1-08-03

IN THE CAYMAN ISLANDS COURT OF APPEAL

Criminal Appeal No. 28 of 2002
Summary Court Appeal No. 30/02

Between:

THE ATTORNEY GENERAL

Appellant

and

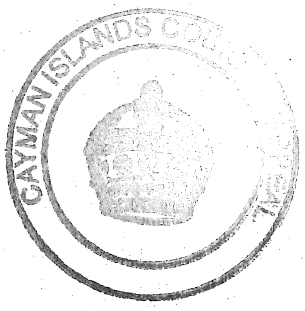
ANNA SKOOG

Respondent

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President.
The Honourable Mr. Justice G. Collett, J. A.
The Honourable Mr. Justice I. D. Rowe, J. A.

Appearances: Ms. Cheryl Richards, Crown Counsel, for the Appellant and Mr. Lawrence Aiolfi of Walkers for the Respondent.

Heard: April 17th 2003.
Delivered: August 1st, 2003.



REASONS FOR JUDGMENT

ROWE, J.A.

1. This appeal has been brought by the Crown against the judgment of Sanderson, J. which was entered on 27th September, 2002 allowing the appeal of the respondent against her conviction and sentence for permitting premises to be used for the distribution of controlled drugs and possession of ganja with intent to supply. She had been convicted in the Summary Court and sentenced to 2 years and 3 years imprisonment, respectively, for these offences. At the conclusion of the appeal, we allowed the appeal, reinstated the convictions and sentences that had been set aside by

Sanderson, J., and now provide the detailed reasons for our decision.

2. Anna Skoog, the respondent, is a Swedish citizen. She came to the Cayman Islands in 1998 and spent 10 months before returning to Sweden for 3 months. She then returned to Grand Cayman and obtained work here. In May 2000, the respondent, Clarence Buchanan, and Hildy Gelstad moved into premises at Keturah Street, known as 16 R & S Apartments, operated by Rita Whittaker. The respondent had known Hildy Gelstad, a Norwegian national, for sometime and she shared the downstairs bedroom of the two bedroom apartment with Hildy while Clarence Buchanan (hereinafter "Buchanan") occupied the upstairs bedroom. In about August 2000 the respondent and Buchanan became lovers and at about Christmas 2000 the respondent moved from the downstairs bedroom to live with Buchanan in the upstairs bedroom.

3. From the inception of the occupation of the R & S Apartments by the respondent, she paid to Buchanan $350.00 per month towards the $1,300.00 lease payment. The respondent contributed to the household bills for water, electricity, telephone and cable for the apartment. Although the personal relationship between the respondent and Buchanan developed into an amorous relationship, the financial arrangements in respect of her right to live in the apartment remained unchanged. The original lease for the apartment was in the names of Buchanan and Hildy Gelstad. However, Buchanan and the respondent continued to live in the premises with the tacit consent of the landlady after the expiration of the lease. The landlady, a defence witness whose evidence the Magistrate accepted as true, gave evidence that on occasions the respondent and others paid the rent for the apartment and that it was not only Buchanan who came to make rental payments. When rent was paid directly by Buchanan, a receipt was issued in his name and when the rent was paid by another person the receipt was issued in respect of Apartment No. 16. The respondent said that she had power to stop anyone except Buchanan from coming into the room but emphasized that she had no power to restrict or exclude Buchanan from that apartment.

4. On August 28, 2001 Buchanan took approximately 250 pounds of ganja to the airport to be loaded on a Cayman Airways flight to Miami. The Police discovered this ganja. That afternoon the Police went to the apartment occupied by Buchanan and the respondent. Buchanan was present and the Police searched the apartment.

5. On entering the upstairs bedroom the Police noticed an overpowering smell of ganja. There was a fairly large walk-in closet the doors of which were open. It contained male and female clothing. On a subsequent date the appellant removed her clothing from that closet. On the floor within the clothes closet were two large duffel bags which were padlocked and appeared to be full. Alongside the two duffel bags in the closet were four (4) similar bags which were empty but appeared to have traces of vegetable matter.

