

GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEALS Nos 7 & 8 of 1993

BETWEEN:

JULIO ROMERO and OSCAR MACRADO

Appellants

and

THE QUEEN

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice

The Honourable Mr. C.M.Dennis Byron - Justice of Appeal

The Honourable Dr. Nicholas J.O.Liverpool - Justice of Appeal

Appearances: Mr. A. B. Clouden for the Appellants

Mr. K.H. W. Friday and Mr. C. Nelson for the Respondent

1994: February 23;

July 04.

JUDGMENT

SIR VINCENT FLOISSAC, C.J.

On 5th June 1992, a bag of cannabis (marijuana) was found concealed in the number 1 hatch of a vessel called "Don Caesar" which was berthed alongside the Hillsborough jetty at the Port of Hillsborough in the island of Carriacou and of which the first appellant (Julio Romero) was the captain and the second appellant (Oscar Macrado) was a member of the crew. Whereupon the appellants and two other accused persons were charged on an indictment containing two counts. The first count was that on 5th June 1992, at the said Port, the appellants and the other accused did have in their possession a controlled drug (namely 50 lbs of cannabis) contrary to section 6(2) of the Drug Abuse (Prevention and control) **Act No. 7 of 1992**. The second count charged the appellants and the other accused with importation of the controlled drug contrary to section 4(3) of the said Act.

On 13th August 1993, after a trial by jury presided over by *Moore J.*, the appellants were acquitted of the offence of were each sentenced to imprisonment for a term of 7 years. The learned judge also ordered that the vessel be forfeited to the Crown and that the cannabis be destroyed. The appellants have appealed against the convictions, sentences and forfeiture.

At the trial, the key witness for the prosecution was David Decoteau (a Customs Officer). That witness testified that in the afternoon of 5th June 1992, he and the second appellant entered the

No.1 hatch. Decoteau said:

There the second appellant behaved suspiciously.

"I looked at the panel on the starboard side of the vessel which is the right side of the vessel facing the bow. Then I moved towards the Port side. There I noticed a piece of foam stuffed into an opening. I had been in the hatch for about one minute.

I moved in the direction of the foam. The No. 2 was then to my left at the foot of the stair leading to that hatch. As I moved in the direction of the foam the No.2 went and stand in front of the opening with the foam. I stepped around the No. 2, moved him away from that opening (witness demonstrates by indicating a sideways movement of the outstretched left arm).I pulled the foam from the opening, looked into the opening, couldn't see anything. Inside was a bit dark. The opening was about 2' x 2'. The foam occupied the whole opening. I pushed my hand into that hold, felt something, pulled it out. I noticed it was a bag which appeared to contain something heavy.

After I pulled out the bag No.2 was on my left. stiffened himself and put his hands to his head demonstrates by putting both hands on top of his holding it tightly.)"

The No.2 (witness head and

The case for the prosecution was that the cannabis was in the joint possession of the appellants. The prosecution relied on the first appellant's captaincy and comprehensive physical custody and control of the vessel and on the second appellant's suspicious behaviour in the No.1 hatch as the basis of the possession of the first appellant and the second appellant respectively. Although this was a relatively simple case, it was complicated by the fact that the appellants were charged jointly for a so-called joint offence. The trial judge's summing up to the jury was therefore exposed to various technical objections which have been raised from time to time in cases of joint charges for joint offences.

At the end of the hearing of this appeal, Counsel for the appellants must have realised that only two of the appellants' seven grounds of appeal against their convictions were viable and merited consideration. They were grounds 1 and 6 which are interrelated and read as follows:

"1. The learned Trial Judge erred in law when he failed to give proper direction to the jury with respect to the co accused being jointly charged and therefore in joint possession of the drugs Cannabis. The learned trial judge ought to have instructed the jury that joint possession must be established. In short the sort of direction to which the learned trial judge should have opened the jury's mind was to ask them to consider whether the drugs formed a common pool from which all had the right to draw. See Searle (1971) Criminal L.R. 592, see Wright (1975) 119 SJ 829 R v strong (1989) the Times

26 January 1990. The failure to give the aforesaid direction amounted to a material irregularity in the course of the trial thus rendering the conviction unsafe or unsatisfactory.

6. The learned trial judge failed to give proper direction in law with respect to the legal issue of possession, joint possession, joint custody, joint control, as it applied to the ingredients of the offenses that the prosecution must prove beyond reasonable doubt. See Warner v Metropolitan Police Commissioner (1969) A.C. 256 R v Boyesen (1982) A.C. 768 McNamara (1988) 87 Cr. App R

246 Marriott (1971) 1 All E R 595 Court of Appeal Commonwealth of Dominica Magisterial Criminal Appeal No.

27 of 1992 Jose Miranda Ortiz et Al Appellants v the Police (Respondent)."

