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27-9-02

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

SCA #30/02

ANNA SKOOG

V

REGINA

Appearances:

For the Appellant, Anna Skoog: Lawrence Aiolfi
For the Respondent, the Crown: Adam Roberts

Hearing: Monday, September 9, 2002

REASONS FOR JUDGMENT

Anna Skoog is 26 years old and she worked as a waitress at the Lobster Pot Restaurant at the edge of George Town, on the Caribbean Sea. She came to Grand Cayman from Sweden in 1998 and has lived with her boyfriend, Clarence Buchanan since January 2001. He became involved in exporting ganja which he kept locked in a store room in his rented apartment. She knew the store room contained ganja but did not know how much. After the drugs were found by the police she was convicted and sentenced to three years imprisonment. She appeals against both her conviction and sentence.

She was convicted of:

1. possession of approximately 1,000 pounds of ganja with intent to supply, contrary to **Section 3(1) of the Misuse of Drugs Law, Law 13 of 1973 (revised 2000)**.

2. permitting premises to be used for the distribution of controlled drugs;
contrary to **Section 3(2)(a) of the Misuse of Drugs Law, Law 13 of 1973** (revised 2000), and;.

She was sentenced by the learned Magistrate to three years imprisonment in respect of Count No. 1 and two years concurrent in respect of Count No. 2.

FACTS

In about September 2000, Ms. Skoog moved into an apartment which she shared with two others. She shared the downstairs room with her friend, Hildi Jelstad and Mr. Clarence Buchanan occupied the upstairs bedroom. The lease with the landlord was in the names of Mr. Buchanan and Hildi Jelstad.

Ms. Skoog paid a share of the rent and utilities. By January 2001 Ms. Skoog and Mr. Buchanan had developed a romantic and intimate relationship and she moved upstairs to share his room with him. At some point Ms. Jelstad moved out and the downstairs room was occupied by others from time to time with all those living in the apartment, sharing the cost of rent and utilities.

In June 2001 Ms. Skoog learned that Mr. Buchanan was keeping "weed" in a locked storeroom off their bedroom. She did not have a key to this storeroom. On about August 14, 2001, she also became aware of two large bags of ganja in their bedroom closet.

She testified that she asked Mr. Buchanan to remove the ganja from the premises but he did not.

On August 28, 2001 Mr. Buchanan took approximately 250 pounds of ganja to the airport to load on Cayman Airways, for shipment to Miami. Included in that 250 pounds were the 2 bags of ganja that Ms. Skoog had observed in the closet.

Later that same day, the premises were searched by the police and approximately 1,000 pounds of ganja was discovered. Also found on the premises were scales, cling wrap and baggies. Ms. Skoog testified that "I never inquired from Clarence why they were in the room", and that she didn't know why they were there.

The learned Magistrate accepted the evidence of the police, that upon entering the premises on August 28, 2001, there was an overpowering odour of ganja.

By August 28, 2001, the original lease had expired but Mr. Buchanan had remained in possession. No one else occupied the downstairs bedroom. The landlord was aware that Ms. Skoog lived there and the learned Magistrate accepted that on occasion Ms. Skoog had delivered the total amount of the rent to the landlord. Ms. Skoog had denied this. When Mr. Buchanan delivered the rent cheque, the landlord issued a receipt in his name but when Ms. Skoog, or anyone else delivered the rent cheque, the receipt was issued in the name of apartment number 16.

The Magistrate concluded that Ms. Skoog and Mr. Buchanan were joint tenants. Ms. Skoog testified that she considered the premises to be her house and that she had the right to prevent other people, other than Mr. Buchanan, from entering the upstairs bedroom.

Ms. Skoog was charged with possession of the 1,000 pounds of ganja found inside the premises. She was not charged in connection with the two bags of ganja that she had admitted knowledge of, prior to August 28, but which were apparently removed from the premises on the morning of August 28, prior to the search by the police.