6. On the floor of the bedroom was an industrial size roll of cling film and alongside it there was a large size set of silver weighing scales. There was a locked door within the bedroom. A key for the door was found by the Police on a small desk adjacent to the door. There was an extremely strong smell of ganja radiating from the locked door. The Police opened the door with the key and found a large number of bales of varying sizes containing vegetable matter resembling ganja. The closet faced the bed, the door to the locked room was to the right of the closet and a second door led to the bathroom. Buchanan who was present during the search admitted that the bales contained 1000 pounds of ganja and admitted that the duffel bags contained ganja. He was arrested and subsequently entered pleas of guilty to the charges brought against him.

7. The respondent was not present at the time of the search by the Police. The evidence is that both Buchanan and the respondent were at the apartment on August 28, 2001 until about 4.00 p.m. Buchanan left the apartment at 4.00 p.m. leaving the respondent there. Buchanan was observed with the bales of ganja at 4.10 p.m. He was intercepted at about 4.30 p.m. at the Owen Roberts Airport. The respondent was interviewed just after 7.00 p.m. that day by the Police. She was told that the Police had searched her apartment and had found two large duffel bags stuffed with ganja.

When asked what she knew about it, the respondent replied that she knew that Buchanan was dealing. She admitted that she knew the drugs were there but added that she had told Buchanan to remove them. The respondent was told of the drugs found in the locked storeroom and according to the Police witness she responded , " I knew there was stuff there. I didn't know how much" and to the question, " You must have known because the room stunk of ganja?", the respondent is alleged to have replied, "We smoked last night". At trial the respondent testified that she knew that there was ganja in the storeroom because in answer to her queries Buchanan had told her that the "private stuff" locked therein was "weed". She denied this knowledge when interviewed by the Police and explained this denial to the Magistrate on the basis that at the time of the denial she was in custody and was scared and shocked. At trial she denied saying that she and Buchanan had smoked ganja on the previous night and explained that she had said, "He", meaning Buchanan, had smoked ganja the previous night.

8. The respondent made a written statement to the Police after she had retained an attorney. In that statement she said she had been living at the apartment for about a year and that a week or 10 days earlier, when she returned from work, she noticed some large bags in the closet. She asked Buchanan about them and he told her that they contained ganja. She was not happy about it and she told him that she did not want them there. Buchanan, she said, told her that he was holding them for someone and they would be gone the next day. However, they remained there until the search by the Police. She said that she did not look in the bags, she did not know how much ganja there was, she did not know where the ganja came from or where it was going. "Other than knowing that it was in my house, I had nothing to do with the ganja at all". At trial she admitted having seen the scale and cling wrap in the apartment but denied that she knew the purpose for which they were intended. She said too, that two of the duffel bags recovered by the Police at the airport from Buchanan resembled those that she had seen in the closet and that the photographs of bags found by the Police in the closet did not resemble those that she had seen there earlier.

9. Possession of ganja with intent to supply is an offence contrary to section 3(1)(m) of the **Misuse of Drugs Law**, Law 13 of 1973 (Revised 2000). The respondent was charged with possession of 1092 pounds of ganja with intent to supply on August 28, 2001. The second charge alleged that between 1 January 2001 and 28 August 2001, the respondent, without reasonable excuse allowed her premises to be used for the distribution of a controlled drug, namely ganja. The learned Magistrate found as a fact the respondent was not merely living with her boyfriend at the apartment but was a co-tenant paying rent in a shared tenancy to which the landlady made no objection, that the respondent considered the apartment to be "her house" from which she could exclude anyone except Buchanan. She found too, that the respondent was an "occupier" of the premises. The Magistrate considered the evidence of the total conduct of the respondent, including her knowledge of the scales and the cling wrap, and concluded that the respondent had deliberately shut her eyes to the obvious and had allowed the distribution of ganja from the premises.

10. An appeal from the Magistrate goes first to a Judge of the Grand Court. Sanderson, J. reviewed the evidence and concluded that the respondent was not a co-tenant of the apartment; that she was at the highest a sub-tenant of Buchanan with no legal right to deny Buchanan access to the premises or to his bedroom and the judge concluded that the respondent was not in control of the drugs found in that apartment. He further concluded that the respondent's inaction did not constitute encouragement to Buchanan and he held ultimately that the respondent was not in possession of the drugs. Sanderson, J. found that the respondent was not an occupier within the meaning of the misuse of Drugs Law and set aside the convictions on both charges.

