PRIVY COUNCIL APPEAL NO. 33 of 1972

THE DIRECTOR OF PUBLIC PROSECUTIONS — APPELLANT

v.

WISHART BROOKS — RESPONDENT

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3rd APRIL, 1974

Present at the Hearing:
LORD WILBERFORCE
LORD DIPLOCK
LORD CROSS OF CHELSEA
LORD SALMON
SIR ERIC SACHS

[DELIVERED BY LORD DIPLOCK]

This appeal is brought by special leave from a judgment of the Court of Appeal of Jamaica which quashed the conviction of the respondent by a Resident Magistrate for an offence under s. 7(c) of the Dangerous Drugs Law of unlawfully having in his possession ganja.

The relevant facts found by the magistrate can be stated shortly. A van was seen by a number of police officers parked with its engine running on a lay-by near an airstrip at Braco. The respondent and two or three other persons were in the cab, the respondent occupying the driver's seat. When the police, who were in uniform, ran towards the car the occupants scrambled out of the door of the cab and took to their heels. Two got away into the bush but the respondent and one other (a co-defendant at the trial) were caught before they could make good their escape. In the body of the van, which was neither visible nor accessible from the cab itself, were nineteen sacks containing a total of more than 1,000 lbs of ganja. When asked by Corporal Lakeman why he had run from the vehicle the respondent said that a man named Reid employed him to drive the van to Brown's Town. Reid took the van leaving him (the respondent) at Brown's Town. Reid returned with it loaded as it was and told him to drive to Braco. (Braco is some 16 miles from Brown's Town.) The respondent was also asked by the corporal whether he knew what was in the sacks, but he made no reply to this question.

At the hearing before the magistrate there was some discrepancy in the evidence of the police officers on the question whether the respondent had tried to run away. This was one of the grounds upon which a submission was made at the close of the prosecution's evidence, that there was no case to answer. The other ground was that there was no evidence that the respondent was in "possession" of the ganja. The magistrate did not find it necessary at that stage to resolve the discrepancy in the police evidence. He ruled that whether or not the respondent had tried to run away, there was a sufficient prima facie case of possession on the part of the respondent. After this ruling the respondent made an unsworn statement from the dock: "What I told Lakeman was true. I did not run from the van. Lakeman held me around the steering wheel." The magistrate did not accept this statement as true. He said that he believed the statements of the two constables who had deposed that the respondent had tried to run from the van. Without giving any further reasons he found the respondent guilty of the offence charged and imposed the mandatory sentence of 18 months hard labour.

The other defendant was convicted too, and his conviction was also quashed by the Court of Appeal. The evidence against him differed from the evidence against the respondent. It is unnecessary to recount it as no appeal is brought against the quashing of his conviction.

On the respondent's appeal to the Court of Appeal, that court accepted its own previous decision in R. v. Livingston (1952 6 J.L.R 95) as correctly laying down the law in Jamaica as to what knowledge the accused must have of the identity of the substance as ganja, in order to amount to "possession" of it for the purposes of an offence under s. 7(c) of the Dangerous Drugs Law. The court rejected a submission by the prosecution that what was said in R. v. Livingston as respects knowledge should be treated as having been in part over-ruled by the decision of the House of Lords in Warner v. Metropolitan Police Commissioner ([1969] 2 A.C. 256). This submission has not been pursued before their Lordships' Board. The question of what are the mental elements required to constitute a criminal offence of having in one's possession a prohibited substance is a finely balanced one, as Warner's case itself shows. It turns on a consideration not only of the particular provision creating the offence but also of the policy of the Act disclosed by its provisions taken as a whole. The Jamaican legislation is not the same as that which was under consideration by the House of Lords in Warner's case. Since R. v. Livingston was decided more that twenty years ago, it has been treated as authoritative on the extent of the knowledge of the accused needed to constitute the offence under the Jamaican legislation, and has been frequently followed in Jamaican courts.

Their Lordships would not think it right to disturb it as authority for what it did decide as to the mental element required to constitute the offence under s. 7(c) of the Dangerous Drugs Law of having in one's possession a dangerous drug.

Since R. v. Livingston was the foundation of the judgment from which the instant appeal is brought, it is however important to see what it was that that case did decide. The defendant, Livingston was a baggageman employed by bus owners who were common carriers. He took into his custody from a consignor for carriage on the bus on which he travelled as baggageman, a sack which was found to contain ganja. It was argued the there could not be "possession" within the meaning of s. 7(c) without knowledge of the thing possessed. The Court of Appeal formulated four questions as being those which arose for their determination:

"(1) Could the temporary dominion or control which the appellant had over the ganja as baggageman on the bus amount to possession within the meaning of section 7(c) or was it merely custody or charge?

