

IN THE HIGH COURT OF NEW ZEALAND  
CHRISTCHURCH REGISTRY

103/12

A.P. No.352/93



226S

BETWEEN

SMITH

Appellant

A N D      POLICE

Respondent

Hearing:      26 November 1992

Counsel:      D.C. Ruth for the Appellant  
                    R.W. Raymond for the Respondent

Judgment:    03 DECEMBER 1993

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JUDGMENT OF TIPPING, J.

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This appeal against conviction concerns the concept of possession. On searching the home of Ms Bell the Police found in her custody two black bags. One contained about 450g of cannabis, the other a pistol. Ms Bell pleaded guilty to being in possession of both. The Police successfully alleged that the present Appellant, Mr Smith, was also in possession of both, not as the custodian, but because he had control of the items in question.

The evidence upon which Mr Smith was convicted was as follows. On 20 June 1993 he was in custody at the Christchurch Central Police Station. While there he made a telephone call to an address in Lincoln Road. The call was made at two minutes past one in the afternoon. Shortly

before making this call Mr Smith had attempted to ring his wife. There was no reply. During the call to Lincoln Road a Constable overheard Mr Smith saying:- "Can you ring Steve and get him to go round to Sally's and pick up a couple of parcels. One is a small black bag and the second one is in a bigger black cloth bag which is all wrapped up. Tell him to take them to you know where. He'll know where that is." While speaking Mr Smith made a gesture with his thumb and forefinger indicating that one of the black bags was approximately six inches long. This tallied with the smaller of the two black bags found in the home of Bell.

It is not known to whom Mr Smith was speaking at Lincoln Road. It was, however, established that someone at Lincoln Road made three calls to an address in Simeon Street. These were made between six minutes past one and half past two the same afternoon. It was also established that the occupier of the Simeon Street address had a boyfriend called S . He was not called. At 5.00 p.m. the same day the Police searched the home of Bell at 25 Sumner Street. In a drawer at that address they found the two black bags.

The Judge drew the inference that the black bags found at Sumner Street were the same black bags as those referred to by Mr Smith in the telephone call. It was faintly suggested by Mr Ruth for the Appellant that there might have been other black bags at the Sumner Street address but in my judgment that was speculative and in any event one view of the evidence suggests that the Police searched the whole property and found no other black bags. In my view the Judge was perfectly entitled to draw the inference which he did. The second inference which the Judge drew was that the Appellant knew what was in the black bags. That in my view was also an inference which was properly open and properly drawn. The Appellant obviously knew enough about the black bags to want them shifted from Bell's care. In my judgment it was proved by inference beyond

reasonable doubt that the Appellant knew that the black bags to which he was referring contained cannabis and the pistol.

The more difficult question is whether the Judge was correct in holding that Mr Smith was in possession of the cannabis and the pistol on the basis that he was in control of them. So far as the cannabis is concerned, it is expressly provided in the Misuse of Drugs Act 1975 that things which a person has in his possession include any thing subject to his control which is in the custody of another: see s.2(2). There is no corresponding provision in the Arms Act 1983 but the concept of control is in any event included within the general concept of possession.

Before examining the evidence more closely, I should mention the legal aspects of possession. Possession involves both physical and mental elements. The physical element is satisfied either by custody of the thing in question or control of it. The mental element involves proof of two things; first knowledge of the essential nature of the thing in question and second an intention to exercise either custody or control of it. Control for present purposes is a concept which is not susceptible of much elaboration. You have control over something which is not in your actual custody if you have the ability to direct the custodian what is to be done with it. You may have that ability in conjunction with others. If you do have that ability, in the sense that the custodian will obey your direction, you then have control. The direction may be to hand the thing to you or to deliver it to someone else, or to destroy it or to do anything else with it.

