1993

IN THE CAYMAN ISLANDS COURT OF APPEAL
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CICA (CRIMINAL) NO. 19 OF 1991

BEFORE: THE RIGHT HONOURABLE THE PRESIDENT MR. JUSTICE EDWARD ZACCA P.C. O.J.
THE HONOURABLE MR. JUSTICE JAMES S. KERR J.A.
THE HONOURABLE MR. JUSTICE KENNETH C. HENRY J.A.

GLENDON SYDNEY LOGAN v. REGINA

Mr. Graham Hampson of Bruce Campbell & Co. for the Appellant
Mr. Adam Roberts of Solicitor General's Chambers for the Crown

APRIL 9TH & 16TH, 1992 AND 7TH APRIL, 1993

KERR, J.A.

REASONS FOR JUDGMENT

In the Summary Court at George Town on June 28, 1990, the appellant, Glendon Logan, was tried and convicted of two offences:

(1) That on 18th January, 1990, at Airport Road, George Town, he was in possession of cocaine with intent to supply contrary to section 3 (1) (m) of the Misuse of Drugs Law, Revised.

(2) That at the same time and place he was concerned in the possession of cocaine of more than two ounces - contrary to section 3 (1) of the Misuse of Drugs Law, Revised.

For possession with intent to supply, he was sentenced to ten years' imprisonment, in addition, a fine of $6,000.00 or six months imprisonment in default, recommended for deportation and his motor car forfeited. On the other charge judgment was deferred.

On appeal to the Grand Court the convictions were affirmed

and the custodial sentence reduced to nine years' imprisonment.

On his further appeal to this Court, the appeal was allowed in part to the extent that the judgment and verdict on the charge of possession with intent to supply cocaine was set aside, while the conviction on the offence of being concerned with possession of cocaine was affirmed and the appellant thereon was sentenced to four years' imprisonment and with an order recommending deportation.

Herein are our reasons for that decision.

The following grounds are directly relevant to the conviction for possession with intent to supply cocaine:

(i) The Crown did not prove beyond a reasonable doubt that the Appellant had possession of the controlled drug contained in the aerosol containers in the possession of Gowie. The learned Grand Court Judge failed to address whether the Appellant was himself in possession of the drug.

(ii) The statutory presumption in section 7 (1) (b) did not apply in this case.

The grounds rested in the main on the following statement in the learned Magistrate's reasons for judgment:

> "Very briefly, and succinctly put the Crown's case is that one Lancelot Gowie came to the Island with a quantity of cocaine and on his arrival was picked up at the airport by the defendant in a motorcar. These facts are not disputed. Gowie pleaded guilty to possession of the cocaine with intent, was convicted and sentenced on these facts. There are therefore two questions to be determined by the Court: firstly, was the defendant at any time in possession of the drug? Secondly, was he concerned in Gowie's possession?"

Section 7 (1) (b) of the Law provides as follows:

> "Where it is proved beyond reasonable doubt that a person had in his possession or custody or under his control anything containing a controlled drug, it shall be presumed, until the contrary is proved, that such person was in possession of such drug."

The Crown has applied this subsection to the first Charge, and the undisputed facts support this application. The defendant was in possession or had under his control the vehicle which contained the bag with the drug. The presumption, therefore, arose that he was in possession of the drug. Learned Counsel for the defence has argued at great length that knowledge has not been proven, and that there can be no possession without such knowledge. There is he submitted no animus furandi. I find no fault in this argument; indeed, possession presupposes knowledge. It follows therefore, that any presumption of possession as contained in this Law must infer knowledge. It is for this reason that the presumption is rebuttable. The onus shifts to the defendant to prove the contrary to the balance of probability, in this case that he had no knowledge that the drug was in the car. The Crown contends that the provisions of Section 7 (1) (d), apply to the second Charge, that of being concerned, this subsection provides that:

> "Where it is proved beyond reasonable doubt that a person is in any way concerned in carrying, removing, harbouring, keeping, concealing, handling or dealing in any manner with anything containing a controlled drug, it shall be presumed until the contrary is proved, that such person knew that such drug was contained in such thing".

