks he asked this Court to be guided by the decision in Warner v. Metropolitan Police Commissioner (1968) 2 A.E.R. 356 in its attempt to answer this question. He contended, or so it appeared, that Livingston's case (supra) was wrongly decided.

We must, therefore, examine Warner's case. The facts, briefly stated, were as follows: The appellant was driving a van when he was stopped by a Police Officer. He had with him three boxes which he said contained

rubbish. These were opened and one was found to contain 20,000 amphetamine sulphate tablets. The appellant explained that he had called at a cafe where a friend had promised to leave a box containing scent which he sold as a sideline. He found two boxes, instead of the one box he expected, under a counter at the cafe and he took both but did not know that the smaller box contained drugs. At his trial at the Inner London Quarter Sessions on a charge of being in unlawful possession of drugs, contrary to section 1(i) of the Drugs (Prevention of Misuse) Act 1964, the Chairman directed the jury that if the box was under the appellant's control, then he also had control of the tablets. If he did not know that the box contained drugs that would be a fact to be considered in connection with sentence. This direction was held to be wrong by the House of Lords. The appellant moved the Court of Appeal to set aside his conviction. Diplock L.J., who delivered the judgment of the Court thought that the judgment of the Divisional Court in Lockyer v. Gibb (1967) 2 Q.B. 243, was directly in point. In Lockyer's case the defendant was stopped by the police and was found to be carrying a bag containing several items among which was a bottle of morphine sulphate tablets. She claimed that she did not know what the tablets were as they had been dumped on her by a friend who asked her to look after them for him when the police entered a cafe in which they were sitting. The defendant was convicted by the Magistrate. Lord Parker, C.J., in delivering the judgment of the Divisional Court dismissing the appeal, was in no doubt that section 13 of the Dangerous Drugs Act 1965 created an absolute offence once possession of the tablets had been proved. He held that "While it is necessary to show that the defendant knew that she had the articles which turned out to be a drug it is not necessary that she should know that in fact it was a drug or a drug of a particular character.

In Warner's case Diplock L.J., said:

> "In the view of this court there is no half-way house provided that it is shown that the appellant knew he had a box - that was undisputed, he took it from under the counter and took it to the van himself - and also knew that the box was not empty but had something in it - and that is undisputed because he said he thought it contained scent. The fact that he did not know that what it contained was drugs is no defence to the absolute offence created by the section."

It should be noted here that whereas the Court of Appeal in Warner's case concluded that the prohibition under the 1964 Act was absolute the view of the Court in Livingston's case was that the prohibition under our Law was not. It should be noted too that the facts in Warner's case bore very little similarity, if any, to the facts in the instant case.

The Court of Appeal in Warner's case granted leave to appeal to the House of Lords. The question that the House of Lords was required to consider was:

> "Whether for the purposes of section 1 of the Drugs (Prevention of Misuse) Act 1964 a defendant is deemed to be in possession of the prohibited substance when to his knowledge he is in physical possession of the substance but is unaware of its true nature."

It is important to note that the question as framed assumed that the appellant knew that he was in physical possession of the box. It was quite unnecessary, therefore, for their Lordships to decide anything outside the scope of the question. For this reason much of what their Lordships said must be treated as obiter.

A majority of their Lordships (Lord Reid dissenting rather emphatically) held that the section of the Act with which they were concerned created an offence involving absolute liability, thereby agreeing with the Court of Appeal. As a matter of construction and for the reasons set forth in their speeches they held that the United Kingdom Parliament intended an absolute offence when it enacted section 1 (i) of the Act of 1964.

As to the quite separate question concerning the meaning to be attributed to the words "have in his possession" as used in the 1964 Act all their Lordships agreed that these words meant something more than mere physical control. Some mental element was required.

Lord Reid said at p.368:

> "The problem here is whether the possessor of a house or box or package is necessarily in possession of everything found in it, or, if not, what mental element is necessary before he can be held to be in possession of the contents. This problem has given rise to a great deal of legal discussion and the numerous authorities are not at all easy to reconcile. I shall not attempt the task."

To relate the problem to the instant case the question may be asked: Is the possessor of a van necessarily in possession of everything found in it? Lord Reid continued, at p.368:

> "In considering what is the proper construction of a provision in any Act of Parliament which is ambiguous one ought to reject that construction which leads to an unreasonable result. As a legal term 'possession' is ambiguous at least to this extent: there is no clear rule as to the nature of the mental element required. All are agreed that there must be some mental element in possession, but there is no agreement as to what precisely it must be."