11. In the first ground of appeal the prosecution complained that Sanderson, J. erred in law in finding that the necessary elements of possession were not present in this case. The relationship between the respondent and Buchanan was not much in dispute. From the time that the respondent moved into the apartment she knew the rental amount for the apartment and she paid a portion

of that rental to Buchanan. The respondent contributed to other outgoings and on occasions she physically paid over the rent to the landlady. She admitted that the compartment which opened into the clothes closet had not been originally locked and that when Buchanan first placed a lock on the door to that compartment she inquired why he had done so. It was then, in June 2001, that Buchanan told her that he was storing ganja within that compartment. The apartment was not searched until August 28, 2001. The respondent admitted that she had seen 2 duffel bags of ganja in the closet for at least 10 days before August 28, 2001 and that Buchanan had not removed them at her request for him to do so. The respondent admitted that Buchanan left the apartment on August 28, 2001 before she did and 10 minutes later he was seen with the 2 duffel bags of ganja that had been sitting down in the closet of the apartment for 10 days. This fact is established by the evidence of the respondent that photographs of 2 of the duffel bags found in the possession of Buchanan at the airport resembled those from the apartment and were different from the two duffel bags that the Police actually discovered in that same closet.

12. The respondent gave evidence that she had no access to the locked storeroom as Buchanan had the key for the storeroom on his personal key ring. This contention of the respondent was contradicted by the prosecution evidence that a key for the storeroom was found on a table in the apartment and was used by the Police to obtain entry to the storeroom. It was open to the learned Magistrate to draw the inference which she did that the respondent was not being frank in her denial that she had any kind of access to that storeroom and that it was exclusively under the control of Buchanan.

13. The Courts have been very troubled in recent times with cases in which several persons who are not members of a single family occupy residences in which controlled drugs are discovered. Our world is preoccupied with the preservation of our generation from the insidious influence of drugs on our population and it is therefore no wonder that there are numerous cases that relate to possession of controlled drugs in a variety of circumstances. In **Warner v. Metropolitan Police Commissioner** (1969) AC 256 at

280F, Lord Reid approached the problem of how to determine who is in possession of a house or conveyance or of other property. He said:

> "The problem here is whether the possessor of a house or box 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. The 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 that task. I think the best approach to this case is to suppose that an innkeeper is handed in the ordinary course a box or a package by a guest for safekeeping. He has no right to open the box – it may be locked. If he is told truthfully what is in it, it may be right to say that he is in possession of the contents".

14. In the instant case knowledge of the respondent that ganja was in the apartment was not an issue. To establish possession, the prosecution had to go further and to show on the evidence that there was joint possession of the respondent with Buchanan. In the case of **R. v. Searle and others**, 1971 Cr. Law Review, 592, the court held that where controlled drugs were found in a vehicle occupied by several persons and there was no evidence to show which of the persons had the actual control of the drugs, the jury could only convict if they had been directed to find that: (a) that the drugs formed a common pool from which all the passengers in the vehicle, (all of whom were on a touring holiday), had the right to draw at will, (b) there was a joint enterprise to consume drugs together, and (c) the possession by any one of them in pursuance of the common intention could become the possession of all of them. This case turned on the misdirection in law to the jury and not on the basis that if there was clear evidence that one occupant of a vehicle had possession of drugs found within that vehicle, another occupant of that vehicle could not, under any set of circumstances, also be found guilty of possession.

15. The Court of Appeal Criminal Division in **R. v. Bland**, [1998] Crim. L.R. 41, had to determine whether passive assistance of one who lived with another who he knew to be in unlawful possession of dangerous drugs amounted to encouragement so as to make

the defendant an aider and abettor. In that case the court held that the fact that the appellant and one Ratcliff who the appellant knew was dealing in drugs lived in the same room was not sufficient evidence from which the jury could have inferred that the appellant provided active or passive assistance to the dealer in drugs. The court held that assistance, though passive, required more than mere knowledge, for example, it required evidence of encouragement at least, or of some element of control.

