

DOMINICA

IN THE COURT OF APPEAL

MAGISTERIAL CRIMINAL APPEAL NO. 27 of 1992

BETWEEN

JOSE MIRANDA ORTIZ  
JULIO CASTILLO  
EDUARDO MIRANDA ORTIZ  
LUIS HOY NEWBALL

Appellants

and

THE POLICE

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice  
The Honourable Mr. Justice Satrohan Singh J.A.  
The Honourable Mr. Justice Albert N.J. Matthew J.A. (Ag.)

Appearances: Messrs E. DeFreitas, A.W. Astaphan and K. Williams  
for the Appellants  
Mr. D.C. Harris for the Respondent

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1992: September 17, 18;  
1993: March 8.  
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JUDGMENT

SIR VINCENT FLOISSAC, C.J.

On the 26th June 1991, 51 bags of cocaine weighing 3051 pounds were found concealed in a water tank of a motor vessel named "Magellenes V" which was berthed in Woodbridge Bay in the Parish of St. George in the Commonwealth of Dominica. According to the "Crew List" of the vessel, the first-named appellant (Jose Miranda Ortiz) was the master, the second-named appellant (Julio Castillo) was a sailor, the third-named appellant (Eduardo Miranda Ortiz) was the chief engineer and the fourth-named appellant (Luis Hoy Newball) was the purser.

As a result of the discovery of the cocaine, the appellants were charged with offences contrary to the Drugs (Prevention of Misuse) Act No.20 of 1988 (hereinafter referred to as the Drugs Act) and the Customs (Control and Management) Act No.16 of 1965 (hereinafter referred to as the Customs Act). All of the appellants were charged with four offences namely (1) having the cocaine in their possession contrary to section 7(2) of the Drugs

Act (2) having the cocaine in their possession with intent to supply it to another contrary to section 7(3) of the Drugs Act (3) importing the cocaine contrary to section 5(3) of the Customs Act and (4) being concerned (with knowledge and fraudulent intent) with concealing the cocaine contrary to section 101(1)(b) of the Customs Act. In addition, Captain Ortiz was charged with the fifth offence of delivering a false customs boarding form contrary to section 98(1) of the Customs Act.

On the 12th February 1992, in the Magistrate's Court of Magisterial District "E" of the Commonwealth of Dominica, Magistrate Desiree Wilson tried and convicted the appellants of the offences charged. The learned Magistrate fined each of the appellants \$50,000.00 for the first offence, \$100,000.00 for the second offence, \$100,000.00 for the third offence and \$10,000.00 for the fourth offence. The fines were to be paid immediately and default of payment thereof carried sentences of imprisonment for terms of 18 months, 3 years, 3 years and 2 years respectively. For the third offence of importing the cocaine, the appellants were also ordered to be deported on payment of the fines or after serving the terms of imprisonment therefor. The learned magistrate also fined Captain Ortiz \$5,000.00 for the fifth offence and sentenced him to imprisonment for a term of six months in the event of his default in payment of that fine. The appellants have appealed against these convictions.

In convicting all the appellants of all the offences with which they were charged, the learned Magistrate expressly relied on the following facts which she found:-

(1) In the case of Captain Ortiz, she relied on the facts that (a) he was the captain of the vessel (b) the cargo of cocaine was enormous (c) he admitted that the cargo could not be unloaded without his knowledge (d) when shown the bag which contained the cocaine and before the bag was opened to reveal its contents, he put his hand behind his head and said "ooh cocaine!" and (e) he

completed and delivered to a customs officer a customs boarding form in which it was falsely stated that there were no drugs on the vessel.

(2) In the case of Castillo, she relied on the facts that (a) he was supposed to have had access to the area in the bow section which contained the opening to the water tank, although the key to that section was held by the boatswain (b) he placed a bag of sugar in that area and (c) when asked by Tony Jno Baptiste (a customs officer who spoke "a little spanish") what was "down below" (i.e. in the hatch where the water tank was), he said "nada" (meaning "nothing").

