19/7

IN THE HIGH COURT OF NEW ZEALAND M. 513/84

AUCKLAND REGISTRY

Special Consideration

787

BETWEEN GOLDSCHMITZ

APPELLANT

A N D THE POLICE

RESPONDENT

Judgment: 9 July 1984

Hearing: 26 June 1984

Counsel: M.G.I. Knapp for Appellant
Miss D.M. Sim for Respondent

JUDGMENT OF CASEY J.

The Appellant was found guilty of possessing a partly smoked cannabis cigarette discovered under a mat in his car by police near midnight on 29th December 1983 in a central city street. He was sitting in the front passenger seat next to a friend in the driver's seat who was smoking the cigarette when the police arrived. The latter evidently put it out quickly when he saw them and hid the butt under the mat below his seat. The police suspicions were aroused by the smell and they searched and found it. Neither admitted smoking and the Appellant was charged with possession as the owner of the car. He gave evidence that he knew his friend was smoking and he did not object, and that when he saw the police he hastily put it out. The Appellant assumed he put it under the mat, because that was where it was found, although he said it all happened too quickly for him to see. The police asked his permission to search the vehicle and both occupants were out of it when this was done. The cigarette had the appearance of just having been put beneath the mat as it was still round in shape and had not been flattened.

The District Court Judge summarised the elements necessary to support possession in law, as the intention to have the drug coupled with the actual fact of being in possession, adding that he must know it is in his possesion.

He thought the case was different from those situations when the drug comes unintentionally into possession, citing R. v. Wright (1976) 62 Cr. App. R. 169, where a tin of cannabis resin was handed to the accused with instructions to throw it out and he did so. He was held not to be in possession when it was only in his custody momentarily and he had no chance to examine it.

There is nothing in the judgment to indicate the Judge doubted the Appellant's evidence. He set great store on the fact that he knew his friend was smoking cannabis in his car, and as soon as it was put under the mat it came under his control as a known drug. Neither the evidence nor the judgment is altogether clear about the circumstances of it being in the ashtray immediately before, but in this equivocal situation the proper inference should be that it was placed there either in the course of being smoked or stubbed out by the friend, and so still remained under his sole control. It was only when he discarded it under the mat that any question of the Appellant having any real controlling interest in it could arise. On the evidence this happened so quickly that he had no chance of making a decision to accept or reject control before the police arrived and matters were effectively taken out of his hands.

I think it is unrealistic in these circumstances to regard the Appellant as having possession of the cannabis within the meaning of the Act. In Wright's case at p. 172 McKenna J. quoted a long passage from Lord Wilberforce's judgment in Warner v. Metropolitan Police Commissioner (1969) 2 A.C. 256, 310 and it bears repeating:-

> "What is prohibited is possession - a term which is inconclusive as to the final /sic/ shades of mental intention needed, leaving these to be fixed in relation to the legal context in which the term is used. How should the determination be made? If room is to be found, as in my opinion it should, in legislation of this degree of severity, for acquittal of persons in whose case there is not present a minimum of the mental element, a line must be drawn which juries can distinguish. The question, to which an answer is required, and in the end a jury must answer it, is whether in the circumstances the accused

> should be held to have possession of the substance, rather than mere control. In order to decide between these two, the jury should, in my opinion, be invited to consider all the circumstances - to use again the words of Pollock and Wright /Possession in the Common Law, 1888, Part III, Ch. 1, p. 119/ - the 'modes or events' by which the custody commences and the legal incident in which it is held. By these I mean, relating them to typical situations, that they must consider the manner and circumstances in which the substance, or something which contains it, has been received, what knowledge or means of knowledge or guilty knowledge as to the presence of the substance, or as to the nature of what has been received, the accused had at the time of receipt or thereafter up to the moment when he is found with it; his legal relation to the substance or package (including his right of access to it). On such matters as these (not exhaustively stated) they must make the decision whether, in addition to physical control, he has, or ought to have imputed to him the intention to possess, or knowledge that he does possess, what is in fact a prohibited substance. If he has this intention or knowledge, it is not additionally necessary that he should know the nature of the substance."

Here I think the evidence falls short of establishing that the Appellant had that positive state of mind towards assuming possession which is necessary to support a conviction, or at least there must be a reasonable doubt about it.

Miss Sim submitted that if I reached this conclusion I should substitute a conviction for permitting the car to be used for the commission of an offence by his friend, of which he is undoubtedly guilty. I have a discretion. Neither offence is serious, and he was only fined $50. It was Appellant's first offence of any kind, and he explained it simply did not occur to him that allowing his friend to smoke was illegal. He had just returned from Holland with its more liberal attitude. I imagine it has cost him rather more than any fine to defend the prosecution and take this appeal. On the other side the prosecutor had the option of amending the charge during the hearing, when all the facts came out, although I can readily understand why he persisted with the charge of possession. As this case demonstrates, there are grey edges to the concept. On the whole I think the ends of

justice have been served by the prosecution and appeal and I will not enter a conviction. The appeal is allowed, and the conviction and sentence are quashed. I make no order for costs.

McCasey J.

Solicitors:

Johnston Prichard Fee & Partners, Auckland, for Appellant
Crown Solicitors Office, Auckland, for Respondent