16. Neither the decisions in **R. v. Searle**, (*supra*) nor **R. v. Bland** (*supra*) have gone without adverse comment. Sir Vincent Floissac, C.J. considered Searle's case in **Romero (Julio) and Macredo (Oscar) v. R.** [1994] 46 WIR 151 and at 153 he said:

> "In my judgment, nothing said by Lord Widgery CJ in Searle's case was intended to be a mandatory catechism or incantation for judges in every case of a joint charge for a joint offense. The Chief Justice's dictum was intended to be confined to the particular circumstances of the case before him. Otherwise the dictum would amount to a total repudiation of the legal principle relating to the criminal liability of a secondary party (an accessory or an accomplice) by reason of the secondary party's complicity in a crime".

17. In the **Romero** and **Macredo** case, the court was dealing with the issue of possession of ganja on a vessel of which the captain had comprehensive physical custody and control and the other defendant was a member of the crew. The court held that where a crime of unlawful possession of a controlled drug is committed by a principal offender and either before or during the commission of the crime a secondary party renders assistance either by way of aid, abetting, counsel, procurement or encouragement to the principal offender in the commission of the crime, the secondary party will be guilty of the crime as a party to it if he rendered assistance with the mens rea necessary for guilt of that crime or with knowledge, contemplation, or foresight of a substantial degree of probability (as distinct from a bare or remote possibility) that the crime was being committed or would be committed by the principal offender. The Court went on to hold that in the case of a joint charge of possession of a controlled drug it was not

necessary (except in limited circumstances) to prove a common pool of drugs and a joint enterprise to consume drugs together.

18. The appellant referred to the decision of the Court of Appeal of Jamaica in **R. v. Haye and Hamilton**, [1972] 18 WIR 361 in which it was held that where two men were in a motor car in which two bags of ganja were found and neither of them gave an explanation to the police at the time of their arrest as to their knowledge of the contents of the bags, it was open to the Magistrate to infer knowledge in both men of the contents of the bags. Although in the instant case, knowledge by the respondent of the presence of ganja was not in issue, the court in **Haye** and **Hamilton** did not import any requirement of a common pool for consumption before there can be a conviction. On the facts of that case there was no room for the inference of personal consumption by the defendants. The quantity of ganja involved was too great.

19. We entirely agree with the principle enunciated by the Court of Appeal Criminal Division in **R. V. Conway and Burkes**, [1994] Cr. L. R. 826, that in order to prove possession of controlled drugs, something more than knowledge must be proved. From control of the premises, the element of encouragement, express or implied can be inferred.

20. In any given case the facts must be closely examined to determine whether there was sufficient evidence of encouragement. In **R. v. Bland**, [1988] Crim. L. R. 41, the Court of Appeal held, on substantially different facts from those in the present case, that there was no evidence of assistance, active or passive on the part of the appellant to prove possession. The appellant had denied knowledge that her co-accused with whom she lived in a one-room apartment had been dealing in drugs. A number of persons who had visited that apartment were found to have drugs in their possession but none of those persons had knowledge of the existence of the appellant. When the premises were searched the police found only traces of drugs. On that state of the evidence the Court held that there was sufficient evidence on which the jury could infer knowledge on the appellant's part that her co-accused was drug-dealing, but no more. The Court held

that assistance, though passive, required more than mere knowledge; for example it required evidence of encouragement at least, or of some element of control, which, in that case, the Court found was entirely lacking. In our view, in the present case, the learned Magistrate got it right when she found that there was abundant evidence of encouragement on the part of the respondent: She found that:

> "The evidence of encouragement was in her permitting him to use the premises she occupied with him as a joint tenant to store the ganja and in knowing the purpose for which the ganja was stored. The drug paraphernalia i.e. the industrial size plastic wrap and the scales and the large quantity stored in that room as betrayed by the overpowering smell in the room of which the officer testified, made it manifestly obvious that the ganja he was storing was being prepared for supply".