(3) In the case of Chief Engineer Ortiz, she relied on the fact that witnesses formed the impression that he was sometimes reluctant to assist in pumping water from the water tank.

(4) In the case of Newball, she relied on the facts that (a) he acted as the ship's interpreter (b) he said that he was on a "joy ride" (c) he denied that the captain had said "ooh cocaine" and (d) when asked what was below the cover of the water tank, he said "only water".

The questions to be decided in these appeals are (1) the proper test of possession which was the common ingredient of the first three of the four offences with which the appellants were charged (2) whether the appellants (other than Captain Ortiz) had physical custody or control of the cocaine or assisted Captain Ortiz in his physical custody or control of the cocaine so as to make those appellants criminally liable as secondary parties to the first, second and third offences based on possession of the cocaine (3) whether the prosecution proved beyond reasonable doubt that the appellants (other than Captain Ortiz) were concerned (with knowledge and fraudulent intent) with concealing the cocaine and (4) whether the prosecution proved beyond reasonable doubt that Captain Ortiz was guilty of the five offences with which he was charged.

### 1) The Test of Possession

In **DPP v Brooks** (1974) 2 AER 840 at 842 & 843, Lord Diplock (delivering the opinion of the Privy Council in an appeal from Jamaica) said:

" 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. .... 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 that is postulated in questions (2) and (3)."

This definition of possession in relation to drugs was confirmed by the House of Lords in **R v Boyesen** (1982) 2 AER 161. There, Lord Scarman (delivering the judgment of the House) said (at 163):

" Possession is a deceptively simple concept. It denotes a physical control or custody of a thing plus knowledge that you have it in your custody or control. You may possess a thing without knowing or comprehending its nature; but you do not possess it unless you know you have it."

Since possession was the common ingredient of the first three of the four offences with which all the appellants were charged, the appellants could not properly have been convicted of those offences unless the prosecution had proved beyond reasonable doubt that the appellants had physical custody or control or assisted in the physical custody or control of the cocaine and that the appellants had knowledge of such custody or control.

### (2) Physical custody or control

There can be no doubt that the comprehensive physical custody

or control of a ship and her cargo is vested in the captain of the ship. The cocaine must therefore be deemed to have been in the physical custody or control of Captain Ortiz.

By contrast, the other appellants could not properly be said to have had physical custody or control of the cocaine unless there was evidence that Captain Ortiz had entrusted the other appellants with custody or control of the cocaine or the water tank or unless there was evidence that the other appellants had assumed such custody or control. Nor could the other appellants properly be held to have been secondary parties (accessories or accomplices) to the unlawful possession of the cocaine so as to be criminally liable therefor unless there was evidence that the other appellants assisted Captain Ortiz in his custody or control of the cocaine or the water tank and that such assistance substantially contributed to such custody or control. No such evidence was adduced. The facts found by the learned magistrate against the other appellants were manifestly inadequate to constitute such evidence. Those facts probably amounted to evidence of the required *mens rea* of knowledge but did not amount to evidence of the required *actus reus* of physical custody or control or participation, assistance or complicity therein.

The result is that the prosecution failed to prove that the other appellants (as principals or as secondary parties) had committed the *actus reus* of the first three offences with which they were charged and which were based on possession of the cocaine. I would therefore allow the appeals of Julio Castillo, Eduardo Miranda Ortiz and Luis Hoy Newball against their three convictions with respect to the first offence (i.e. the unlawful possession of the cocaine), the second offence (i.e. the unlawful possession of the cocaine with intent to supply it to another) and the third offence (i.e. the importation of the cocaine). I would accordingly quash those three convictions and set aside the sentences imposed on those three appellants for those three

offences.

**(3) The concealment**

The fourth offence with which the appellants were charged was an offence under section 101(1)(b) of the Customs Act which provides for the punishment of any person who (with fraudulent intent) "is in any way knowingly concerned with ..... concealing ..... any such goods "(e.g. any "goods with respect to the importation ..... of which any prohibition or restriction is for the time being in force under or by virtue of any written law").