(2) 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?

(3) 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?

(4) If the answers to questions (1), (2), and (3) are in the affirmative, was there evidence of knowledge by the appellant in this case upon which the learned magistrate could properly find him guilty of the offence charged?"

Their Lordships would observe that questions (1) and (4) are special to the facts of Livingston's case, and that question (1) is not about the knowledge that a person has about a thing that is in his physical custody or control. That is dealt with separately in questions(2) and (3). These two questions are not special to the facts of Livingston's case but deal with principles of law of general application as to the extent of the two different requirements of knowledge on the part of a defendant needed to constitute the mental element in the criminal offence of having in one's possession a dangerous drug.

All four questions were answered in the affirmative. Their Lordships need not deal further with the answers to the general questions (2) and (3). They accept the affirmative answers as correctly stating the law applicable to this offence in Jamaica.

The affirmative answer to question (1) was clearly right upon the particular facts of Livingston's case; but, in their Lordships' view, the way in which the question was framed and the

brief reason given for the answer are liable to mislead and have led the Court of Appeal in error in the instant case. The reason given was: "As regards question (1) above, we think that the appellant's position was that of a common carrier or the agent of a common carrier and that, as such, he had possession, and not merely custody or charge, of the ganja. (Pollock and Wright on Possession In the Common Law pp. 130, 131, 166)."

In the ordinary use of the word "possession" one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under one's physical control. This is obviously what was intended to be prohibited in the case of dangerous drugs. Question (1) and the reason given for the answer, however, suggest that, in addition to the mental element of knowledge on the part of the accused, which the Court of Appeal had chosen to deal with separately in questions (2) and (3), the word "possession" imported into this criminal statute as a necessary ingredient of an offence against public health the highly technical doctrines of the civil law about physical custody without ownership as a source of legal rights in the actual custodian against third parties and about the legal relationships between owner and custodian which brings about the separation of proprietary and possessory rights in chattels. If this is the implication to be drawn from this part of the judgment in R. V. Livingston it is, in their Lordships' view wrong. These technical doctrines of the civil law about possession are irrelevant to this field of criminal law. The only actus reus required to constitute an offence under s. 7(c) is that the dangerous drug should be physically in the custody or under the control of the accused. The mens rea by which the actus reus must be accompanied is the kind of knowledge on the part of the accused thatis postulated in questions (2) and (3).

Upon the evidence, including his own statement to the police, the nineteen sacks of ganja were clearly in the physical custody of the respondent and under his physical control. The only remaining issue was whether the inference should be drawn that the respondent knew that his load consisted of ganja. Upon all the evidence and in particular the fact that he and the other occupants of the van attempted to run away as soon as they saw the uniformed police approaching, the magistrate was, in their Lordships' view, fully entitled to draw the inference that the defendant knew what he was carrying in the van.

Although the judgment of the Court of Appeal included an elaborate discussion of the speeches in the House of Lords in Warner's case, which were concerned with the accused's knowledge of the identity of what was in his physical custody or control, the Court of Appeal, as their Lordships understand the judgment, did not find it necessary to reach a final conclusion as to whether the magistrate's inference

as to the accused's knowledge was justified or not. They quashed the conviction on a different ground.

Misled, as their Lordships think, by the apparent distinction drawn in question (1) in Livingston's case between physical custody and control, and possession in the technical sense in which that expression is used in civil law to connote a source of legal rights against third parties, they held that the respondent "was not..... shown to have anything more than mere custody or charge of both the van and its contents" and that this was not enough to constitute "possession in the meaning attributed to that word in Livingston's case." This conclusion they reached upon the ground that the respondent was in charge of the van in the capacity of servant to the man Reid referred to in the respondent's statement to the police; and relying on the authority of Pollock and Wright on Possession in the Common Law, they held that the "possession" of the van and its contents remained in Reid as the master and never passed to the respondent as his servant. Accordingly they held that he could not be convicted whether or not he knew the contents of the van to be ganja. In so holding the Court of Appeal fell into error.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed and the conviction of the respondent restored. The case should be remitted to the Court of Appeal for consideration of the respondent's appeal against sentence.