GROUND OF APPEAL

Ms. Skoog says that the Magistrate made two errors in convicting in respect of Count No. 1; possession with intent to supply. They are:

1. The facts as found by the learned Magistrate did not support a conclusion that Ms. Skoog was in possession of the ganja in the storeroom, because she had no practical control over it.
2. The facts as found by the learned Magistrate do not support a conclusion that Ms. Skoog encouraged Mr. Buchanan in his endeavours to supply.

Possession can be proved in the criminal context by showing:

1. actual possession, co-existent with knowledge of what the thing is and with some degree of control, or;
2. constructive possession covering cases where a person is not in actual possession but has some rights to recover the goods (i.e. control), again coupled with knowledge of what the goods are.

See *R v. Merren* 2000 C.I.L.R, 234 and *Attorney General v Merren* 2001 C.I.L.R. C.A., p181.

In the present case it is not suggested that Ms. Skoog was in actual physical possession of the ganja, that is, on her person. It is accepted by the Crown that the proper inference to be drawn from the evidence is that all of the ganja found in the premises on August 28, had been in the locked storeroom that morning and that Mr. Buchanan had taken some of it out, packaged it and put it in the bedroom closet that day, after Ms. Skoog had left for work and before she had returned.

The learned magistrate concluded at pages 4 and 6 of her reasons as follows:

“The defendant Skoog is also charged with possession of ganja with intent to supply.

The first issue arising is whether she could be said to be in possession of the ganja in the circumstances . . .

The defendant Skoog admits knowing that there was ganja on the premises. According to her, she had known it was there for over several months. The only issue is whether or not she had sufficient control to constitute possession and I find as a fact that she did.

As to the issue of encouraging another's possession and as a matter of law, acquiescence *where there is the element of control* allows the jury to infer from the fact of permitting the activity, that the defendant thereby encouraged it."

With respect to possession with intent to supply she stated at page 7 of her reasons:

"In my view, the issue for resolution in this case is, did the defendant Skoog aid and abet Buchanan's possession with intent to supply?

I answer that question unequivocally in the affirmative:

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 in knowing the purpose for which the drug was stored. The drug paraphernalia i.e. the industrial size plastic wrap and the scales and the large quantity of ganja 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 as I have observed *supra*.

Even if she didn't know the particulars of how the drug was to be dealt with i.e. exported, by permitting him to use the premises for the storage and distribution of the drugs, with full knowledge of the preparation of the drugs for distribution, she aided him in his possession with intent to supply and I find her guilty of the charge of possession with intent to supply."

It seems, therefore, that the basis of her decision was that:

1. the defendant knew there were drugs on the premises;
2. she had an element of control over them or the premises;
3. her acquiescence amounted to an encouragement to Mr. Buchanan.

ANALYSIS

Mr. Aiolfi on behalf of Ms. Skoog submits:

1. That there are not sufficient facts proved to make a finding that Ms. Skoog was in possession (as that term has been defined by the authorities). He says that mere knowledge of the location of the ganja is not enough to base a conviction. He says that the Crown must prove that the accused was in a position to exercise practical control over it.
2. That mere acquiescence is not enough. There must be some positive evidence of encouragement or control and he says there are none.
3. Further, that in order to prove encouragement the Crown must prove;
 - (a) that the defendant was aware that her inactivity was encouraging the crime, and,
 - (b) that Mr. Buchanan's knowledge of her inactivity, in fact encouraged him to commit the crime.

In summary, Mr. Aiolfi submits that the learned magistrate erred in respect of Count No. 1 because:

1. there was no practical control over the ganja;
2. that mere knowledge and acquiescence is not sufficient, that there must be some positive evidence of encouragement;
3. the Crown has not proved that the defendant either intended her inactivity to encourage or that it did in fact encourage Mr. Buchanan in his illegal endeavours.

In *Hughes v Guild* 1990 SCCR 527, two occupants of a house were convicted of possession of cannabis resin. The High Court held that mere knowledge of the presence of the offending substance was not enough because the person must be in a position to exercise practical control over it in some way. The Court in that case held that practical control was proved because:

1. all of the relevant articles were lying in the open in their own living room;
2. the appellants were the only persons occupying the house; and
3. if they knew that the drugs were in their own room they could have picked them up and done with them what they wished;

The Court went on to observe that it may be possible to distinguish the position of one occupier from another if drugs are concealed or if one occupier is absent at the crucial time.