And at p.369 Lord Reid shows that once this mental element is recognized,

> " .... that destroys any contention that mere physical control or custody without any mental element is sufficient to constitute possession under that enactment. If something is slipped into my bag I have as much physical control over it as I have over anything else in my bag."

One may well ask: If some mental element is necessary to constitute possession of a van or box or package, why should it be unnecessary, as in the view of their Lordships it appears to be, to require that same mental element in relation to the contents? Lord Reid demonstrates, by way of several illustrations, the remarkable consequences that could ensue if it be held that there is one rule as to mens rea concerning the van, or box, or package, and another rule with regard to the contents. These illustrations show the fallacy of any rule as to absolute liability predicated on a theory that it can be easily split into two inconsistent parts.

Lord Wilberforce, with whom Lord Pearce agreed, said at p.391:

> "I can say at once that I am strongly disinclined, unless compelled to do so, to place a meaning on the Act of 1964 which would involve the conviction of a person consequent on mere physical control, without consideration, or the opportunity for consideration, of any mental element. The offence created by the Act of 1964 is a serious one and even though nominal sentences, or conditional discharges, may meet some cases, there may be others of entirely innocent control where anything less than acquittal would be unjust. This legislation against a social evil is intended to be strict, even severe, but there is no reason why it should not at the same time be substantially just. One may venture to regret that Parliament has not, in defining this and other offences relating to the possession of drugs, been more specific -

as it has, for example, in relation to explosives - as to the facts required to be proved to show guilt or innocence."

Lord Wilberforce then proceeds to discuss the distinction between possession and control, and the necessity for establishing, in the case of the former, an intention to possess, among other things.

When the speeches of their Lordships are carefully examined and analysed it becomes clear that they would have answered the second question posed in Livingston's case in the affirmative. As to the third question their Lordships would, no doubt, have given a negative answer. But the answer to this latter question would have resulted from the conclusion of the majority that the 1964 Act by section 1(i) had created an absolute offence.

We see no justification for departing from the principle enunciated in Livingston's case. Their Lordships in Warner's case appear to have had not a little difficulty in deciding precisely what the mental element involved in possession is. For the reasons which they advanced they were driven to hold that possession, under the 1964 Act, may be satisfied by knowledge of the existence of the thing itself in the control of the possessor, but without his knowledge of its qualities. In so holding their Lordships clearly recognized that their decision, while giving rise to certain grave problems, left unresolved several other problems no less grave.

In our view the appellant Brooks was not, on the evidence in this case, shown to have anything more than mere custody or charge of both the van and its contents; and this assumes that he was aware that the van was loaded as distinct from any knowledge actual or constructive of the nature of the load. He was not a common carrier as was the appellant in Livingston's case. He was a person who had been hired by the owner of a loaded van to drive that van from Brown's Town to Braco. There was certainly no evidence that he had handled the bags.

It is important to emphasize here that the learned Resident Magistrate did not base his findings merely on evidence that the police came upon the appellant Brooks and others sitting in a van loaded with ganja from which the occupants ran on the approach of the police. He accepted as true, and acted upon, Brooks' statement to Cpl. Lakeman.

of possession, [illegible] of whatever the loaded van contained.

There was no evidence, apart from the statement of Brooks, as to the circumstances under which he was hired to drive the van. Nor was there evidence of possession, in the meaning attributed to that word in Livingston's case, as distinct from being in charge of whatever the loaded van contained. This distinction clearly recognized in Pollock and Wright on Possession (see pp. 59-60, 129, and 138-140), was also recognized in Livingston's case (see p.98). All that the prosecution proved was that Brooks had driven the van on Reid's instructions (and this, on Brooks' own admission), and that there were 19 bags of ganja in the van. It seems to us that, assuming a finding that he knew that he was "transporting" ganja, it would have been proper to charge him with that offence. It was precisely in order to meet such a case that the Parliament of this country created the offence of using a vehicle to transport ganja. In creating that offence Parliament clearly recognized the possibility of cases where a driver or person in charge of a vehicle used to transport ganja was not necessarily in possession of the ganja.

For these reasons we allowed the appeal and set aside the co: and sentence of both appellants.