In the present case Mr Smith purported, one might say tried, to exercise control by giving directions that the black bags were to be shifted from Bell's home to another location. He was purporting or trying to exercise that control through the agency of Steve. The mental dimension was clearly established. Mr Smith had knowledge of the essential nature of the things in question - that has already been discussed. He also clearly had

an intention to exercise control. The remaining and much more difficult question on the evidence is whether in physical terms Mr Smith actually had control. The difficulties derive from the evidence given by Bell. She was clearly a most reluctant and largely unhelpful witness. Why she was called by the Police in those circumstances is unclear.

In his judgment the Judge said that he had formed the impression that Ms Bell was "one of those unfortunate young women enmeshed in criminal activities by some who exercise some power over her". The Judge expressly rejected her evidence that she was the sole owner of the cannabis and the pistol. He found that she was holding them for someone else. He did not say who. The Judge did not expressly reject or accept other aspects of Ms Bell's evidence. She said that she knew Mr Smith, whom she identified in Court. She had known him for approximately a year. She indicated that he had not been to her address at Sumner Street prior to the night of the Police search which uncovered the cannabis and the pistol. She said that she had received the cannabis from someone else. The gun she was given to look after. She declined to say who had given her either the cannabis or the pistol. She said that she would not say because she was afraid.

When asked whether Mr Smith had brought either of the black bags into her house she replied that she could not say. When asked to confirm that it was not Mr Smith who had done so she said again that she could not say. There then followed this question and answer:-

Q. If somebody had come to your house indicating that they were there on behalf of Mr Smith and had asked you to hand over the two black bags would you have done so?

A. No."

The Judge then asked her:-

"Q. Why not?

A. Because I was only to give it to the person that gave it to me."

It is clearly implicit from this evidence, if accepted, that Ms Bell would not have given the black bags to Steve had he arrived before the Police. Ms Bell was only going to give the bags back to the person who gave them to her. It was not suggested Steve had done so. The Judge did not reject this evidence in spite of his express rejection of certain other aspects of her evidence.

Sitting on appeal I cannot say that Ms Bell's evidence on these two points could not possibly have been true. Indeed the proposition that she was only willing to return the bags to the person who gave them to her has some plausibility. The answer was given in reply to the Judge. That does not necessarily mean that it is more likely to be correct. There is, however, a logical consistency between the two propositions. Indeed, as I mention below, the Judge took the view that this evidence might be true. For it to be said that Mr Smith had actual control in the circumstances, the Judge needed to be satisfied beyond reasonable doubt that Ms Bell would have handed the bags and their contents to Steve at his request. If the matter is approached on the basis of potential control the Judge had to be satisfied that Mr Smith was the person who handed the bags and their contents to Ms Bell. If that had been shown then it might have been possible to argue that Mr Smith was potentially in control because if he had been free to go and get the bags himself Ms Bell would have handed them to him.

I have referred to potential control because Mr Raymond directed my attention to a passage in the judgment of the Court of Appeal in Cox (1990) 5 C.R.N.Z. 653 which was followed by the same Court in

Cossey (1990) 6 C.R.N.Z. 185. In Cox at page 655 Hardie Boys, J. delivering the judgment of the Court described the physical element of possession as involving "actual or potential physical custody or control". It was an oral judgment and I think it possible that the Court did not intend the word "potential" to govern the word "control" as well as the word "custody". It is possible to read the phrase as though a comma appeared before the words "or control". The concept of potential custody is reasonably straight forward. I have potential custody of something if it is in someone else's custody but I have the ability to get it back. That, however, is really no different from my being in actual control of it. So potential custody perhaps differs little, if at all, from actual control.

