J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE CRIMINAL APPEAL NO.109/71

B E F O R E: The Hon. Mr. Justice Luckhoo - Ag. President
The Hon. Mr. Justice Fox
The Hon. Mr. Justice Graham-Perkins

VINCENT WHYTE v. REGINA

Unlawful Possession

20th January, 1972

FOX, J.A. (dissenting)

At the trial of a person for an offence under Section 5 of the Unlawful Possession of Property Law, Cap. 401, the prosecution must lead evidence at the outset which is capable of proving that the accused is a "suspected person" as defined by that Law. For the purpose of this appeal, the relevant portion of that definition reads thus:

> "'suspected person' means any person who -
>
> (a) .....
>
> (b) has in his possession or under his control in any place any thing including an article of agricultural produce,
>
> under such circumstances as shall reasonably cause any constable or authorised person to suspect that that thing has been stolen or unlawfully obtained. "

In the interpretation which I make of these provisions, it follows that as a condition precedent to the making of an order to account under Section 5(4) of the Law, the prosecution must establish three basic matters.

1. .../

1. The arresting constable or authorised person must have found the accused in possession of, or having under his control, the property which is the subject of the charge.

2. The "circumstances" under which the accused was found in possession of the property. These circumstances describe the factual context of the accused's possession and consist of all the facts which are relevant for a complete and accurate statement of that context.

3. A suspicion in the mind of the arresting officer that the property had been stolen or unlawfully obtained. In proof of this suspicion, the prosecution may lead evidence not only as to the observations of the officer, and what the accused might have said tohim, but also of reports which may have been made to the officer by other persons who were in a position to speak of the circumstances under which the property came to be or was in the possession or under the control of the accused. The prosecution may prove not only the fact of the report having been made to the officer, but also what was actually said to him. When only the fact of a report is proved, and the officer is not asked to say what he was told by some other person, but that other person gives evidence of the activities of the accused, it would, in my view, be reasonable and permissible for the Magistrate to understand, subject to evidence to the contrary, that the officer was told those particular relevant details to which the other person subsequently testified. In respect of this position, an important caveat must be lodged. An understanding of what the officer was told, whether this results from direct evidence by the officer himself, or inferentially, goes only to proof of the cause for and the existence of suspicion in the mind of the officer, and must not be confused with the evidence which is being relied upon to prove the circumstances under which the accused is in

possession .../

possession of the property. Evidence, directoor circumstantial, of what the officer was told can have no probative value in establishing those circumstances. In an appropriate case, a magistrate may have to warn himself to this effect when he is weighing evidence he has heard.

Upon proof of these three basic matters, a single critical question arises for the magistrate's decision before he takes the step of ordering the accused to account. The magistrate must determine whether the circumstances under which the accused was found in possession of the property are such "as shall reasonably cause any constable or authorised person to suspect" that the thing had been stolen or unlawfully obtained. In relation to this question, the views of the arresting constable are relevant. They may be considered by the magistrate but they are far from being decisive of the question. Thus, the magistrate may be satisfied that the constable boha fide thought that in the circumstances he had reasonable cause to suspect that the thing was stolen. This finding of the magistrate, however, would not oblige him to come to a similar conculsion. The suspicion which must be caused by the circumstances, and which the magistrate must endeavour to ascertain, is not so much that of the particular arresting officer, but of any reasonable constable or authorised person; the hypothetical judicious person as distinct from the particular illusive individual.

Consequently, even if an existing bona fide suspicion in the mind of the officer is proved, but the magistrate takes the view that that suspicion would not have arisen in the mind of a reasonable officer, an order under Section 5(4) of the Law would not be made. The prosecution would have failed to establish that the accused was a "suspected person", and at that stage the magistrate would dismiss the charge.

Again, the magistrate may be satisfied that at the time he arrested the accused, the suspicion of the constable that the thing was stolen, though reasonable,having regard to what he had been told, was based upon false information, and the magistrate may be able to find further, that the true circumstances under which the accused was in

possession..../

possession of the property were incapable of giving rise to a reasonable suspicion. In this situation also the suspicion of the officer would be irrelevant. On his findings, the magistrate would be obliged to rule that it had not been established that the accused was a suspected person. To take yet another illustration. The magistrate may find that the suspicion of the arresting officer was based upon a part only of the relevant circumstances proved, or upon extraneous facts, or the magistrate may come to doubt the bona fides of the officer's suspicion. This also would not be conclusive of the issue which the magistrate has to try. The issues are not the sufficiency of the grounds for the particular officer's belief, or the validity of his belief, or, to take an extreme and scarcely possible situation, even the very existence of his belief that the thing in the possession of the accused was stolen or unlawfully obtained.

