IN THE HIGH COURT OF NEW ZEALAND 21/5 Ap.79/93
CHRISTCHURCH REGISTRY

705

BETWEEN CADENHEAD

Appellant

A N D THE POLICE

Respondent

Hearing: 5 May 1993

Counsel: K N Hampton, QC, for Appellant
M N Zarifeh for Respondent

Judgment: 20 MAY 1993

JUDGMENT OF FRASER, J.

The appellant was convicted on a charge of possession of a Class B drug, cannabis oil. It was part of a group of charges, some of which were dismissed and on two of which he was convicted. The appeal involves consideration of one conviction and part only of the evidence heard and the judgment given.

Police officers executing a search warrant found cannabis in various places in premises owned by the appellant and used, inter alia, as the meeting place for a club. The material the subject of the conviction which is under appeal was eight capsules of cannabis oil in a match box located in a safe in the premises. The Judge referred in his judgment to this item having been in the refrigerator. That was a mistake. Other drug material was found in a refrigerator but this particular material was found in the safe. I have no doubt that the reference to the refrigerator was a mere slip of the tongue. It is clear

from the evidence and the judgment which particular item was being discussed and dealt with. It was in fact the cannabis oil in the match box located in the safe.

Broadly speaking the evidence was that some 14 months or more before the search the appellant's brother-in-law had asked the appellant to hold or look after the match box and one or other of them put it in appellant's safe. There is no dispute that the appellant knew then that it contained an unlawful drug, but at the time it was found by the police and at the trial he said that he had completely forgotten that it was there.

As Mr Hampton said, there were in effect two issues before the District Court Judge. They were:
(1) Leaving aside whether the appellant had subsequently forgotten about the match box or not, in the circumstances in which the box and contents were given to him could he be said to be in "possession" of the contents?
(2) Had he in any event forgotten about the box and contents to such an extent as not to be in "possession" (ie, the necessary mental element needed to constitute possession was not present)?

Mr Hampton submitted that the Judge's finding in respect of the first issue, that the appellant had control and possession, was erroneous. I do not accept that submission. The evidence seems to me to amply justify the conclusion that at the time the match box was put in the safe, it came into the appellant's possession as bailee and custodian and that he had control over it for the purpose of preserving it in safe custody pending its return to his

brother-in-law. He knew it was there and he knew the box contained a controlled drug.

The second issue is rather more complicated. The Judge found that the appellant's evidence was unreliable and drew the conclusion that he had not completely forgotten the item but that he actually knew that it was there. Prima facie that disposes of the point taken but the finding is challenged and if appellant succeeds in this respect, other issues require determination.

As to the finding of fact it was submitted that the Judge was incorrect in noting, as he did, that appellant's evidence that his brother-in-law placed the match box in the safe was "contradicted" by the appellant's brother who said that he was present when the transaction took place and that he had seen the brother-in-law give the box to the appellant and the appellant put it in the safe.

I agree with Mr Hampton that there is not the sharp conflict in the evidence which that finding supposes. The appellant's evidence is at best ambiguous. He was asked (the underlining in what follows is mine) "*Anyone else see <u>you</u> put it in the safe? A.Yes they did. Q.Who was that? A.My brother*". And then at a later stage of the evidence has asked: "*In the period of time <u>since you say your brother-in-law</u> put it in there and when the police arrived have you ever noticed it in the safe? A. No I haven't I didn't even know where it was.*" It will be seen that appellant was not directly asked who actually placed the box in the safe and that the issue arose incidentally in the course of questions, the tenor of which was to ascertain whether

anyone else saw what happened and whether he had ever in the meantime noticed it in the safe.

The result is that the Judge thought that there was a sharp conflict between the brother and the brother-in-law as to one item of fact but the transcript now shows that the conflict was not so marked and the particular point was never directly addressed either in evidence in chief or in cross-examination.

The Judge does not expressly say that he took into account this view about contradiction when he reached his conclusion that the appellant was unreliable. It is difficult to escape the conclusion, however, that having expressly mentioned it in some detail in the section of his judgment leading up to his finding that the appellant's evidence was unreliable it did not play a material part in his reaching that conclusion.