Here, again, in applying this subsection to

> the facts, the Crown has proved beyond reasonable doubt that the defendant was concerned in the carrying, handling, or dealing with the drug. It is contained in a bag in his car. The onus is on him to rebut this presumption in the same degree as required in the previous section."

In support of these grounds, Counsel for the appellant submitted that in this case, the presumption was only applicable to Gowie in whose possession, custody and control was the bag containing the drug and that bag was at no time in the possession of the appellant. If the Court was not satisfied in relation to possession then the charge of being concerned with possession must be separately considered.

In our view a driver of a motor vehicle would certainly be in control of the vehicle but it does not logically follow that he would be in possession, custody or control of the personal belongings of the passenger he was then carrying. It would be unrealistic and contrary to good sense to hold in such circumstances that the conveyance was the container contemplated by the subsection where, on the face of it, the container containing the prohibited drug would be at the material time in the possession of the passenger. In the absence of tradition or divesting of any proprietary right, custody or control, exclusive possession would remain in the passenger. It would be an infelicitous and extravagant interpretation of the subsection to make the presumption applicable to a driver of a vehicle merely on the basis that he was carrying a passenger whose suitcase or bag contained a prohibited drug.

However, there was much more to the instant case than the facts outlined by the learned Magistrate in what was obviously a pre-emptive opinion, as he himself later said:

> "The Crown's case rests on the series of facts and circumstances which, when viewed as a whole, lead to one irrefutable conclusion, one which satisfies the requirements of both

Section 7 (1) (b) and (1) (d)."

In that regard Harre, J. who exercised the appellate jurisdiction of the Grand Court, objectively opined:

> "The learned magistrate carefully considered that evidence as a whole and in particular the lies which the appellant told about his association with Gowie, his contacts with him on the day in question, and his reasons for being at the airport. The appellant gave three different explanations for this. I have already mentioned two. The third was that he had received a message that he should pick up Gowie, whose name was told to him.
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> The way in which the magistrate dealt with aspects of the evidence, which, taken separately, could raise no more than suspicion, or inferences not necessarily adverse to the accused were subjected to criticism. None of this however, was of such substance as to lead me to the conclusion that the learned magistrate was wrong in concluding, on the totality of the evidence, that the appellant was guilty as charged".

This opinion is fortified by the fact that later towards the end of his reasons for judgment, the learned Magistrate summarised the findings of fact on which he relied. Accordingly, we agree with Harre, J. that the Magistrate in arriving at his verdict considered the evidence in its totality.

This summary of the learned Magistrate will be referred to later in greater detail with regard to our determination as to the verdict which was considered appropriate, having regard to the evidence.

Evidence of events leading up to the police intervention and subsequent arrest of the appellant was given by Detective Sergeant Brown, who along with Detective Constable Montague, was at the airport when the Air Jamaica flight came in at about 9.00

p.m. Among the arriving passengers was Lancelot Gowie who cleared Immigration and Customs. He was carrying a red travelling bag. The two officers left the airport and joined another officer on motor patrol with Montague driving. While on patrol they saw the appellant driving his car and followed him to the airport where at the passenger exit he picked up Gowie and drove out. Appellant was followed and stopped on the road in response to a flashing headlight signal given by Detective Constable Montague. Appellant quickly came out of his car and up to the patrol car leaving Gowie in the car. When asked about his passenger, he said that he went to pick up a girlfriend but she did not come on the flight and the man in the car begged him a ride. He denied knowing his passenger. However, Brown remembered seeing both men together about two weeks before in the Pit Stop Restaurant and the appellant introducing Gowie to him and his suspicions were aroused. He spoke with Gowie and then informed appellant that he was taking Gowie to the police station to be searched for drugs. Gowie went into the police car to the station. Appellant followed in his car to the station but remained outside. At the station Gowie's red travelling bag was searched and two aerosol cans were found; when cut open, each contained cocaine in plastic bags. A notebook containing appellant's name, a telephone number - 97539 - was also found with Gowie. By then appellant had left. Appellant later telephoned to enquire if everything was right with Gowie. Sergeant Brown gave an affirmative answer and an invitation to pick up Gowie with the intention of luring appellant to return to the police station. Sometime after, not seeing the appellant, Brown accompanied by Detective Constable Montague and others went to appellant's home, told him of what they had found and arrested him.

