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IN THE PRIVY COUNCIL

No. 33 of 1972

ON APPEAL FROM THE COURT OF APPEAL OF JAMAICA

B E T W E E N :

THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

- and -

WISHART BROOKS

Respondent

CASE FOR THE RESPONDENT

Record

10 1. This is an appeal by Special Leave from the Judgment of the Court of Appeal of Jamaica (Luckoo, P., Smith and Graham-Perkins, J.J.A.) dated the 2nd day of July 1971, which quashed the Respondent's conviction and sentence of 18 months hard labour in the Resident Magistrate's Court for the Parish of Trelawney for having in his possession ganja contrary to Section 7 (c) of the Dangerous Drugs Law (Cap.90).

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20 2. The Respondent was charged together with one Gary Palmer that on the 7th day of October 1970 he unlawfully had in his possession Ganja (18 crocus bags and one plastic bag containing ganja) contrary to Section 7 (c) of Cap.90. They were both convicted and sentenced to 18 months hard labour.

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3. The case for the prosecution is summarised in the Court of Appeal judgment as follows:-

30 "At the trial of the appellants before His Honour Mr. Lloyd Ellis Resident Magistrate for Trelawny, the prosecution led evidence through three material witnesses. From the evidence-in-chief and cross-examination of these witnesses there emerged the following picture: On the 7th October, 1970 Cpl. Lakeman, Constable Hemmings, Cpl. Wynter and other police officers set out in two cars from Rio Bueno for Braco in Trelawny arriving there at about 11.30 a.m. On reaching a point on the main road about one-quarter of a mile east of a point where a road leads from this main road to the Braco airstrip Cpl. Lakeman saw a Transit Ford Van X 559 parked on what appears

40 to be a lay-by some 20 yards ahead. Lakeman

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p.20, 1.16

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brought his car to a stop and he and Hemmings got out and, armed with guns, ran towards the parked van. As they did so, either four men (according to Lakeman and Hemmings), or two men (according to Wynter), came from the cab of the van and ran into some bushes. The appellant Brooks, on Lakeman's evidence, was one of those four men. According to Wynter, however, Brooks did not run from the van - "Brooks was held around the steering wheel". However, when Lakeman reached the van he saw no one in it. He opened a door in the body of the van and saw some eighteen crocus bags and one plastic bag from which emanated what he described as a strong odour. He could not determine, without opening the bags, what they contained. At first he thought he "was smelling dry bush", but later he thought the odour was that of ganja. It is of some importance to note here firstly, that Lakeman did not appear to have detected any particular odour until he opened the door of the body of the van, and secondly, that there was no means by which one could see anything inside the body of the van without opening the door. Shortly after the discovery of the bags in the van Hemmings, who had gone in search of the men, came up to the van holding the appellant Brooks. Lakeman questioned Brooks about his connection with the van. Brooks explained that a man named Reid, the owner of the van, had employed him to drive the van to Brown's Town, that on reaching there Reid took the van leaving him (Brooks) at Brown's Town, that Reid returned with it loaded as it was, and handed it back to him and told him to drive it to Braco. Brooks denied ownership of the bags, and any knowledge as to their contents. The appellant Palmer who was not identified as one of the men seen running from the van, was discovered to have been under the van when it was pushed from its position. He said, on being questioned by Lakeman, that he was hungry and had approached the men in the van "to beg something" but on seeing armed policemen approaching he sought refuge under the van.

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The two appellants, together with the bats, were taken to the Falmouth police station where, in the presence of the appellants, Lakeman opened the bags. In each Cpl. Lakeman saw vegetable matter resembling ganja. He sealed the nineteen

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bags. He then arrested the appellants and charged them with possession of ganja. The bags were taken to the Government Analyst who took a sample of the contents of each. He certified that his examination revealed the contents of the bags to be ganja.

10 Lakeman, no doubt as a result of what the accused Brooks had told him, saw and spoke with the owner of the van. This person, Reid, was not called by the prosecution. This, then, was the case for the Crown."

4. At the conclusion of the case for the prosecution Counsel for the Respondent and for Gary Palmer submitted that there was no case to answer. On the 10th February 1971, the Resident Magistrate rejected the submissions. He said that he accepted that there were discrepancies in the statements of the three policemen, but they were not serious enough to hold that the Crown's case fails. With regard to the conflict in the evidence as to whether or not the Respondent ran from the van into the bush, the learned Magistrate said

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p.13, 1.37

"I am aware of the principle that where two (2) inferences can be drawn one unfavourable to an accused and the other favourable the latter should be drawn. Counsel for the defence submits that the Crown's case was contradictory on the issue of whether Brooks did run and I am asked to say that because Wynter said Brooks was apprehended behind the steering wheel that lets in the principle of the two (2) inferences. What if in deference to the principle I say that Brooks did run or did not run. Where would that leave the defence. That he did or did not run would not assist Brooks bearing in mind that he said he was the driver. I hold therefore that the evidence led by the Crown established that the two (2) accused were in the van and were seen by the police. Now that I have come to the above conclusion a question of law nor arises as to whether the accused were in possession of the ganja as charged".