In this case Mr. Aiolfi argues that Ms. Skogg had no practical control over the drugs in the locked storage room. He says that the two bags found in the closet were taken from the storeroom that day, when Ms. Skoog was away at work and that last inference is accepted by the Crown.

In *R v. Searle and Others* 1971 C.L.R. 592 C.A., drugs were found in a vehicle which the defendants were using for a driving holiday. The Court of Appeal set aside the convictions on the basis that mere knowledge of the presence of the forbidden article in the hands of a confederate was not enough: joint possession had to be established. The Court said that the direction that ought to have been given, was to ask the jury to consider whether the drugs formed part of a common pool from which all had the right to draw at will and whether this was a joint enterprise to consume drugs together because then the possession of drugs by one of them in pursuance of that common intention might well be possession on the part of all of them.

The commentary that follows that case in the report states:

“If the drugs were the property of and under the exclusive control of only one of the tourists, the fact that the others were present and knew of the existence of the drugs would not be sufficient to make them guilty as abettors: *Coney* (1882) 8 Q.B.D. 534. It would be necessary to establish that they assisted or encouraged the possessor in some way in his possession of the drugs. If then, all that can be established is that one or more were in possession and the rest knew about it, all must be acquitted. If the drugs form a common pool from which all may draw at will, then clearly there is joint possession and each defendant is a joint principal.”

In *R v. Conway & Burkes* 1994 Crim. L.R. 826 C.A., a cohabitee of premises was convicted of possessing cannabis that was found at the house she shared with her co-accused. The trial judge directed the jury that on the offence of possession, that permitting the drug to remain, rather than getting rid of it was sufficient to convict.

However, the Court of Appeal held that something other than simple knowledge must be proved. If knowledge is proved but the drugs are or may be under the exclusive control of another, then the defendant's liability will only be that of a secondary party. To be liable as a secondary party the Crown must prove something more than mere knowledge. It must prove something positive which

may be express or implied but which emphasises that there must be evidence of encouragement at least, or something similar.

In *R v. Bland* [1988] Crim. L.R. 41 C.A., the appellant was living with her co-accused, in one room of a house, which was also occupied by others. A search of the premises revealed traces of drugs and the appellant was convicted of possession with intent to supply. The Crown argued that it was open to the jury to find that the appellant knew what the co-accused was doing and that the appellant had acted, not as principal but one who had lent passive assistance.

The Court of Appeal quashed the conviction on the basis that there was no evidence of assistance, passive or active. The Court concluded that the fact that the appellant and the co-accused lived together in the same room was not sufficient evidence from which the jury could draw such an inference. The Court said that there was sufficient evidence from which the jury could have inferred knowledge on the appellant's part that Ratcliffe was drug-dealing, but no more. At page 41 of the report it states:

"Assistance, though passive, required more than mere knowledge; for example, it required evidence of encouragement at least, or some element of control, which was entirely lacking in the case. The case should have been withdrawn from the jury."

The commentary that follows that case at page 42 states:

"A dilemma frequently encountered, especially by young people sharing a house, a flat or a vehicle, is that one or more of their companions may unlawfully possess controlled drugs. Is an innocent person to continue to share the premises or should he, for his own protection, move out? It would be wrong that a person should be required to leave premises where he has every right to be, or not to use a vehicle which he has every right to use, merely because another person, whom he has no right to control, is using the premises or the vehicle for a criminal purpose. Almost

inevitably, however, he incurs some risk of being suspected of participation in the offence and prosecuted.

The present case provides welcome confirmation that the mere fact that a person is living with another whom he knows to be involved in possessing or supplying drugs is no evidence that that person is guilty of the offence. A contrary ruling would, in effect, have imposed a duty on that person to cease to live with the guilty party; and that could not be right.