These two grounds of appeal revolve around the decision of the English Court of Appeal in **R v Searle & others** (1971) Crim. L.R.

592 where *Lord Widgery, C.J.* is reported to have said in effect

that:

"The sort of direction which ought to have been given was to ask the jury to consider whether the drugs formed a common pool from which all had the right to draw at will, and whether there 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."

In my judgment, nothing said by *Lord Widgery, C.J.* in **Searle's case** was intended to be a mandatory catechism or incantation for judges in every case of a joint charge for a joint offence. The learned Chief Justice's dictum was intended to be confined to the particular circumstances of the case before him. Otherwise, the dictum would amount to a total repudiation of the legal principle relating to the criminal liability of a secondary party (an accessory or accomplice) by reason of the secondary party's complicity in a crime. According to that legal principle, where a crime (including unlawful possession) is committed by a principal offender and either before or during the commission of the crime, a secondary party renders assistance (either by way of aid, abetting, counsel, procurement or encouragement) to the principal offender in the commission of the crime, the secondary party will be held to have been guilty of the crime as a party to it if he rendered the assistance with the *mens rea* necessary for guilt of that crime or with knowledge, contemplation or foresight of a substantial degree of probability (as distinct from a bare or remote probability) that the crime was being committed or would be committed by the principal offender.

The proper approach to joint charges for joint offences was explained in the decision of the House of Lords in **D.P.P. v Merriman** (1972) 3 A.E.R. 42. There, *Lord Morris* said (at p46):

"But in answering the question it is important to consider what is meant by a 'joint charge'. In my view, it only means that more than one person is being charged and that within certain rules of practice or convenience it is permissible for the two persons to be named in one count. Each person is, however, being charged with having himself committed an offence. All crime is personal and individual though there may be some crimes (of which conspiracy is an example) which can only be committed in co-operation with others. The offences charged in the present case were individual charges against each of the brothers. Each is a separate individual who cannot be found guilty unless he personally is shown to have been guilty."

Lord Diplock said (at p59):

"The source of the confusion lies, I believe, in the equivocal use of such expressions as 'joint offence' and 'joint charge of one offence'. It is hornbook law that, as Hawkins put it: '... the offence of one man cannot be the offence of another, but everyone must answer severally for his own crime'.•• But when two men are aiding one another in doing physical acts with criminal intent, though the *mens rea* of the separate offence of each is personal to the individual charged, the physical act of either one of them is in law an *actus reus* of the separate offence of each. A 'joint offence' of two defendants means no more than that there is this connection between the separate offences of each, so that as against each defendant not only his own physical acts but

also those of the other defendant may be relied on by the prosecution as an actus reus of the offence with which he is charged."

Lord Diplock concluded as follows:

"I conclude, therefore, that whenever two or more defendants are charged in the same count of an indictment with any offence which men can help one another to commit it is sufficient to support a conviction against any and each of them to prove either that he himself did a physical act which is an essential ingredient of the offence charged or that he helped another defendant to do such an act, and, that in doing the act or in helping the other defendant to do it, he himself had the necessary criminal intent. This was held to be the law by Street CJ and Owen and Herron JJ in the Supreme Court of New South Wales in *R v Fenwick*- a case of rape. I respectfully agree with their reasoning."

Accordingly, the question to be decided in this case is whether the learned judge properly directed the jury on the law relating to unlawful possession of a controlled drug, the law relating to joint charges for so-called joint offences and the law relating to complicity in a crime.

In his summing up to the jury, the learned trial judge began by explaining to the jury that the onus was on the prosecution to establish the guilt of the appellants beyond reasonable doubt. He then isolated the separate and individual offence of each appellant in these words:

"In this case the two accused persons are charged jointly, but although, as I said, they are charged jointly, you must consider the case against and for each accused person separately. In other words, the Prosecution has to prove their case against each one of the two accused. In this case also each accused person is charged on two separate counts. You must consider the evidence on each count separately, so that if you combine those two concepts you must consider each count separately and the case for each defendant separately on each count."

With regard to the case against the first appellant, the learned judge said:

"Now in the case of the No.1, the Captain of the ship, the Prosecution relies on the presumption that the comprehensive physical custody or control of a ship and her cargo is vested in the captain of the ship and that as a result of that presumption the controlled drug, that is, the marijuana, is deemed to have been in the physical custody or control of the Captain.

