

CAYMAN ISLANDS

IN THE COURT OF APPEAL

Criminal Appeal

No. 26/87

10-12-87

Reported

VICTORIA WEEKS

vs

R E G I N A

BEFORE:

The Hon. Mr. Justice Zacca, P.
The Hon. Mr. Justice Georges, J.A.
The Hon. Mr. Justice Henry, J.A.

Appearances are:

Mr. Hampson for the Appellant.
Mr. Sharman for the Crown.

August, 27th & 28th, 1987

J U D G M E N T

The appellant was charged jointly with one Joseph Garland Murphy with possession of ganja, possession of ganja with intent to supply and importation of ganja. Murphy pleaded guilty to importation of ganja but not guilty to possession and possession with intent to supply. The appellant pleaded not guilty to all the charges. The prosecution, on Murphy's plea of guilty, did not proceed with the charges to which he had pleaded not guilty. The hearing continued against the appellant on all three counts. She was found not guilty of importation, but guilty of possession with intent to supply. The charge of possession was left on the file.

At the close of the argument we allowed her appeal and now give our reasons for so doing.

The appellant was the owner of a sailing Yacht "Cheers", which, because of bad weather, had put into harbour in Grand Cayman and was moored at Spott's Bay. Murphy and herself were the only persons on the yacht. She states that Murphy was the captain and there is no evidence contradicting this.

Officers of the Drug Squad, among them Sgt. Leroy Mitchell, boarded the yacht and were granted permission to search. Going below decks Sgt. Mitchell noted that the wood on the sides of the boat was of a different shade from that of the floor. He pushed a screw-driver between the slates on the side. When he pulled it out, it smelt of ganja. He then unscrewed the wood on the side and uncovered a secret compartment with brown paper packages. He bored a hole in one of these packages and saw that it contained a brown vegetable material resembling ganja. He showed this to both the appellant and Murphy and cautioned them. They made no reply. A further search revealed several secret compartments and in all, 699 lbs of ganja were retrieved. Sgt. Mitchell stated that it was immediately noticeable that the floor of the boat was dark brown and the sides a lighter shade of brown, but apart from that there was nothing else to suggest that there may have been secret compartments. There was no smell of ganja before the slat was forced. Detective Chief Inspector Briggs, who corroborated the evidence of Sgt. Mitchell stated that the fact that the floor of the boat and the wall were of a different colour was not suspicious.

There was a question and answer session with the appellant. She denied that she was aware that there was any ganja on the boat. She had bought it in October, intending to use it in her business of boat chartering with a sailing school in Key West. The boat would be useful in that business.

She had known Murphy for ten (10) years. At one time they had lived together but they had grown apart, though remaining friendly. They maintained a business connection and had lunch once in a while. She employs him on charters.

She had purchased the boat in October, 1986, after inspecting it and then had handed it over to Murphy with a power of attorney to put it in a seaworthy condition. When she inspected the boat it appeared to be basically just like other boats of that type. She had noticed that the wood on the floor was darker than that on the sides but had thought nothing of it. It was not clear as to exactly when she had made that observation.

She confirmed the substance of the interview in her evidence on oath.

She stated that having purchased the boat she thought she should have a sail in it to see how it handled. Murphy left in October to sail the boat to Grand Cayman. She was to join him there, sail to Jamaica and then to Key West. She did come down on November 20th, but there had been difficulty in finding someone to do sail repairs and the trip was not possible then. She decided to postpone it until after Christmas. She flew back to Miami on November, 24th.

She returned on January 12th or 13th. Murphy had come down earlier. They set off on January 16th, and went to Cayman Brac. They ripped their main-sail and had to have it repaired. They left the Brac on January 21st, 1987, and got to Jamaica on January 23rd. A northwestern blew up shortly after their arrival and they spent the night aboard in safe anchorage. In Jamaica, she states that for most of the time she was not in Murphy's company, though they did on occasion eat together. They visited Ocho Rios and Port Antonio and it would appear that on leaving they cleared their departure from these ports in the usual way.

While in Jamaica there was need for her to return to Miami in connection with her business. She left at 9 a.m. on Sunday and returned on the Tuesday evening about 5 p.m., February 3rd. They left the next day and on their way a storm arose which forced them to seek shelter in the Caymans. She had no idea that there was any ganja on board the boat. She had made no arrangements to buy any.

In his short judgment the trial magistrate stated that he just could not believe that the appellant did not know that the ganja was on board the ship. In effect, he found that the story was so inherently improbable as to be unbelievable. He made no comments on the manner and demeanour of the appellant as a witness, nor did he refer to any inconsistencies in her testimony. There are none.

Essentially, the magistrate held that her relationship with Murphy was such that she must have known that he had placed the ganja on board.