To constitute aiding and abetting, some assistance or encouragement must be given and the defendant must intend to assist or encourage, in the sense that he knows that what he does will have a tendency to assist or encourage the act which constitutes or results in the commission of the crime. Inactivity may sometimes constitute encouragement, particularly where a person refrains from exercising any right he has to intervene. His passivity may then constitute a positive encouragement to another to continue in some unlawful activity. The draft Criminal Code, clause 31(3) (Law Com. No. 143) expresses the principle as follows:

“... encouragement includes encouragement arising from a failure by a person to take reasonable steps to exercise any authority he has to control the relevant acts of the principal in order to prevent the commission of the offence.”

It will be noted that this provision does not dispense with the requirement to prove encouragement in fact. It merely makes it clear (in accordance with case law) that this is one way of giving encouragement which is recognised by the law, a matter which might otherwise be in doubt. Nor does it in any way dispense the prosecution from the need to prove that intention to encourage or assist which is required in the case of every other secondary party.

It does not necessarily follow that these are the only circumstances in which inactivity can amount to encouragement. It is established that, if a person is present at an affray and stands by nursing an intention to join in if help is needed by the side he favours, he commits no offence; *Allen* [1963] 2 All E.R. 897; but, if his presence with that intention were proved to be in fact an encouragement to his side to continue the fight, and that he knew this was so, then, it is submitted, he would be properly convicted. Though he has no authority to intervene, his remaining there - i.e. not going away with that intention, constitutes an intentional encouragement of the commission of the offence and should entail liability [*J.C.S.*]"

The learned Magistrate referred to *R v. Bland* (supra) and said at page 6 of her Reasons:

"With respect to *Bland*, it is a case to be decided on its own facts and best restricted to its facts and not a decision to be elevated to a statement of principle as stated by the Court of Appeal in *R v. McNamara and MacNamara* [1998] Crim. L.R. 278."

The summary in *R v. McNamara* states:

"Mr. and Mrs. M were convicted of possession of cannabis with intent. They lived in a reasonably large house, in which their five children of 17 or over, lived or regularly stayed. When the house was searched, a large slab of cannabis resin was found in a bag containing dirty clothes in the basement, a smaller block was found on a dressing table in Ms' bedroom and a small bag was in a pair of jeans admitted by Mrs. M to be hers . . .

The authorities relied on by the Ms in respect of the submission of no case to answer on possession were to be distinguished. Reliance was primarily placed on *Bland* [1988] Crim. L.R. 41. In that case, the appellant B lived with R, who clearly dealt in drugs from their flat. The Court concluded that there was no evidence from which the jury could infer that B assisted R, as opposed to merely having known of his

activities. It was decided as a particular case on its own facts and it was wrong to evaluate it into a statement of principle. The court in that case was not laying down general rules about the evidence necessary for inferences to be drawn in respect of possession or joint enterprise in such cases. In the instant case, blocks of cannabis were found in two places. One was in a bag of dirty clothes, and it was Mrs. M's evidence that on the morning of the search, she had got up to do the washing. The other block was in plain view in the Ms' bedroom."

The commentary that follows McNamara (*supra*) states:

"Bland which is fully reported at (1987) 151 J.P. 857 is a useful illustration of limits of secondary liability in possession offenses. See commentary [1988] Crim.L.R. 41. In such cases the evidence must be sufficient to satisfy a jury either that each party was in possession with intent to supply, or that someone (in the present case, possibly a third party) was, and the defendant not only know that he was, but also assisted or encouraged him in the enterprise. It is not enough that the jury are satisfied that one of the defendants was in possession with intent to supply if they cannot be sure which one it was, or that the party not in possession with that intent was intentionally assisting or encouraging another."

The Court of Appeal in *Bland* was not laying down any statement of principle about what particular evidence is necessary to draw inferences in respect of possession or joint enterprise (emphasis added) and the Court held in *McNamara* that there was not sufficient evidence for the necessary inferences to be drawn. But *McNamara*, (as the commentary suggests) does not detract from the conclusions reached in *Bland* (*supra*) and the other cases relied upon by the Appellant to the effect that an accused must not only have knowledge of the drugs and the intention to supply but that an accused must also have assisted or encouraged in the enterprise.