Detective Constable Montague's evidence in general corroborated Sergeant Brown's.

Gowie gave a witness statement but when called at the trial by the prosecution, resiled, was permitted by the learned Magistrate to be treated as a hostile witness and, subsequently

so found, and his evidence discarded by the Magistrate.

The written record of an interview with the appellant was tendered and admitted in evidence. In it he admitted meeting Gowie at the Pit Stop Restaurant about one month before and Gowie had asked him to assist him in the sale of lobster and conch to people in Cayman; that he had no previous arrangement to pick up Gowie but he got a message from Delores of the Pit Stop Restaurant. It was he who gave Gowie the number of the Pit Stop Restaurant. He admitted his first denial of knowing Gowie and saying he had come to pick up a girlfriend; he said so because he was frightened when the police stopped him. Although he was told to wait at the station he left because he was frightened. He admitted telephoning the station and he drove to the station but did not see Gowie so he went home. He admitted speaking by telephone to Gowie while in Jamaica but the talk was about lobster business.

Delores Williams who then worked at the Pit Stop said that she relayed Gowie's message to appellant that Gowie was asking appellant or his girlfriend, Judy Watler, to pick him up at the airport.

Franz Manderson, Immigration Officer, gave evidence of appellant's visits to Jamaica between November 1989 and January 1990, as revealed by the records and that appellant was the holder of a Jamaican passport.

Rudolph Myles, Data Processing Manager for Cable and Wireless, as requested, made checks on the use of 97470 - Judy Watler's telephone number - for the period 19th December, 1989 to 18th January, 1990; ten calls were made to Jamaica, including one to number 9295470 - the workplace of Gowie and one to the number 9243473 - the home of Gowie.

In answer to the Crown's case, appellant gave evidence to the effect that when stopped that night he did not tell the police that he did not know Gowie. He said it was his brother

who answered the phone and told him that someone at the airport was waiting for a lift but was unable to say who it was or whether a man or woman. At the airport Gowie said that he was the passenger and entered the car. He had no conversation with him. On 5th November, 1989, he had met Gowie and spoke about the business of selling lobster tails in Cayman and that he told Gowie that whenever he is bringing lobster tails he should get in touch with him (appellant). That night he was taking Gowie to his lodging. Police patrol stopped him on the way near there. When he stopped, police searched and found nothing on him or in his car. He told the police he had met Gowie once but did not know his background and could not tell them anything about him. Police took Gowie in their car and he followed. Police told him to wait outside. He waited for an hour and then left for Pit Stop Restaurant to his girlfriend, then to his home from where he telephoned the station and spoke to Sergeant Brown, telling him he would be right down. He went to the station but not seeing Gowie he went home to bed. Some 45 minutes after the police arrived and told him of finding Gowie with cocaine. He had no reason to believe Gowie had cocaine. From the time he was stopped by the fire station to his being arrested was one-and-a-half to two hours. He made no arrangements with Gowie to bring cocaine into Cayman. Had he made any such arrangements he would have enough sense to know that he should not go to the airport to meet him.

In cross-examination, he said that he was notified in December that his work permit was refused and his entries in December 1989, and January 1990 were, "as a visitor". The police did not give him a chance when stopped to explain about the lobster business. He agreed that a number of telephone calls on the bill were made from his place to Gowie's workplace and residence. The call on the 11th January for 11 minutes was about car parts for Gowie. He agreed he was going to Jamaica that very day. The calls were made by his girlfriend. He did not know Gowie was coming to Cayman on 18th January.

On the offence of being concerned with possession, it was

contended that the Crown did not prove beyond a reasonable doubt that the appellant was concerned in the possession of the drug found in the aerosol container. It was submitted that there was no evidence of participation in the affair or of knowledge by appellant that Gowie had the drug at the material time - see R. v. Robert Hughes (1985) 81 Criminal Appeal Report - p 345. Further in coming to his verdict the learned Magistrate gave too much weight to appellant's inconsistencies and such lies as the Magistrate may have found as these did not go to the relevant issues.