The question of whether appellant had forgotten the presence of this box accordingly requires reconsideration. There was no finding or reference to manner and demeanour. If the conflict which the Judge referred to is put aside I am of the view that it is a reasonable possibility on the evidence that appellant may have forgotten about the existence and presence of the match box with the cannabis oil capsules. I base that on the lapse of time between the date they were received by the appellant and the police search, (14 months possibly longer); the fact that it was not his own but held for his brother-in-law; the usage of the premises by the club; the finding of other small quantities of cannabis in various places in the premises in respect of all of which the

appellant made an acknowledgment and explanation; the exclamation of surprise noted by the searching police officer when the box of oil capsules was found in the safe (contrasted with appellant's behaviour in respect of the other items found); and the qualification to the Judge's view about appellant's memory when he said *"he may have at some stage forgotten"*.

The next question is whether in the circumstances now found the charge ought to be dismissed. Mr Hampton submitted that it should, relying on Mahon J's judgment in **Police v Rowles** [1974] 2 NZLR 756. Mr Zarifeh submitted that if I did come to the view which I now have, that it was a reasonable possibility that the appellant had forgotten the existence and presence of the match box, he should still be convicted relying on **R v Boyerson** [1982] 2 All ER 161 and **R v Martindale** [1986] 3 All ER 25.

Mahon J considered these questions in **Rowles** (supra) and **Police v Emirali** [1976] 1 NZLR 286. The latter case is probably better known as authority for the proposition that possession is to be of a usable quantity on which point the judgment was subsequently upheld by the Court of Appeal [1976] 2 NZLR 476. But the law as to possession and guilty knowledge is helpfully set out in Mahon J's judgment in the Supreme Court especially at p 288, 289 where he said:

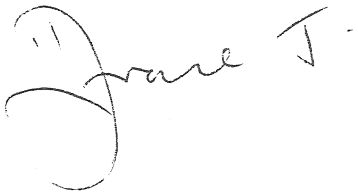
> "Under the Drugs (Prevention of Misuse) Act 1964 (UK), which was the subject of the decision in *R v Warner*, mere possession was sufficient to establish liability as the relevant offence under that statute was one of absolute liability. That principle still applies in the United Kingdom though subject now to the special defence constituted by s 28(2) of the Misuse of Drugs Act 1976 (UK) which has replaced the earlier statute. But

> under the Narcotics Act 1965, as interpreted by *R v Strawbridge* [1970] NZLR 909 (CA), the combination of physical custody and animus possidendi which creates legal possession is not in itself sufficient to establish liability. There must also be guilty knowledge on the part of the possessor. As demonstrated by *R v Strawbridge*, mere proof of possession of a prohibited drug will be prima facie evidence of possession with guilty knowledge, the presumptive inference being liable to displacement if the accused person can point to any evidence tending to raise a doubt as to the existence of the requisite guilty knowledge. In *Police v Rowles* the presumption of knowledge of the contents of the cabinet constituted not only the mental element necessary to transform custody into possession but also constituted prima facie proof of guilty knowledge because all the contents of the cabinet were the property of the defendant. In the present case, the appellant and his wife were the sole occupiers of the flat. The contents of the flat were thus presumptively in their possession.
> ....
>
> In *Police v Rowles* I referred to the distinction between possession at common law generally in the various contexts in which it might appear, and criminal possession which will include a requirement of guilty knowledge unless the terms of the relevant statute indicate otherwise. The same distinction is referred to in *Director of Public Prosecutions v Brooks* [1974] AC 862, 867; [1974] 2 All ER 840, 843. The common law possession of an occupier in relation to articles on his premises will not in itself amount to criminal possession without proof of guilty knowledge, assuming the latter to be an element of liability, although proof of such possession may be prima facie evidence of criminal possession in accordance with *R v Strawbridge*."

Adopting, as I do, that statement of the law the result in this case is that the appellant was in possession of the cannabis oil in the common law sense, notwithstanding that he had or might have forgotten about its presence in the safe. If the prosecution had been brought in England it appears that he would have been convicted. But in New Zealand where the offence requires proof, not merely of

possession in the general sense, but also, guilty knowledge, then on the basis of Mahon J's reasoning in **Rowles** and **Emirali** the appellant ought to be acquitted.

For those reasons the appeal is allowed and the conviction quashed.



Solicitors:

Wolfe Cadenhead, Christchurch, for Appellant
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