In support of its position, the Crown relied upon *McNamara* (supra) and *R v Ashdown* (1974) 59 Cr App. R 193 C.A. In *Ashdown* (supra) the defendant was charged with the offence of permitting premises to be used for smoking cannabis and therefore I shall deal with that case under Count No.2.

From the foregoing cases I have concluded that the following principles are applicable in this case:

1. the evidence must prove that Ms. Skoog was able to exercise some practical control over the drugs; or
2. if Ms. Skoog had knowledge of the drugs but lacked control over them, then mere acquiescence is not sufficient to prove possession. The Crown must prove assistance, encouragement or something similar.
3. to prove encouragement the Crown must prove that:
 - (a) Ms. Skoog was aware that her non activity was encouraging the crime (i.e. she had intention); and
 - (b) Mr. Buchanan's knowledge of her inactivity, in fact encouraged him to commit the crime.

In the present case the learned Magistrate concluded as a fact that Ms. Skoog had control over the drugs.

The Crown did not refer to evidence which, in my view could lead to that conclusion. Ms. Skoog testified that the storage room was locked and that the keys were on Mr. Buchanan's key ring. The Magistrate did not say that this evidence was rejected and if it were rejected I would have expected that the learned Magistrate would have said so. When the police searched the premises, Ms. Skoog was not at home but Mr. Buchanan was. The key to the storage room was located in the room.

Therefore, I conclude that Ms. Skoog did not have a key to gain access to the storage room.

But the storage room was inside the bedroom - not outside

I also conclude that she was not, at law, a co-tenant with Mr. Buchanan. He was the tenant on an overholding lease. He had rights as against the landlord. If anything Ms. Skoog was a sub-tenant of Mr. Buchanan. She did not have the legal right to deny Mr. Buchanan access to the premises or to his room.

Mr. Roberts for the Crown, submitted that Ms. Skoog had some control over the drugs because she could have informed the police, informed the landlord or threatened to do either. She also could have threatened to move out. He says that such acts would have resulted in the drugs being removed from the premises and she, therefore, had some control over them and she chose not to exercise it.

I think to conclude that Ms. Skoog was in control based on these submissions would go contrary to the reasoning in *Hughes v Guild* (supra), *R v. Searle* (supra), *R v. Conway* (supra), *R v. Bland* (supra) and *R v McNamara*.

In none of those cases was it suggested that a person would be in control of drugs simply because they could report it or threaten to report its existence to the authorities. To hold that constitutes control, could extend to anyone a positive obligation to report or threaten to report to the police, knowledge of someone else's drug possession. I do not think the common law has gone so far as to impose criminal liability on a person for possession, on the basis that they know someone else has drugs and they have failed to report it.

In these circumstances I conclude that Ms. Skoog was not in control of the drugs.

However, Ms. Skoog can still be guilty as a secondary party if she had knowledge of the drugs and assisted or encouraged Mr. Buchanan in his illegal operation.

The learned Magistrate concluded that "acquiescence where there is the element of control allows the jury to infer from the fact of permitting the activity that the defendant thereby encouraged it".

With respect, I do not think the authorities cited support that proposition. Rather, if there is an element of control then the defendant may be found to be in possession, depending on the circumstances and degree of control.

However, where there is no element of control, acquiescence itself is insufficient. There must be some positive evidence of assistance or encouragement or something similar.

In the present case Ms. Skoog said she asked Mr. Buchanan to remove the drugs. He did not. She did nothing more. The learned Magistrate found that Ms. Skoog must have been aware that there was a large quantity of ganja on the premises and that Mr. Buchanan had it there for the purpose of supplying others. When asked what Ms. Skoog did to encourage Mr. Buchanan, Mr. Roberts for the Crown, submitted that Ms. Skoog knew there were drugs on the premises, that they had previously been bagged and ready to go and that the amounts were significant and yet she did nothing. He said that constituted encouragement.