In dealing with arguments in support of similar grounds of appeal, Harre J. accepted as correct the following statement in Douglas Gibson v. R. (1988-89) CLR p 346

> "By the Cayman Legislation, Section 7 of the Misuse of Drugs Law, (second revision) proof of the requisite knowledge no longer rests solely on inference but on a statutory rebuttable presumption which will arise on proof by the prosecution of the container of the drug being in the accused's possession, which in this context expressly includes custody or control. The standard of proof demanded by the statute is proof beyond reasonable doubt. Accordingly a finding that the burden has been discharged can only be made on consideration of all relevant evidence including any evidence from the defence. It is therefore when all the evidence has been heard that the presumption may be applied".

However, in deference to the efforts of appellant's Counsel he went on to deal with the standard of proof required of the appellant in rebutting the statutory presumption as this question was not relevant to the decision of the Gibson case which dealt with proof of possession of the container. In that

regard, he sought from a number of cases, dicta helpful in answering the following question formulated by him:

> "But what is the burden on an accused person once the presumption has been applied? Must his evidence be merely such as to give rise to a reasonable doubt, or must he rebut the presumption on a balance of probabilities?"

He referred to a statement in the Canadian case of **R. v. Price** (1961) 130 CCC at p 259 interpreting somewhat similar provisions - namely, section 17 of the Opium and Narcotic Drug Act in which it was stated that:

> "the burden resting upon the accused in the present case required her to do no more than come forward with evidence which raised in the mind of the court a reasonable doubt that she had knowledge of the presence of the drug in the cabin".

That approach was adopted in another Canadian case of **R. v. Cappello** (1959) 122 CCC at p 342. To Harre J. this proposition seemed inconsistent with the statement in a third case - **R. v. Sharpe** (1961) CCC 131 at p 75 to the effect that:

> "when the finding of possession was made against the appellant the statute imposed an onus upon him to establish by a balance of probabilities that he was not in possession for the purpose of trafficking".

Unlike Harre J. we decline to be troubled by the statements or approach in these Canadian cases because, as Harre J. eventually did, we accept that the House of Lords gave a considered answer to that question and laid down guidelines in interpreting provisions similar to the subsections referred to in the instant case in **R. v. Hunt** (1987) A C 352 per Lord Griffiths at p 375.

> "In **R. v. Edwards** (1975) Q B 27, 39-40 the Court of Appeal expressed their conclusion in the form of an exception to what they said was the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. They said that the exception
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> > "is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities".
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> I have little doubt that the occasions upon which a statute will be construed as imposing a burden of proof upon a defendant which does not fall within this formulation are likely to be exceedingly rare. But ---. I would prefer to adopt the formula as an excellent guide to construction rather than as an exception to a rule. In the final analysis each case must turn upon the construction of the particular legislation to determine whether the defence is an exception within the meaning of section 101 of [the Magistrates' Courts Act 1980] which the Court of Appeal rightly decided reflects the rule of trials on indictment. With this one qualification I regard **R. v. Edwards** as rightly decided".

The burden placed on an accused is expressed with lucid simplicity in section 7 (1) (b) and 7 (1) (d) of the Misuse of Drugs Law. Those provisions make it clear that were the basis for the presumption has been established beyond reasonable doubt then the rebuttable presumption comes into play and is rebutted when "the contrary is proved." [Emphasis supplied]. The

reasonable interpretation of the words emphasised is that an onus of proof is placed on the accused to be positively discharged by evidence and being one which lies on the accused, consistent with established principle, it is a burden lighter than that on the prosecution and, therefore, is on the balance of probabilities.

The wording of the Cayman legislation, therefore, is within the category contemplated in the following statement in **R. v. Carr-Briant** (1944) Criminal Appeal Report 76 at p 87 and upon which statement Harre J. in the end, relied:

> "In our judgment, in any case where, either by statute or at common law, some matter is presumed against an accused person unless the contrary is proved the jury should be directed that it is for them to decide whether the contrary is proved; that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish".