These would arise as important issues in any subsequent action against the officer for false imprisonment or malicious prosecution; but in the trial of a person for an offence under the Unlawful Possession of Property Law, although they may be of significant importance in the deliberations of the magistrate, they would not be <u>the decisive issues</u>. Consistent with the approach which is clearly imperative in the two other hypothetical situations described above, the real issue to be determined by the magistrate is whether in the proven circumstances of the accused's possession, any reasonable constable or authorised person would honestly suspect that the thing was stolen or unlawfully obtained. If the answer to this question is in the affirmative, the accused must be called upon to account. If it is in the negative, the accused must be discharged. To sum up. The single critical question which arises for the magistrate's decision after evidence has been given of the three basic matters outlined above is in terms of the perceptions of the reasonable officer. In determining these perceptions, the magistrate may be assisted, but he is in no way fettered by the assessments of the particular arresting officer.

In this appeal, the substantial question which has arisen for decision by this court is whether the circumstances under which

the ..../

the appellant was found in possession of a fire extinguisher were such "as shall reasonably cause any constable or authorised person to suspect" that it was stolen or unlawfully obtained. Having regard to the approach and the considerations which have been outlined above, these circumstances consist of the following facts.

1. The appellant was working with the Walcott K.I.W. at the Alcoa construction site at Halse Hall, Clarendon.
2. In the course of his work, the appellant drove trucks of the Walcott K.I.W.
3. For the purpose of its operations, Walcott K.I.W. is equipped with fire extinguishers of a particular yellow colour, and a particular model.
4. Walcott K.I. W. had extinguishers of this type at Halse Hall.
5. George Rossi, a security officer employed to Alcoa saw the appellant behaving in a suspicious manner at about 10.25a.m. on 19th July, 1971. The appellant was standing near to a Walcott K.I.W. trailer which was parked in the driveway of the car park. The appellant was looking up and down in a suspicious manner. He opened the bonnett of a car and touched something in the engine. He opened the doors of the car. He continued "Looking up and down". He opened the trunk at the back of the car. He then opened the door of the trailer, and transferred something from the trailer to the trunk of the car. He closed the trunk, the doors and the bonnett of the car and drove away in the trailer. Rossi said he could not see the thing which had been transferred from the trailer to the trunk of the car because after taking it from the trailer, the appellant "held it in front of him and just spun around and placed it in trunk of car". Rossi went to the main entrance gate and made a report to Sergeant Lamey.
6. Kenneth Lamey, a sergeant of Police stationed at Halse Hall received the report from Rossi at about 10.30 a.m. on 19th July, 1971. As a consequence of what he was told,

Sergeant ..../

Sergeant Lamey went with Rossi to the car into the trunk of which the appellant had put the thing two to three minutes earlier. Sergeant Lamey opened the trunk of the car. He and Rossi saw a fire extinguisher. He closed the trunk of the car and sought out Donald Freenaux.

7. Donald Freenaux is the Material Controller of walcott L.I.W. at Halse Hall. Between 10.00 - 11.00a.m. on 19th July, 1971, Sergeant Lamey made a report to him at his office at Halse Hall, and took him to the parking area on the compound. Sergeant Lamey opened the trunk of the car and Freenaux saw the fire extinguisher and recognised it as the same type used by his firm. Freenaux told Sergeant Lamey something.

8. At about 4.30p.m. the days work on 19th July, 1971 ended at Halse Hall. Sergeant Lamey was at the main gate at about 4.45p.m. when the appellant came up driving the same car in the trunk of which the fire extinguisher had been seen earlier by Rossi, Freenaux and Sergeant Lamey. Sergeant Lamey stopped the appellant, told him he was going to search the car, and asked him to open the trunk. The appellant did so. The extinguisher was revealed. Sergeant Lamey asked, and the appellant replied that he did not "know how it got in there". Rossi was present. In the hearing of the appellant Rossi said 'I see you put something intthe car today man". The appellant said, "I really go out there but I didn't put anything in it." Sergeant Lamey, Rossi, and Freenaux gave evidence forthe crown.