I disagree. Her inaction did not in my view constitute any encouragement. On the contrary she had expressed her view of discouragement to Mr. Buchanan. Further there is really no evidence on which the learned Magistrate could properly conclude that Ms. Skoog intended to encourage Mr. Buchanan by her inaction or that her inaction actually encouraged him. All we really know is that she asked him to get rid of the drugs and he did not.

Accordingly I conclude on the evidence as found by the learned Magistrate that Ms. Skoog could not have been in possession of the drugs and accordingly that conviction is set aside.

Count No. 2

The learned Magistrate also convicted Ms. Skoog of permitting premises to be used for the distribution of controlled drugs, contrary to **Section 3(2)(a) of the Misuse of Drugs Law** (supra).

Under **Section 3(2)(a) of the Misuse of Drugs Law**, the Crown must prove that Ms. Skoog was the “occupier” of the premises and “permitted or suffered” the distribution of drugs. These terms are not defined by the **Misuse of Drugs Law**. That Section is, however, similar to **Section 8 of the Misuse of Drugs Act** of the United Kingdom and therefore cases decided in relation to it are helpful.

Mr. Aiolfi submitted that the learned magistrate erred in law and fact in finding that Ms. Skoog was an occupier in law, of the premises, within the meaning of the **Misuse of Drugs Law**. He submitted that in order to be an occupier within **Section 3(2)(a)**, the person must be someone who is in occupation of the premises and has the **requisite degree of control over those premises to exclude the offender from them**. He agreed, that Ms. Skoog was in occupation but said that she did not have sufficient control to exclude Mr. Buchanan.

Mr. Aiolfi relied on *R v. Tao* [1976] 63 Cr App. R. 163 C.A. The defendant in that case was a student at Cambridge and lived in a room at a college hostel. He had the exclusive contractual license to use the room and was its only resident. A small fire broke out in his room and the police were called. The defendant was not present but cannabis was found in his room.

Roskill L.J. at page 165 set out what interpretation is to be given to the words “occupier” in the **Misuse of Drugs Law**. He said:

“One asks what is the mischief against which this section is aimed. If one asks that question, it seems to this Court plain that the object is to punish those persons who are able to exclude from their premises potential offenders who wish to smoke cannabis in those premises but do not do so, by making such persons themselves guilty of an offence if they knowingly permit or suffer any of the forbidden activities, those persons being either “the occupier” or “concerned in the management” of those premises. This suggests that Parliament was intending not that a legalistic meaning should be given to the phrase “the occupier” but a commonsense interpretation, that is to say “the occupier” was to be regarded as someone who, on the facts of the particular case, could fairly be said to be “in occupation” of the premises in question,

so as to have the requisite degree of control over those premises to exclude from them those who might otherwise intend to carry on those forbidden activities I have already indicated. That is the way in which this Court would approach the question of construction, apart from authority.”

The appellant also relied on *R v Coid* 1998 Crim. L.R. 199 C.A., where the Court of Appeal affirmed the principal stated in *Tao* (supra). It held that the object of the section was to punish those who were able to exclude from their premises, potential drug users but did not do so. The Court also held that an occupier does not have to be a tenant or have an estate in land. For the purpose of the Act, the fact that one person can be identified as an occupier, even if enjoying a legal title or tenancy does not preclude the application of that description to other people.

Tao was also followed in *Campbell v Campbell* [1982] Crim. L.R. 595 and *DPP v Reid* [1997] unreported Q.B.D.

Therefore, even if Mr. Buchanan was the tenant of the premises, Ms. Skoog could nevertheless be an occupier. To be such, she would have to have required degree of control over the premises to be able to exclude Mr. Buchanan from those premises. The learned Magistrate dealt with this issue in her Reasons as follows:

“The first issue arising with respect to the charge of knowingly permitting the premises to be used for the distribution of drugs under s. 3 is whether or not she was an “occupier”.