On opening the appeal, Mr. Hampson for the appellant applied to have admitted in evidence certain documents listed in his Amended and Consolidated Grounds of Appeal. The documents were:

- (1) statements made by Joseph Murphy;
- (2) a brochure showing the vessel "Cheers" when it was new and later in its existing condition;
- (3) a notarised affidavit sworn by one Nadine Jones dealing with the issue as to whether Murphy still lived with the appellant; and
- (4) a communication from City Electric System to Joseph Murphy.

The application was made under section 13 of the Court of Appeal Law, and was plainly not well conceived. There was no evidence that the material sought to be admitted had not heretofore been available. Some of the material, e.g. the statements of Murphy, would in any event not have been admissible in evidence at the trial of the appellant. The brochure of pictures could not be admitted unless the photographer who compiled it was available to tender it. Nadine Jones would have had to be present for cross-examination. The application was, therefore, not granted.

The first ground of appeal was that it had not been proved beyond reasonable doubt that the appellant had in her possession or custody or under her control anything containing a controlled drug. This was clearly not maintainable. Even though Murphy was the captain, the appellant, as owner, present on the ship would plainly have been in possession of it. The presumption enacted in section 6A(b) of the

Misuse of Drugs Act, therefore applied. This reads:

"Where it is provided 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 substantial ground of appeal was that in the circumstances of the case, even if the statutory presumption operated to shift the burden of showing lack of knowledge on to the appellant, she had satisfied the court on the balance of probabilities that she neither knew nor had reason to know or suspect the existence of the drug on the boat. The trial magistrate had not properly addressed his mind "to the legal reasoning required to arrive at the decision he made".

It is clear on the evidence, and indeed accepted by the prosecution, that there was no obvious tampering with the wood-work of the yacht so as to excite suspicion. In the words of Chief Inspector Briggs, "the fact that the floor of boat and wall are a different colour is not suspicious".

Sgt. Mitchell agreed that apart from that difference in colour, there was nothing else to suggest that there was ganja on board. That would mean that the boat did not ride on the water in a manner which could have led an observer to conclude that it was more heavily loaded than it should have been, having regard to the obvious cargo. There was no smell of the drug on the yacht.

Murphy had been in control of the yacht since October, 1986, with a power of attorney authorising him to put it in seaworthy condition. There was ample opportunity for him to have put in the secret apartments without the appellant being in any way aware of them.

There is no evidence as to when the marijuana was placed on the yacht. Indeed, in his reasons the trial magistrate conjectured that it may have been loaded while the yacht was at anchor at Spott's Bay. Quite rightly, he rejected that hypothesis, although, somewhat contradictorily, he used it as the basis for dismissing the count of importation against the appellant. Mr. Hampson sought to use this to develop an argument that the verdicts of guilty of possession with intent to supply and not guilty of importation of the same cache of marijuana were inconsistent. The verdicts are clearly not inconsistent on the reasoning of the trial magistrate, though the reasoning itself may be open to criticism.

On the evidence, a finding that the marijuana was loaded while the yacht was in Jamaica would be well founded. The evidence is that the appellant and Murphy were not always together while in Jamaica. She stated that she engaged in activities of her own and so did he. There is no evidence from which any inference can be drawn as to the length of time it would have taken to pack the bags of marijuana found in the concealed compartments. It may not have required as long as was taken up by the appellant's business visit to Miami. The compartments may have been prepared in the knowledge that the cargo could have been loaded in a period of half a day while the appellant was away on some pleasure trip by herself - an eventuality which could be foreseen or even arranged. The appellant's explanation on analysis, does not conflict with any of the established facts in the case.

From the brief reasons which he gave, it would appear that the trial magistrate found that the relationship between the appellant and Murphy was such that she must have known that there was

marijuana on the boat. The appellant's evidence, as has been indicated, was that the relationship with Murphy, though intimate at one time, had become merely pleasant and businesslike. The magistrate rejected this, as well he might. There was evidence that he gave her address as his on immigration documents. It was also the address on a receipt from a gun shop in Fort Lauderdale and, apparently, on his driving licence. She explained that he used her address as his mailing address because he moved around a great deal and it was convenient. She had asked him to stop doing this.

Accepting that there was a close relationship between them, this appears quite inadequate by itself to support a finding that she must have known of the presence of marijuana on the boat. It is at least equally plausible that Murphy could have abused the trust she placed in him and used his access to the yacht to lay the plan for smuggling the marijuana for a quick profit.

The trial magistrate in effect says he does not accept her story because it is inherently improbable. His finding does not appear to have been based on the appellant's demeanour as a witness. Against the background of the established fact, we were satisfied that it could not be said that the explanation which she gave was inherently improbable and this court as an appellate tribunal is in as good a position as was the trial magistrate to form that opinion.

In R v Carr-Braint, [1943] 1 K.B. 607, Humphreys, J., stated at p 612:

"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".

We were satisfied that the appellant had satisfied that test in that on all the known facts, her story was reasonably probably.

DELIVERED this *10th* day of *December* 1987.