

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON ANTIGUA

CASE ANUHCR 2018/0123

REGINA

V

NICOLE MARTIN

APPEARANCES

Ms Rilys Adams for the Crown.

Mr Michael Archibald for the defendant.

2019: JULY 19

RULING

On the meaning of possession in a drugs case.

- 1 **Morley J:** I am asked to rule on whether a certain factual scenario might amount in law to being in possession of cannabis. I have decided it does, promising written reasons, which are these.
- 2 On 25.11.16, at 11.43, drugs squad officers executed a search warrant at the residence of Kenroy Simpson in Cedar Grove. They found 170lbs6oz of cannabis, worth \$681500ec, of which 5lbs10oz was in the kitchen (along with scales, two vacuum sealers, vacuum seal rolls, zip lock bags, and money bags on the kitchen table), and the rest in bushes outside. Though Simpson was absent, in the house was his girlfriend Nicole Martin (dob 02.12.84), then 31,

- who had two weeks before given birth. For the purposes of this ruling, the Crown do not gainsay she had moved in only after the birth, of necessity, to aid in her recovery. She was not the legal tenant, nor in any other legal control of the property, and the drugs and paraphernalia are accepted to belong to Simpson.
- 3 In the kitchen, six packages of drugs were found – one in a derelict stove, one in the sink, one on the floor beside a working stove, one on the table, and two on a shelf, all said to be identified by Martin to officers as ‘marijuana’ and ‘weed’. Photos were taken.
 - 4 Simpson was murdered some weeks later.
 - 5 In a statement under caution on 25.11.16, Martin said at 05.00 that day she had boiled some water on the stove, and at no time prior to the search warrant had seen or smelled cannabis.
 - 6 The Crown seek to prosecute Martin for possession of the cannabis in the kitchen, suggesting she was lying denying it had been present prior, and as Simpson’s girlfriend she could at any time have tidied it away, noting it was in the sink and by inference she had moved it (as well as perhaps packages found on the floor and table) to run the tap to boil water on the working stove. In sum, though not the owner of the cannabis, her status meant she had control over where it was in the kitchen and inferentially had been touching it (though there is no forensic evidence). They do not suggest she was concerned in its sale or supply or even smoking it. In this sense, the Crown’s case is *de minimis*.
 - 7 The defence counter this cannot be what the law intends is possession of cannabis, arguing she has no meaningful custody or control of it.
 - 8 Martin is charged with possession of a controlled drug, here cannabis, contrary to **s6(2) Misuse of Drugs Act** cap 283.
 - 9 On analysis, there is clear evidence available to the prosecution she knew there was cannabis in the kitchen in which she cooked. The issue is whether she had control of it.

- a. There is learning in **Blackstones 2017** at **B19.29**. In **R v Lambert 2002** 2 AC 545, Lord Hope stated there are two elements to possession: there is the physical element and there is the mental element. The mental element requires knowledge that the thing possessed is cannabis, which is here satisfied. The physical element involves proof that the thing is in the custody of the defendant or subject to his [her] control.
 - b. In **R v Kousar 2009** 2CrAppR88, David Clark J found control in the sense of ability to demand that property be removed or ability to remove it oneself from home was no more than knowledge and acquiescence, and that a finding of being able to exercise a measure of control was not the same as a finding control had been in fact exercised.
 - c. In **R v Monica Williams 1970** 16 WIR 74, it was held the mere occupation of a dwelling-house without 'something more' is not sufficient to invest the occupant with possession of cannabis found there.
 - d. In **R v Skoog 2002** from the Cayman Islands, as reported in **The Law of Dangerous Drugs in the Commonwealth Caribbean, by Desiree C Allene**, it was said to prove that the accused had permitted her boyfriend to use premises to distribute drugs the Crown had to prove she could have excluded him, who was the tenant, from the apartment, so that where the accused had no tenant's right and no physical ability to remove the drugs she lacked the necessary degree of control to exclude him or prevent his use of the premises for drug distribution.
- 10 Distilling this material, **Skoog** is distinguishable because the case appears to have been predicated on proving she did not exclude the owner and had permitted drug distribution from the apartment, when in this case the Crown do not seek to prove permission or power to exclude. **Kousar** is distinguishable because the Crown here seek to prove there were instances of physically handling the drugs, whereas in that case it was presented on the basis there was the potential to remove illicit items from a shared home, meaning there was potential to handle them, and mere potential was found not to be enough.

- 11 As to **Williams**, the 'something more' was found there to be offering a false alibi, remaining mute on being confronted with drugs, and the factual scenario of how the drugs were packaged and lying about when she was the only person home, which in combination allowed the Magistrate to find the defendant to be in possession. In this context, the instant case is similar, as there is the something more possibly available to the jury to consider, namely lying the cannabis had not been present before the search warrant, and the distribution of it begged it being moved around by Martin in order to get any kitchen work done, noting just to run the sink tap she would have to move it when she had earlier boiled water which by inference came from the tap.
- 12 If she has moved cannabis, knowing it is cannabis, to work in the kitchen, then the Crown will have proved she has exercised at least some control over it.
- 13 As a public policy position, the Crown wishes to take the point that girlfriends of drug dealers cannot expect to live for a period in a home strewn with drugs, receiving shelter and comfort in a context of blatant criminal activity all around, going along with it, then tidying up keeping the premises homely, and yet be deemed lacking any culpability. This is a sentiment with which I agree. It used to be said in the Wild West that 'if you ride with outlaws you become one'. And though the offending is at the lower end of the criminal calendar, nevertheless it must be marked.
- 14 The reason a police officer handling drugs on seizure or a cleaner tossing into the bin unfinished joints as debris with bottles and stale food from a party would arguably neither be in possession in such scenarios do not show a person going along with the drug use.
- 15 Moreover, specifically the **Misuse of Drugs Act** contemplates that police officers are exempt and that a cleaner would have a defence, by **s6(4)** which states:

In any proceedings for an offence under subsection (2) in which it is proved that the person charged had a controlled drug in his possession, it shall be a defence for him to prove- (a) that, knowing or suspecting it to be a controlled drug, he took possession of it for the purpose of preventing another from committing or

continuing to commit an offence in connection with that drug and that, as soon as possible after taking possession of it, he took all such steps as were reasonably open to him to destroy the drug or to deliver it into the custody of a police officer; or (b) that knowing or suspecting it to be a controlled drug, he took possession of it for the purpose of delivering it into the custody of a police officer and that, as soon as possible after taking possession of it, he took all such steps as were reasonably open to him to deliver it into the custody of such a police officer.

- 16 There is also specific exemption for medicinal and other uses if licensed, as contemplated by **s9**.
- 17 The language of **s6(4)** is important. It clearly contemplates that any physical contact with a controlled drug, knowing it to be so, can constitute possession.
- 18 In the circumstances, the Crown will set out to prove by inference from her apparent lies, and the context that can be seen in the photos, she has plainly moved the drugs when in the kitchen, it seems obvious she would have to, thereby going along with their presence, and by coming into contact with them has exercised momentary control over them, so that as such she has been *de minimis* in possession of them.
- 19 I should like to thank counsel for their intelligent submissions and for the memorable liveliness of this discussion.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

19 July 2019