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IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

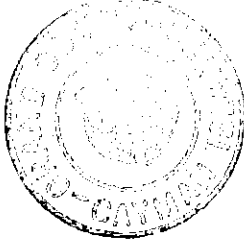
SCA. 26A/86

LEIGH RITCH V. REGINA

For the Crown: Mrs. T. Escalante
For the appellant: Mr. J. Furniss

Before Bingham J (Acting)

Heard April 16, 1993



JUDGMENT

The appellant was as far back as 3rd April 1986 convicted for possession of a controlled drug, being a salt of cocaine contrary to Section 3 (1) (i) (k) of the Misuse of Drugs Law, Law 13 of 1973 by His Honour Kipling Douglas, the Senior Magistrate. He was sentenced to a term of eighteen months imprisonment and in addition fined \$5,000.00 or 6 month imprisonment. He appealed against his conviction and sentence and the matter was subsequently set down for hearing in the Grand Court before the single judge on 18th December 1986. The appeal was not heard on that day as in the interim the appellant was apprehended in the United States of America for offences alleged to have been committed in that country. He was subsequently tried, convicted and sentenced to a long period of incarceration which at present is still continuing.

As someone who prior to his present situation resided in these Islands where he had applied for and obtained status, in his absence he has not sought through his attorneys to continue to prosecute this appeal to a finality.

The facts leading up to his conviction were as follows -

A party of police officers went to the residence of the appellant at Northwest Point atd about 3:45 p.m. on 9th January 1986. The appellant Ritch was seen and asked "what part of the house he occupied?". He replied "upstairs". He then led three of the officers up the external stairway, and into an apartment. He was then asked "if he had any firearms or drugs?" whereupon he replied "no". The police, after instructing the accused Ritch to watch while they searched the premises then proceeded to search the apartment. Nothing was found in that apartment. In a cabinet below the washbasin in a bathroom of the passageway the police sergeant found a piece of aluminium foil wrapped up. On opening it he found that it contained a white powder. This he showed to the appellant asking him "if he knew what it was?". The appellant replied saying "I dont have any comments for you guys". The appellant was then arrested for possession of cocaine. He then told the police that a woman, one Sandra Knosher also lived at the house. She was then on the balcony. When summoned and asked "where she was staying?". She replied "the east room". She then took the police into the room which she and the appellant was sharing. This room was in the master bedroom which had its own bathroom. This bedroom and bathroom was searched but nothing was found. She was nevertheless also arrested. That was after she had been shown the white powdery substance in the foil by the police and was advised by the appellant to say nothing.

The appellant and his female companion were taken to the police station. When questioned and upon being cautioned there they both exercised their rights to remain silent.

At the end of the evidence the female accused was dismissed and the appellant convicted.

The conviction has been challenged on two main grounds namely -

1. "That the decision of the Magistrate was unsafe as the learned magistrate erred in having discharged the co-accused Knosher and the weight of the evidence against both accused being substantially the same the magistrate should have applied the

the same onus to the appellant and discharged him also.

2. That the decision of the Magistrate was unsafe as he failed to consider adequately or at all the following evidence -
 - (a) That the bathroom that the drug was found in was not used by the appellant.
 - (b) That the bathroom was a communal bathroom for guests of the appellant.
 - (c) That there was an abundance of guests on the premises at the time of the discovery of the drug. None of whom were questioned by the police."

Having regard to the conclusion reached in this matter only the second of these two grounds upon which learned counsel for the appellant advanced arguments will be addressed.

Learned counsel for the appellant has submitted that in light of the evidence as to the circumstances in which the controlled drug was found by the police there was no evidence upon which the court could properly find that the appellant was in exclusive possession of the said drug.

Learned counsel for the Crown on the other hand submitted that once it was established that the drug was found on the premises, having regard to the position of the appellant, the onus was on him to ensure that nothing illegal took place there. The silence on the appellant's part was some evidence which the magistrate was entitled to take into consideration in determining whether the charge was proven.

Based on the evidence as it emerged from the Crown's case it is clear that although the premises in question was occupied by the appellant it was at the time of the incident also occupied by at least six to eight other persons. Six of these persons were at the time of the

visit by the police officers by the swimming pool and two were in the water. None of these persons were summoned by the police nor were they questioned as to the substance found in what has been described as being the guest bathroom.

It was the further evidence of the appellant that on the day in question as many as 24 persons were, at some time or other prior to the search and discovery of the drug, on the premises where a party was being held.