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The learned Magistrate then proceeded to examine the law, and held, it is submitted wrongly, that the Respondent's driving of the van and his occupation of it from Brown's Town did amount to possession of the ganja by him, and also that he had knowledge that he had ganja.

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p.14 1.3

The ruling of the learned Magistrate was not based on whether or not the Respondent ran from the van, but on the erroneous basis that since the Respondent was the driver of the vehicle, therefore he had possession of the bags and knew their contents.

5. The Respondent called no witnesses but elected to make a statement from the dock in the following terms:-

"What I told Lakeman was true. I did not run from the van. Lakeman held me around the steering wheel. That is my statement."

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6. At the close of the case for the defence, the Resident Magistrate said:-

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"I do not accept the stories put forward by the accused. I believe the police statements of Lakeman and Hemmings."

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7. The judgment of the Court of Appeal was delivered by Graham-Perkins, J.A. on 2nd July 1971. The Court analysed the findings of the Resident Magistrate and concluded that "the factual situation as found by the Magistrate is as follows: Brooks and Palmer set out from Brown's Town in a loaded van which Brooks drove to Braco on the instructions of Reid. From this fact Brooks and Palmer are found to be in occupation of the van. And from this fact of occupation over that distance Brooks and Palmer are found to be in possession of the 19 bags found in the van."

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p.31 1.35

The Court then referred to the case of R. v. Livingston 6 J.L.R. 95 wherein it was held that possession in S.7(c) of Cap.90 requires that the accused must be shown to have had knowledge that he had the thing in question and further that the thing was ganja. The Court held that from the factual situation as found by the Magistrate "it is not easy to understand his conclusion that Brooks and Palmer, or either of them, had actual knowledge of the contents of the bags!" The Court said that the authority of Livingston's case has never been doubted in Jamaica and refused, upon the invitation of Counsel for the Crown, to hold that it was wrongly decided, and to be guided by the decision in Warner v. Metropolitan Police Commissioner (1969) 2 A.C. 256.

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The Court of Appeal, it is submitted correctly,

concluded their judgment as follows:-

"In our view the appellant Brooks was not, on the evidence in this case, shown to have anything more than mere custody or charge of both the van and its contents; and this assumes that he was aware that the van was loaded as distinct from any knowledge actual or constructive of the nature of the load. He was not a common carrier as was the appellant in Livingston's case. He was a person who had been hired by the owner of a loaded van to drive that van from Brown's Town to Braco. There was certainly no evidence that he had handled the bags.

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It is important to emphasize here that the learned Resident Magistrate did not base his findings merely on evidence that the police came upon the appellant Brooks and others sitting in a van loaded with Ganja from which the occupants ran on the approach of the police. He accepted as true, and acted upon, Brook's statement to Cpl. Lakeman. There was no evidence, apart from the statement of Brooks, as to the circumstances under which he was hired to drive the van. Nor was there evidence of possession, in the meaning attributed to that word in Livingston's case, as distinct from being in charge of whatever the loaded van contained. This distinction clearly recognised in Pollock and Wright on Possession (see pp.59-60, 129, and 138-140), was also recognised in Livingston's case (see p.98). All that the prosecution proved was that Brooks had driven the van on Reid's instructions (and this, on Brooks' own admission), and that there were 19 bags of ganja in the van. It seems to us that, assuming a finding that he knew that he was "transporting" ganja, it would have been proper to charge him with that offence. It was precisely in order to meet such a case that the Parliament of this country created the offence of using a vehicle to transport ganja. In creating that offence Parliament clearly recognised the possibility of cases where a driver or person in charge of a vehicle used to transport ganja was not necessarily in possession of the ganja."

8. On the 16th day of November 1972, the Judicial Committee of the Privy Council granted the Appellant Special Leave to Appeal. On the hearing of the Petition, Counsel for the Appellant did not challenge the authority of Livingston's case (Supra), but submitted

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that on the facts of the case, the Resident Magistrate was entitled to find that the Respondent had in his possession the 19 bags of Ganja and had knowledge of their contents.

9. The Respondent respectfully submits that this appeal should be dismissed for the following among other

R E A S O N S

1. BECAUSE there was no evidence that the Respondent was in possession of ganja. 10
2. BECAUSE there was no evidence that the Respondent knew of the contents of the 19 bags.
3. BECAUSE the Resident Magistrate was wrong in rejecting the submission of no case to answer.
4. BECAUSE on the facts as found by the Resident Magistrate, no offence of possession of ganja was committed by the Respondent
5. BECAUSE the Resident Magistrate misinterpreted Livingston's case (Supra) and did not apply it correctly to the facts as found by him. 20
6. BECAUSE the Court of Appeal was right in following Livingston's case and holding that on the evidence, the Respondent was not shown to have had possession of the ganja, nor shown to have had knowledge, actual or constructive, of the nature of the load in the van.
7. BECAUSE, in any event, there is nothing in this case which tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future, and therefore nothing which would justify intervention or disturbance of the decision of the Court of Appeal. 30

THOMAS O. KELLOCK

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CASE FOR THE RESPONDENT

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