Under section 42 of the Drug Abuse Prevention and Control Act of 1992, section 42 sub-section 1(b) says this, "Where it is proved 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." So here the evidence is that the No.1 was the captain of that ship. The law presumes that he is in possession or custody or control of the ship; of its cargo, and of anything which is found on board the ship. He is therefore deemed or presumed by law to be in possession or custody or control of that cannabis, but that is not the end of the matter. It is now open to the No.1 accused to rebut that presumption by proving that he was not in possession or custody or control of that drug. It is open to him under section 39 of the same Act to prove that he neither believed nor suspected nor had reason to suspect that the

marijuana in question or that the thing which was found in the ship was a controlled drug. Let me go that over again. The law is that he shall be acquitted if he proves that he neither believed nor suspected nor had reason to suspect that the substance that is to say, the thing in the bag, was a controlled drug, and it is also open to him to prove, if he can, that he neither knew what the substance was or that it was there or that it was a controlled drug. In other words he has to prove that he had neither possession nor custody nor control of that which was found in the ship and bear in mind also the standard of proof which he is required to reach, to prove, that is on the balance of probabilities, so that if you think it is more probable than not that he was neither in custody nor control nor possession of a controlled drug or that he did not know that what was in the ship was a controlled drug,, if on a balance of probabilities, you find those things, you will have to acquit him."

With regard to the case against the second appellant, the learned judge said:

"In so far as the No.2 is concerned however, the Prosecution's case is somewhat different. He is not the captain of that ship. He is a member of the crew, so no presumption operates against him. The Prosecution if they are to prove their case against him, are asking you to look at his conduct in that hatch. Examine it critically and see whether that conduct in that hatch was not the kind of conduct from which you could draw the inference and that he had guilty knowledge of that bag of marijuana which Decoteau pulled out from that opening in the wall of the hatch, and it is from his conduct that the Prosecution is asking you to infer, to draw inference, that he had possession, or custody, or control of the bag and of its contents, knowing that the contents were marijuana, and that he had not only physical custody and control, but he had the mental intention to possess it. Let us look at the evidence and see what is the evidence the Prosecution is relying on. Listen to it carefully and see if from it you can draw those inferences and remember that even if you draw the inferences and you find that he was in possession, custody or control, he too would be entitled to an acquittal if he can prove on a balance of probabilities that he was not in possession, or custody or control, that he had no knowledge of the thing, he had no knowledge of its nature, of its character, he had no knowledge that it was cannabis, if he can satisfy you or if he can establish his defence on a balance of probabilities."

The learned judge did not direct the jury specifically on the law relating to the criminal liability of a secondary party by reason of the secondary party's complicity or participation in a crime. In other words, the learned judge did not specifically tell the jury that even if they found (for example) that the cannabis was in the sole physical custody or control of the first appellant, they could nevertheless convict the second appellant of the crime of unlawful possession of the cannabis if they were satisfied beyond reasonable doubt that the second appellant knew that the first appellant had physical custody or control of the cannabis and with that knowledge assisted the first appellant in such physical custody or control. This omission on the part of the learned judge was favourable to the second appellant because it resulted in a heavier burden being placed on the prosecution.

In my judgment, apart from the omission to deal with complicity, the learned judge's direction to the jury on the joint charge of the appellants for the joint possession of the controlled drugs was impeccable. He clearly explained to the jury in simple language (1) that the offence of unlawful possession of a controlled drug consisted of the actus reus of physical custody or control of the

drug and the *mens rea* of knowledge of that custody or control (2) that notwithstanding the joint charge, the *actus reus* and the *mens rea* of possession had to be proved separately against each appellant (3) that in the case of the first appellant, the basis of the alleged possession was his captaincy and physical custody and control of the vessel which gave rise to a presumption which was rebuttable by proof (on a balance of probabilities) of the absence of physical custody or control of the drug or the ignorance of such custody or control and (4) that in the case of

..., the second appellant, the basis of the alleged possession was his suspicious conduct in the hatch.

Although the learned judge failed to point out to the jury that unlawful possession included complicity therein, his failure to do so did not result in a substantial miscarriage of justice. Had he dealt with complicity, the jury which found that the second

appellant's suspicious conduct in the hatch indicated unlawful possession of the controlled drug would inevitably and *a fortiori*

have found that the suspicious conduct indicated complicity in the unlawful possession and would inevitably have returned the same verdict.

I am satisfied that in all other respects, the learned judge's summing up to the jury was faultless. He accurately expressed the law relating to the onus and standard of proof. He correctly elucidated the offence of unlawful possession of a controlled drug. He fairly explained to the jury the statements and defence of the appellants and generally submitted to the jury a fair and balanced picture of the facts. appeal. For these reasons, I would dismiss the appeal.

SIR VINCENT FLOISSAC

Chief Justice

I concur

C.M. DENNIS BYRON

Justice of Appeal

I concur.

NICHOLAS J.O. LIVERPOOL

Justice of Appeal