The phrase "is in any way knowingly concerned with concealing" is clearly intended to be descriptive of any form of conscious participation, complicity, assistance or involvement in the concealment of the goods. It is intended to refer to any conduct whereby a person becomes the principal or a secondary party (an accessory or accomplice) to the concealment. Accordingly, a person is knowingly concerned with concealing goods if he performs any unequivocal act or makes any false (but unequivocal and credible) statement which is intended to prevent and is capable of preventing or substantially assisting in or contributing to the prevention of the detection of the goods.

In my judgment, the false statement by Castillo that there was "nada" (nothing) "down below" and the false statement by Newball that there was "only water" under the cover of the water tank were both statements within the amplitude of section 101(1)(b). Had those *prima facie* credible statements been acted upon, they would have effectively averted the detection of the cocaine. Those statements were evidently uttered with fraudulent intent. In those circumstances, the learned magistrate was justified in convicting Castillo and Newball of the fourth offence relating to concealment. I would accordingly dismiss Castillo's and Newball's appeals against their convictions of the fourth offence and would affirm

the sentences imposed by the learned magistrate with respect thereto.

The fact that Chief Engineer Ortiz was sometimes reluctant to assist in pumping water from the water tank or that witnesses formed that impression does not indicate that he was concerned with concealing the cocaine. His reluctance is equivocal conduct which does not justify the inference of conscious participation, complicity, assistance or involvement in the concealment. I would therefore allow Ortiz's appeal against his conviction of the fourth offence of being knowingly concerned with the concealment of the cocaine. I would quash the conviction and set aside the sentences imposed on him therefor.

#### **(4) Captain Ortiz's guilt**

Captain Ortiz was properly convicted of the first offence of unlawful possession of the cocaine because as captain, he had total physical custody or control of the vessel and knew or must be presumed to have known that 51 bags of cocaine weighing 3051 pounds formed part of the cargo of the vessel. He was also rightly convicted of the second offence of unlawful possession of the cocaine with intent to supply it to another because of his conviction of the first offence and by reason of section 7(4) of the **Drugs Act** which provides that "..... a person found in possession of the following controlled drugs in quantities of more than ... (b) one gramme of cocaine.... shall be deemed to be in possession of such controlled drug for the purpose of supplying it to another .... unless the contrary is proved, the burden of proof being on the accused." However since the second offence included the first offence, it was wrong to have punished him separately for both offences. Accordingly, we must set aside the fine and alternative sentence of imprisonment imposed upon him with respect to the first offence.

His conviction of the third offence of importation is the natural consequence of the facts that at all material times he was

the captain of the vessel and as such in control of its cargo and that he was continuously in possession of the cocaine. Further, there could be no doubt that he was correctly convicted of the fourth offence of being knowingly concerned with concealing the cocaine. If there was any such doubt, that doubt was removed by his exclamation when he was shown the bag of cocaine and before the contents of the bag were disclosed. He was also duly convicted of the fifth offence of delivering a false customs boarding form. The commission of that offence was proved conclusively and without any defence being offered in relation thereto.

I would therefore dismiss Captain Ortiz's appeals and affirm his five convictions. I would also affirm the sentences imposed on him with respect to the second, third, fourth and fifth offences.

**(5) Summary**

The net result is that all the appeals of Captain Ortiz are dismissed, all the appeals of Chief Engineer Ortiz are allowed and in the case of Castillo and Newball, their appeals against their convictions of the first three offences based on possession are allowed but their appeals against their convictions of the fourth offence relating to concealment are dismissed.

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SIR VINCENT FLOISSAC  
Chief Justice

I concur.

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SATROHAN SINGH  
Justice of Appeal

I concur.

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ALBERT N.J. MATTHEW  
Justice of Appeal (Ag.)