21. Two large duffel bags of ganja were stored in the closet in which the respondent kept her clothes for at least 10 days. She could have thrown them out of her very private space and demanded that they be removed from the room immediately. She could have threatened to go to the Police if Buchanan did not remove the drugs from her room; she could have threatened that she would find other accommodation if he did not remove the foul smelling ganja from the room which she occupied. Instead the respondent remained in occupation of the room and smoked ganja with Buchanan in the room the night prior to her arrest. Buchanan's behaviour from June 2001 until the time of his arrest was clear evidence that he had nothing to fear from the respondent who knew that he had this vast quantity of ganja in the premises. He was brave enough to have his large weighing scale and industrial size cling wrap exposed in the middle of the bedroom as he had no fear of exposure from the respondent and no pressure was being imposed by her on him to get rid of the stock of ganja. On any view of this mass of evidence the Magistrate could find as she did that the respondent provided express or passive encouragement to Buchanan.

22. In our view it was not necessary for the respondent to have had control over the drugs. If she had control over the premises and

had knowledge that the drugs were present in that apartment, the proper question to be asked was whether she provided encouragement to Buchanan in his possession of the ganja. If she provided such encouragement she could become an aider and abettor and consequently she would be in joint possession with Buchanan. We are of the view that Sanderson, J. fell into error when he found that the inaction of the respondent did not amount to any encouragement. Accordingly we find merit in the first ground of appeal.

23. It was argued for the respondent that on the basis of **R. v. Tao**, [1976] 63 Cr. App. R. 163, the respondent could not be held to be "an occupier" of the apartment at 16 R & S. Apartment, Keturah Street, as the lease was not in her name and she had no control over the premises so as to exclude Buchanan from it. The question of occupation is one of fact and degree. There can be more than one occupier of premises in a given case and a person may be an occupier at one time and later cease to be such. The question is always one of fact. See **R v. Coid** [1988] Crim. Law. R. 199. The respondent was not in the position of a student with modest financial resources seeking accommodation in a limited market. She was one of the two individuals residing in the apartment; she was employed and was paying her fair share of the rent and the outgoings. On occasions she would herself pay over the rent to the landlady. On the facts of this case her position was at least that of a sub-lessee of the apartment. Section 3 of the Interpretation Law defines "to occupy" as follows:

> "to occupy" includes, in addition to its ordinary signification, to use, inhabit, possess or enjoy the premises in respect whereof that verb is used, otherwise than as a mere servant and for the mere purpose of the care, custody and charge thereof".

24. The respondent was not residing in this apartment as a servant or as a caretaker thereof and in our opinion her presence there falls within the meaning of occupier for the purpose of the Misuse of Drugs Law.

25. Sanderson J. set aside the respondent's conviction on the charge that she permitted the premises to be used for the distribution of controlled drugs contrary to Section 3(2)(a) of the Misuse of Drugs Law, on the ground that the respondent was not an occupier of the apartment. It does not appear that his attention was drawn to the definition of "to occupy" in the Interpretation Act. He relied almost entirely on the fact that the respondent had no power to exclude Buchanan from the apartment and dicta from English cases which deal with that situation.

26. Section 3(1) of the Misuse of Drugs Law makes it an offence for anyone who is not lawfully authorized in that behalf to inter alia; import, export, produce, store, sell, buy or otherwise deal in, supply, distribute, dispose, administer, possess or consume any controlled drug, or who attempts, assists, or is concerned in any such matters. Section 3(2)(a) of the Misuse of Drugs Law then provides:

> "a person is guilty of an offence if, without lawful excuse or without being authorized in that behalf:
>
> > (a) being the occupier or concerned in the management of any premises, he permits or suffers any of the following activities to take place on those premises, that is to say, producing, supplying, distributing, displacing, administering or consuming or attempting to do any of such things in contravention of subsection (1); or"

The legislation in Grand Cayman defines "to occupy" in such a way as to include someone who is residing on the premises as of right. This was the situation of the respondent who had been paying rent to Buchanan, who had been paying a portion of the outgoings and who was in a "husband and wife" relationship with Buchanan. In our view the Magistrate was right to find that the respondent was an occupier of the premises.

27. We adopt the submission of Crown Counsel that on the totality of the evidence before the Magistrate, she was entitled to find that the respondent had actual knowledge of the possession by Buchanan of the very large quantity of ganja in the premises and she took no proper steps to try to prevent the criminal acts from occurring in her premises. The Magistrate was right to find the

appellant guilty and her decision to convict on both charges must be restored.

ZACCA P.

COLLETT, J.A.

ROWE, J.A.