The first question which the magistrate was required to answer was whether the appellant had been found in possession of the extinguisher. When Sergeant Lamey stopped him at the main gate it was in the trunk of the car he was driving. From this fact alone, the magistrate could have inferred that he was in possession of it. This inference was strengthened by the evidence of what had transpired in the morning. Admittedly, there was a s possibility that in the very short

period .../

Period - two to three minutes - which elapsed between the time the appellant drove away from his car and the time Sergeant Lamey lifted the trunk and saw the extinguisher, it could have been put there by some person unknown to the appellant. But this possibility in favour of the appellant is remote. To use the words of Denning J. in Miller v Minister of Pensions (1947) 2 All E.R.372 at 373, the possibility "can be dismissed with the sentence, of course it is possible, but not in the least probable".

In my view, it was open to the magistrate to conclude beyond reasonable doubt, and by way of inference from all the circumstances, that the thing which the appellant clandestinely transferred from the trailer to his car was the extinguisher. Even if per chance it was something else, nevertheless, it would be entirely safe for the magistrate to feel sure that the extinguisher was in the trunk of the car when it was opened by the appellant, and would then have been seen by him. I consider also that the circumstances under which the extinguisher was found in the appellant's possession are entirely sufficient to support a reasonable suspicion that it was stolen or unlawfully obtained. The appellant was therefore proved to be a "suspected person".

In the light of the interpretation of reasonable suspicion which has been maintained in this judgment, that conclusion could not be affected by the evidence of Sergeant Lamey that "as a result of what Freenaux had told me earlier that day I was not satisfied that he had come in possession of (the extinguisher) by lawful means", and that he was "suspicious for this and also because it appeared to be new".

But even if the reasonable suspicion required by the Law is subjectively that of Sergeant Lamey, it seems to me that by reference to what Freenaux had told him and to the fact that the extinguisher was new, the Sergeant was indicating the ultimate and the decisive facts in a chain of facts which precipitated his suspicion. I do not think that it is a fair reading of the printed record to conclude that the Sergeant was saying that these and no other were the two facts upon

which .../

which his suspicion was founded. As the investigating constable from the very beginning into the circumstances of the appellant's possession of the extinguisher, the Sergeant must have had substantial knowledge of all the facts which were later given in evidence to the magistrate. This is an intelligent understanding of the position and should not be denied the magistrate. These facts give rise to a plain inference that prior to arrest, the Sergeant had reasonable cause to suspect that the extinguisher was either stolen or unlawfully obtained. It was therefore really unnecessary for him to give any specific evidence to this effect, R. v. Walters 5 J.L.R.110. The fact that he did give some evidence should not be allowed to detract from the force of the inference.

I am satisfied that the magistrate was right in ordering the appellant to account for his possession. He did not attempt to show the lawful means by which he came by the extinguisher. He said he did not know how it came to be in the trunk of his car. He had gone to his car but had not opened the trunk. In effect, his defence was a denial that it was in his possession. The verdict of the magistrate depended therefore upon his answers to two simple questions of fact, namely,

(i) did the appellant open the trunk of his car as Rossi said he did?

(ii) did the appellant know of the existence of the extinguisher in the trunk of his car?

The answer of the magistrate to these questions were obviously adverse to the appellant. On the evidence these answers are entirely reasonable.

I would therefore have dismissed this appeal. My brothers conclude otherwise. In determining the fundamental question of what constitutes reasonable cause for suspicion, they construe the provisions which define "suspected person" in a way which is altogether different from that which is maintained in this judgment. In their view, the circumstances of the accused's possession which the magistrate is at liberty to consider in resolving the issue of reasonable suspicion are restricted to those which are shown to have been within the apprehension

of the .../

of the arresting officer at the time of arrest. They do not accept as the method whereby these circumstances are to be identified, the test of actual possession which has been suggested in this judgment. They do not agree that the question is to be answered by way of the perceptions of the reasonable officer, objectively ascertained by the magistrate from these actual circumstances of the accused's possession. The decision of the court is therefore in accordance with the views of my brothers.

LUCKHOO, J.A.

By a majority the appeal is allowed, the conviction is quashed and the sentence is set aside.