

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 15/90

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

REGINA vs. WESLEY DALEY & ALEXANDER WHYTE

Ian Ramsay for appellants

Lloyd Hibbert for the Crown

March 19 and April 5, 1990

WRIGHT, J.A.:

On March 19, 1990 we allowed the appeal of Wesley Daley, quashed his convictions and set aside his sentences. Also we dismissed the appeal of Alexander Whyte and affirmed his convictions and sentences. As promised, we now put our reasons for judgment in writing.

The appeals were against convictions and sentences for -

- (a) Possession of ganja
- (b) Dealing in ganja
- (c) Taking steps preparatory to exporting ganja.

Both appellants were convicted in the Resident Magistrate's Court for St. Catherine on October 19, 1989, before Her Honour Mrs. N. E. McIntosh and sentenced as follows:

For Possession of ganja: Each fined \$15,000
or 18 months imprisonment at hard labour.

For Dealing in ganja: Each fined \$50,000
or 18 months imprisonment at hard
labour.

For Taking steps preparatory to exporting
ganja: Each fined \$50,000
or 18 months imprisonment at hard
labour.

In addition each was sentenced to imprisonment at hard labour for six months. It was also ordered that if the fines were not paid the sentences would run concurrently.

The charges arose out of a raid carried out by the Police at 2:00 a.m. on December 7, 1968, at the Caymanas Aerodrome in the parish of St. Catherine. Ganja packaged in fifteen parcels weighing 1099½ lbs. was found in a room to which access was gained by Whyte opening the door with a key on a bunch of keys which the Police claimed he had in his possession, which evidence the learned Resident Magistrate accepted. The three significant factors in the case which pointed the way to the convictions were:-

1. The possession of the key by Whyte
2. A statement attributed to Whyte when the ganja was found viz. "Is a man left them with me".
3. A statement allegedly made by Whyte in the presence of Daley, after arrest and caution viz. "Mi and Daley know 'bout the ganja but mi girlfriend nuh know nothing 'bout it".

Whyte's girlfriend, who was found on the premises, had been apprehended by the Police. Previous to that Whyte had disclosed to the Police that he was the mechanic at the aerodrome and that Daley was the watchman. Daley, in his defence, said he was the night watchman and knew nothing "about the ganja business". That he was indeed the night watchman was not contradicted. On the occasions when Whyte is alleged to have made the two statements (supra) Daley said nothing.

In his defence Whyte denied that he had exclusive control of the room in which the ganja was found. Indeed, he contended, contrary to the evidence of the Police, that the key with which he opened the compressor room had been hanging from a nail by the side of the building and, further, that he was absent from the premises at the time when the ganja must have been put there. His defence was rejected by the learned Resident Magistrate who had the benefit of seeing the witnesses.

In conceding that Whyte's conviction was unassailable, Mr. Ramsay contented himself with saying that if the evidence was accepted, which it was, then he could say nothing against Whyte's conviction. However, he prosecuted the appeal of Wesley Daley in the terms of the under-mentioned Supplemental Ground of Appeal for which he obtained the leave of the Court:

"1. That the Learned Resident Magistrate erred grievously in finding the Appellant Daley guilty of the charges herein on the basis:

- (a) That he had control of the room in which the ganja was found and hence was in control of the contents of the said room.
- (b) That his silence upon hearing an accusation of knowledge made in his presence by the co-defendant upon caution, gave a ground for an inference of guilty knowledge.

That accordingly it is submitted that the conviction is wrong in law and in fact".

The learned Resident Magistrate's understanding of the law as it relates to silence by an accused person in the face of an accusation made in his presence is revealed

in Finding #23 of the Findings of Fact in which she stated the basis for Daley's conviction. It reads:

"The size and number of the parcels were such that they could not have been brought on the premises without his knowledge - if brought while he was on duty as watchman. Further the evidence is that he like Whyte lives on the premises and it is only in his unsworn statement that there is a mention of him being only a night watchman. Therefore, when Whyte stated in Daley's presence and hearing that they both knew about the ganja it was reasonable to expect some response for him. His statement that he did not hear Whyte's statement on caution was rejected and from his failure to respond in all the circumstances the necessary guilty knowledge was inferred."

Evident in this assessment of the evidence and application of the law are two fundamental errors: The first has to do with ~~the inescapable element of doubt, since there~~ is no evidence as to when the ganja was deposited in the compressor room. Such doubt must inevitably enure to the benefit of the appellant. The second betrays a misunderstanding of the relevant law which was, accordingly, misapplied in founding a conviction.

There was reason to hope that the resolution of the difficulty posed by the question of silence insofar as it may give rise to an inference of guilt would be greatly facilitated by the recent decision of this Court (per Campbell J.A.) in R v Derrick Latty and Hernard Smith R.M.C.A. 57/87, 14/3/88 (unreported) in which the decisions of the Privy Council in Dennis Hall v R (1970) 12 J.L.R. 240 and Donald Parkes v R (1976) 14 J.L.R. 260, were considered and applied. But it appears that as far as R v Latty & Smith (supra) is concerned, the decision of the learned Resident Magistrate was per incuriam otherwise a verdict of not guilty must have resulted.

Certain principles of law distilled from the authorities with reference to the issue of silence can be stated thus:

1. What an accused person says under caution is evidence against him alone.
2. Where a co-defendant preserves his silence where he hears an accusation against him by another accused such silence can give rise to no adverse inference.
3. Whether an adverse inference can arise from an accused person's silence after hearing an accusation against him before caution will depend on whether he admits the allegation by words, conduct, action or demeanour. Silence without more does not meet the criterion.
4. Where a person has been arrested for an offence, a common law right to silence accrues to such a person and it does not matter whether he is reminded of that right or not.
5. Where there has been a caution the situation is doubly fortified and it would be wholly misleading to say a person has a right to remain silent but will be penalized if he exercises that right.

It was submitted that the appellant, Daley, is entitled to the protection of each of these principles.

The concept of possession involves exclusive control whether by one or several jointly. Can it be said that the appellant Daley had exclusive control either alone or jointly with Whyte? Relevant to the determination of this question is the consideration that occupation of premises generally is not enough to show control of the contents thereon, particularly where others have access. Further, it was submitted that where the evidence is that one person has effective control of the prohibited material then it cannot

be held that another person has control because he has knowledge of the exclusive control in that other. Finally, it was submitted that Finding #22 reflects a confusion of control with responsibility. It is recorded thus:

"The accused Daley as watchman for the premises is responsible for the premises and all it contains in performing his duties as watchman."

This is surely an over-statement of the scope of a watchman's duties.

It suffices to say that Mr. Hibbert quite laudably conceded that the conviction of Daley cannot be supported having regard to the authorities dealing with an accused person's silence in the face of accusation made in the presence of a police officer and with the requirements for possession in the criminal law. We readily agreed with Mr. Hibbert finding, as we do, great merit in the ground of appeal.

On the question of Whyte's sentences, we were not persuaded, despite Mr. Ramsay's entreaties, that there was any basis for interfering. We accordingly, as already stated, dismissed Whyte's appeal and affirmed the sentences.