At the end of the Crown's case therefore before calling upon the appellant for his defence the learned magistrate had to be satisfied that there was some evidence pointing to possession of this drug by the appellant. Mere occupation of the premises was not sufficient to found possession in the appellant. Possession here connoting control of the drug coupled with knowledge of the fact that it was a controlled substance. The appellant's conduct upon his being questioned by the police when the substance was found could not provide the "something more" required to satisfy the magistrate that a prima facie case was made out. The learned magistrate here had to be at least satisfied that the appellant had control of the drug to the exclusion of all the other persons present on the premises. On the evidence the highest that one could take the case for the Crown given the accessibility of the guest bathroom to the other persons present was that anyone of these persons including the appellant could have placed the aluminium foil with the drug in the closet in that bathroom.

Harre CJ in Davis Patrick Lawrence v. Regina SCA. 115/92 (unreported) delivered on 16th April 1993 in dealing with a not too dissimilar matter in which evidence of that "something more" was not lacking had this to say - (p. 1)

"The appellant admitted that the bottle was for his dogs but denied in his interview and subsequently that he had anything to do with the contents. As the area where the bottle was found was readily accessible to other people the Crown acknowledged that without more they

would not have a strong case.
However there is more".
(Emphasis supplied)

In the absence of an admission by the appellant, unlike in Davis Patrick Lawrence (supra) to establish possession of the controlled substance in this case there was no evidence at the close of the Crown's case which called for an explanation from either the appellant or the female accused as to whether they knew how the substance came to be on the premises. The onus being on the Crown to establish the charge and that onus not having been discharged the learned magistrate in the circumstances ought not to have called upon them for their defence. In doing so he seemed to have been led to adopt such a course based upon the appellant's conduct following the discovery of the drug.

At page 3 of the "Reasons for Judgment" having reviewed the evidence the learned magistrate said -

"The Court is asked to draw the inference that someone other than the two accused was responsible for the drugs that was found. Is there any evidence in the surrounding circumstances to support this. There is little in the behaviour of the accused Ritch from the moment he was shown the drug until his return to the dock in this court that assisted him to discharge this burden of proof. Exercising ones right to remain silent is a common Law privilege which under the present law can result in missed opportunities to provide spontaneous evidence which would assist in the discharge of the evidential burden."

From the cited passage it is clear that the learned magistrate was of the view that upon the discovery of the drug by the police there was some onus placed on the appellant to establish the absence of knowledge or possession on his part of the substance found in the bathroom. Having regard to the position where the bathroom was located, to the apartment where the appellant indicated to the police that he and the co-accused Koshner occupied, good sense dictated that they ought to have invited some response from the persons present by the pool all of whom had an equal access to the guest bathroom in question. That opportunity was, however, not made use of.

The appellant in his sworn testimony denied any knowledge of the presence of the controlled substance or how it came to be in the guest bathroom. His evidence accordingly did not advance the Crown's case any further.

The learned magistrate in coming to his verdict nevertheless sought to rely on the provisions of 7 (1) (a) and 7 (1) (b) of the Misuse of Drugs Law in establishing guilty knowledge on the part of the appellant.

The relevant sub-sections reads as follows -

- 7 (1) (a) "where it is proved beyond reasonable doubt that a person imported 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;
- (b) 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."

Before resort could be had by him to invoke the statutory presumptions referred to in the enactment the learned magistrate had first of all to be satisfied that there was credible evidence upon which he could come to a primary finding that the appellant was in possession of the controlled substance in question. To borrow the words of Kerr J.A. in C.I.C.A. 19/91 Glendon Sidney Logan v. Regina (unreported) delivered on the 7th April 1993. At page 11 the learned judge of appeal said :-

"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 made it clear that where 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."

I would adopt the words as apposite to the facts in this case, as the basis required here would be proof of possession in the appellant.

Such evidence as adduced by the Crown was as I have previously indicated ~~was~~ lacking on the Crown's case. No tacit acceptance of the evidence of the witnesses for the Crown as being the truth could elevate their evidence to the standard required to establish possession in law as laid down by the decided authorities.

In the circumstances the conviction cannot stand. The appeal is allowed. The conviction is quashed and the sentence is set aside. A verdict of acquittal is hereby entered.

D.O. Bingham

D.O. Bingham

Judge (Acting)

30th April, 1993