Mr. Aiolfi has submitted that she is not an “occupier” and he relies on the dicta in cases such as *Tao*¹ where the Court held that “occupier” is someone who on the facts could fairly be said to be “in occupation” of the premises, so as to have the requisite degree of control over those premises to exclude from them those who might otherwise intend to carry on those forbidden activities. He submits that as against Buchanan, Skoog had no power to exclude him from the premises and that as a matter of law, Buchanan was the lessee (the lease was, as a matter of fact, expired).

I find as a matter of fact that she 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.

She considered the premises to be “her house” and she considered that she had the right to prevent people, other than Clarence, from entering the room she occupied. Essentially Mr. Aiolfi’s submission is that because she paid rent to Buchanan she had no control over the premises and cannot be regarded as an ‘occupier’, but the submission is at odds with the admitted facts and the statement of the defendant herself identifying the premises as ‘her house’. Taken another way, Mr. Aiolfi’s submission is that as a co-tenant of the premises, she could not stop her co-tenant from using the premises for the prohibited purposes; that she could not as matter of law be said to permit a co-tenant to use the premises for the prohibited purposes as she lacked the requisite control.

In the opinion of the Court, this case falls squarely within the case Ashdown² relied on by the Solicitor General in which Roskill LJ observed:

“Why is it, if I may put the matter in this way, that one co-tenant who knows another co-tenant is smoking cannabis in the rented premises and permits him to do so, is not guilty of that offence. Why is there any privilege or immunity attaching to his position of co-tenant. In the view of this Court, one co-tenant who knowingly permits another co-tenant to smoke cannabis on those premises is just as guilty of an offence as a single tenant of premises who invites friends into those premises and then knowingly permits them to smoke cannabis there”.

I find as a matter of fact and law that Skoog was an “occupier” of the premises.”

In *R v Ashdown* 1974 59 Cr App. R. 193 C.A., the Court of Appeal upheld the conviction of four co-tenants for permitting the premises to be used for smoking cannabis. The four appellants had all signed a joint tenancy agreement with the landlord and it seems that the question of whether or not they were “occupants” was not an issue. The issue before the Court was whether they could knowingly permit another co-tenant to smoke cannabis. The requirement that a person must be able to exclude the drug user before they can be an occupier was not raised. Since it was not raised, I

think it likely that the Appellants in that case accepted that as co-tenants they were in such a position as to be able to exclude a drug user from the premises.

In the case at bar the learned Magistrate has not dealt squarely with that issue. She has found the Appellant in occupation but she has not set out on what basis, either legal or factual, that Ms. Skoog would be able to exclude Mr. Buchanan from the premises. In this appeal the Crown also relied on *R v Thompson* (1976) 63 Cr. App. R. 65 C.A., *R v Brock and Wyner* [2001] Crim. L.R. 320 C.A., and *R v Souter* (1971) 55 Cr. App. R. 403 C.A. However, none of those cases dealt with the point raised in *Tao* and argued by Ms. Skoog here. That is, that Ms. Skoog must be in a position to exclude Mr. Buchanan from the premises before she is an occupier within the meaning of **Section 3(2)(a) of the Misuse of Drugs Law**. The cases relied upon by the Crown all deal with the issue of whether the accused knowingly permitted the premises to be used (emphasis added).

In this case, what could Ms. Skoog have done to prevent Mr. Buchanan from entering the premises? No argument was advanced by the Crown that she had any legal remedy (i.e. action available to her) or that she had any realistic actual ability to remove the drugs herself. The original lease was in Mr. Buchanan's name (together with Ms. Jelstad) and not in the name of Ms. Skoog. She had no tenant's rights directly with the landlord. If anything she was a sub-tenant of Mr. Buchanan.

She testified that she felt it was her house and that she could prevent people other than Mr. Buchanan from entering the room she occupied. Those facts, however, simply do not give Ms. Skoog the degree of control required to allow her to exclude Mr. Buchanan from the bedroom.

Accordingly I accept the appellant's submission that she was not an occupant within the meaning of **Section 3(2)(a) of the Misuse of Drugs Law** (supra) and set aside the conviction.

The appeal is allowed and both convictions are set aside.

D. Sanderson
Judge of the Grand Court

Dated: _____