However, it should always be borne in mind that there is no presumption in respect to the basis upon which the presumption must rest; the statute expressly states that that basis must be proved beyond a reasonable doubt. Accordingly, with regard to the basis [e.g. in section 1 (b) possession of the container] it would be enough for the accused to raise a reasonable doubt for an acquittal. Where, however that basis has been proved beyond a reasonable doubt, the presumption of possession of the drug contained therein is rebuttable by the accused on the balance of probability. Implicit in the presumption is that knowledge which is accepted as an essential element in establishing criminal culpability for illegal possession of a prohibited substance or thing is presumed against anyone in possession, custody or control of the container.

In the instant case, the Magistrate clearly rejected the

defence and recorded the following findings of facts thus:

"1. On or about 4th January, defendant introduces Gowie to Officer Det. Sgt. Brown at Pit Stop Restaurant, in George Town.

2. Defendant leaves for Jamaica on 30th November, 1989 and returns on 5th December.

3. At 12.41 p.m. on 10th January, 1990, there is a phone call from defendant's residence to Gowie's workplace in Jamaica Call No. 9295470.

4. The following day, 11th January, defendant leaves for Jamaica returning on 17th January.

5. On 18th January five telephone calls originating from defendant's residence are made to Jamaica:

   First, at 8.36 a.m. to Gowie's workplace.

   Second, at 3.02 p.m. to Gowie's house (No. 92943973)

   Third, at 3.02 p.m. a call is made to Gowie's workplace.

   This is followed at 8.14 p.m. by a call to Gowie's residence.

   At 8.09 p.m. the final call is made, this time to Gowie's workplace.

6. That night shortly after 9 p.m. Gowie arrives at the Airport.

7. Gowie makes a phone call to Pit Stop workplace to defendant's girlfriend, requesting to be met.

8. Defendant picks up Gowie at Airport.

9. Members of the Drug Squad, on seeing defendant heading for airport, turn around and followed to see who he was meeting.

10. Defendant's car stopped by police, defendant leaves Gowie in car and goes to talk to police.

11. Defendant denies knowing Gowie, alleging that it was a girl he had gone to meet.

12. Gowie searched at station and over 1 lb of cocaine is found in his bag.

13. Defendant, who accompanies police to station, disappears from station, then phones to find out if all is well with Gowie.

14. Defendant arrested at home on suspicion of being in possession of cocaine with intent to supply.

15. Gowie convicted and sentenced for POSSESSION OF COCAINE WITH INTENT TO SUPPLY.

In fact, I find that on the totality of the evidence the Crown has gone further than the statute requires, in that the defendant did not only go there to pick up Gowie, but that he did so knowing exactly what that now convicted man had in that travelling bag. In other words, the Crown has satisfied the Court that the defendant had knowledge, the absolute proof of which is essential under the jurisdictions to which Learned Counsel for the defence has referred. The Crown has by circumstantial evidence adduced facts which led to one irrefutable conclusion: that the accused is guilty as charged".

On the evidence it was open to him to conclude, as he did, to the effect that Gowie obtained and brought the drug to Grand Cayman pursuant to arrangements which the appellant had previously made and that having regard to the appellant's conduct and, in particular, his lying endeavours to disassociate himself from Gowie, the courier, he inferred that the appellant knew that Gowie had the drug in the red travelling bag. Thus in addition to, and independent of the presumption, he drew what was a reasonable inference of knowledge on the part of the

appellant. However, as that travelling bag remained in the exclusive possession of Gowie and there was no evidence as to the transfer of the property or possession to the appellant, the evidence points more strongly to the appellant being concerned in the possession of the cocaine.

In allowing the appeal in part we acted in keeping with the approach extracted from dicta in **R. v. Dawson** (1960) 44 Criminal Appeal Report at p 87 as set out in the headnotes thus:

> "Where a prisoner is convicted on both of two alternative counts, there is no rule of law that the Court of Criminal Appeal will treat the conviction as if it had been on the lesser charge only, though the court may do so in a proper case, or if in doubt. It is the duty of the court to look at the realities of the position and it may be proper to affirm the conviction on the count on which the evidence is plainest, even though that be the count charging the major offence".

Having regard to the evidence and the realities of the matter we considered this a proper case for affirming the conviction on the lesser charge only and imposing a sentence appropriate to that charge.

For these reasons we entered judgment in the terms set out above.