If their Honours intended to refer to potential control, that concept is more difficult. The concept pre-supposes that, while not having actual control, the possessor has the potential to gain control. Difficult questions of degree immediately arise. The introduction in Cox of the concept of potential custody (as opposed to actual control) and perhaps the concept of potential control was, I think, unnecessary for the decision in that case. With great respect I consider that it would be better to stick to actual custody and actual control. Potential custody arguably adds nothing because it equates with actual control. Potential control is a difficult concept. In the present case Mr Smith had no capacity to exercise actual control by appearing in person at Ms Bell's house. He was otherwise detained. He could perhaps have attempted to exercise control personally over the telephone but whether Ms Bell would have acted on his instructions depended, on her evidence, on whether he originally handed the items to her.

Although there must be considerable suspicion that it was Mr Smith who handed the bags and their contents to Ms Bell in the first place, there is no finding by the Judge that this was so and that conclusion could

hardly have been drawn beyond reasonable doubt. The evidence, for what it is worth, from Ms Bell was that Mr Smith had not been to her house prior to the Police search. The bags could have been handed to her elsewhere. There was no evidence to that effect and to come to that conclusion beyond reasonable doubt is simply not possible. Indeed it seems more probable that the bags were handed to her at her home.

What is left therefore is the proposition that Mr Smith had actual control through Steve. The difficulty with that proposition is that Ms Bell's evidence was to the effect that she would not have handed the bags to a representative such as Steve. That is the clear effect of the answer which she gave to counsel's question set out above. This answer at least was unequivocal in contrast to many of her other answers. The Judge did not find as a fact that, contrary to Ms Bell's evidence, she would have handed over the bags to Steve. Mr Raymond, mindful of the difficulty, submitted that it was implicit from the Judge's overall conclusion that he had rejected Ms Bell's evidence in this respect and had effectively found that she would have handed over the bags to Steve.

The following passage in the judgment is relevant to Mr Raymond's submission. After correctly directing himself on the two elements of possession, the mental and the physical, the Judge said:-

"It is the prosecution case here that the defendant had physical control of the items and that they were not in his custody, but that he exercised control over their disposition, and that indeed that is what he was attempting to do in the course of the telephone call; that is to say to influence their disposition.

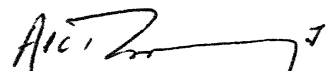
Having regard to all the circumstances of the case, and conscious of the authorities to which counsel has referred, I come to the firm conclusion that notwithstanding that Miss Bell might not have given over the packages to some representative of the defendant's, that is not something which is capable in law of distinction in this case. I take the view that on the facts the inevitable inference is that the defendant was fixed with knowledge of both packages and their contents and I further take the view that the only inference available

from the telephone call, given my findings of fact, is that at the material time he exercised control over both of the packages; and that the facts are simply not susceptible of any other rational conclusion. For those reasons I find that both charges are proved.

That passage, I fear, does not assist Mr Raymond's submission. In it the Judge accepted that Ms Bell might not have given the bags to Steve. His Honour then observed that this was not something which was "capable in law of distinction". I am not entirely sure what His Honour meant by that comment. While the mental ingredients of control were undoubtedly present, the key issue was whether Mr Smith had physical control. In terms of my earlier discussion the question is whether he had the ability to direct the custodian what was to be done with the items in question.

On the Judge's view the custodian (Ms Bell) might not have obeyed Mr Smith's direction, if conveyed to her through Steve. Ms Bell, on the evidence, would not have obeyed Mr Smith's directions if conveyed to her in person, unless Mr Smith was the person who had originally handed her the bags and their contents. That, as already indicated, was not proved beyond reasonable doubt. The Judge had a number of factual and legal issues put to him. Understandably his mind was not directed to what became the key issue.

In the light of Ms Bell's evidence, which in the material respects the Judge seemed minded to accept (certainly he did not reject it), I do not consider that it was proved beyond reasonable doubt that Mr Smith had possession of the cannabis and the pistol. It was not proved beyond reasonable doubt that Mr Smith had physical control either through his purported agent Steve or personally. For these reasons the appeal must be allowed. The convictions for possession of the cannabis for supply and for possession of the pistol are set aside. The concurrent sentences of nine months imprisonment will automatically fall.





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