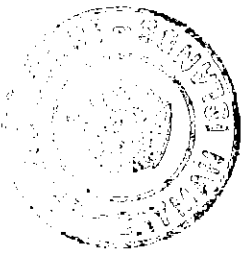


24-9-93
CMA

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
SCA. #49/92 AND 27/92



Dave C. Rockett v. Regina

Betsy Ebanks v. Regina

Mr. Michael Clarke for the Crown
Mr. Keith Collins for both appellants

JUDGMENT

These are appeals against convictions entered and sentences imposed by the learned magistrate on the 31st March 1992 following on the joint trial of the appellants and of a third defendant, Maureen Palmer.

The appellant Rockett was convicted and sentenced on three separate charges as follows:

(i) Permitting premises to be used for the purpose of supplying a controlled drug for which he was sentenced to imprisonment for 4 years and fined \$1,000.00 or four months imprisonment in default of payment.

(ii) Possession of ganja with intent to supply for which he was sentenced to four years imprisonment concurrent and fined \$500 or two months imprisonment in default of payment.

(iv) Consumption of ganja for which he was sentenced to six months imprisonment, consecutive.

A fourth charge for possession of ganja, simpliciter, was ordered to be left on file.

The appellant Ebanks was convicted and sentenced for the single offence with which she was charged, that of being concerned in the

possession of ganja with intent to supply, and sentenced to nine months imprisonment, sentence to run from 20th February 1992, the date during the course of the trial, when bail was revoked.

Maureen Palmer was convicted and sentenced in relation to the offence of possession of ganja with intent to supply.

The charges against the appellants arise from circumstances and events which unfolded on Friday 13th September 1991 at premises off Shedden Road in George Town, premises owned and occupied by the appellant Rockett.

On the day, officers of the drug squad of the Cayman Islands Police under the supervision of Det. Sgt. Brown mounted a surveillance operation in the vicinity of those premises.

They had received information leading to the suspicion that illicit drugs were being sold from them.

Constable Ifty Ahmed was positioned at a vantage point from which he could, without himself being seen, observe persons in the yard of the premises and the movements of anyone going to or from the premises.

Other officers were positioned at places nearby at which they could receive radio transmissions from Constable Ahmed and as a result intercept on his signal, any persons whom he might identify as suspects for having been observed transacting at the premises.

Ahmed commenced observations at about 3:00 p.m.

From his evidence given at the trial a sequence of events was described.

It revealed that on at least eleven separate occasions between 3:11 p.m. and 5:46 p.m. different individuals or groups of persons arrived at the premises.

On many occasions the persons or person spoke to Maureen Palmer who was employed by the appellant Rockett at the premises as a domestic helper. Transactions were observed on a number of those occasions between Palmer and the visitors.

On other occasions when no direct exchange occurred with Palmer, the visitor would enter into exchanges with a man who was present and apparently working in the yard and who, it was later discovered, was employed there as a gardener.

The gardener would act as a go between and was observed on at least three occasions to have taken something from Palmer which he handed over to the particular visitor and, on one occasion, vice versa.

On each occasion Ahmed transmitted for the interception of the suspect giving personal descriptions or descriptions of vehicles.

Eighteen suspects were arrested as a result.

Three of the incidents in particular illustrate in some detail the modus operandi observed by Ahmed.

The first was that which occurred at 3:11 p.m. when a man arrived in a Diahatsu Charade motor car and walked to the gate of the premises.

He shouted "Rockett, Rockett" and, seemingly in response, Maureen Palmer appeared from somewhere within the premises and approached him at the gate. They spoke. He handed something to her and she to him.

Ahmed observed the man return to the car carrying this "something" in his hand which Ahmed was unable, more clearly, to discern. The man drove away at about 3:15 p.m.. Ahmed radioed for his interception.

At about 3:25 p.m., when according to Ahmed's testimony "it started to get busy" a blue or black and blue truck arrived and a man got out, went to the gate and spoke to the gardener.

The gardener then went and spoke to Maureen Palmer who was standing near the door to the house, the door facing the gate. She handed something to him. He returned to the gate and handed something to the man who then left in the truck.

Even while this man was transacting as described above others had arrived and were waiting in turn.

The third incident selected for detailed description occurred at about 4:42 p.m. when a man arrived on foot, running, to the premises.

He spoke to the gardener at the gate. Maureen Palmer was again at the door. Ahmed heard her shout "what does he want?"

The gardener then obtained something from Palmer which he handed to the man who secreted it in his shoe. He then left on foot.

It appears, sometimes inferentially from the evidence of other officers in the case, sometimes directly, that the three suspects involved in those instances as well as a number of other suspects were detained and eventually charged by the police.

More significant was the fact that recovered from a number of the suspects were small packages of ganja wrapped in identical fashion to some 36 small packages recovered from the premises later that afternoon in circumstances which I now briefly describe.

The surveillance operation was stood down at about 5:46 p.m.

A detachment of officers later proceeded to enter and search the premises shortly after 6:00 p.m.

They found the premises secured and unoccupied. Maureen Palmer and the gardener had departed the premises in the meantime.

During the ensuing search Police Constable Bellafonte recovered the 36

packages from a clothes basket found beneath the wash basin in a cupboard in the bathroom.

The packages were wrapped in plastic and contained in a calabash which was, itself, resting in the basket.

Elsewhere in the house, it seems on a shelf in the kitchen, was found a box containing several packets which each contained a number of unused cupcake paper wraps. Originally the box would have contained 24 packets each containing 88 wraps, more than 2000 in all.

They were an assortment of pink, blue and yellow and exhibited at the trial as Exhibit 2.

They were identical to the paper wrappings found in Exhibit 1, the 36 packets of ganja recovered from the bathroom.

Also exhibited at the trial were packets of what appeared to be ganja recovered from two suspects during the operation.

These were contained in Exhibits 8 and 9, three packets wrapped in pink wrapping of the type found in Exhibits 1 and 2.

The suspects in those instances were George Seymour and Dwight Wright. The prosecution adduced evidence of the convictions of these men and of two others in cases which preceded the trial in this matter.

That evidence is the subject of a main ground of appeal and will be dealt with below.

The appellant Rockett was arrested during the afternoon of the next day.

In his cautioned interview he stated he left his home at about 6:15 a.m. on the 13th September to go fishing and that at the time of the police operation he was at sea on his fishing trip from which he did

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not return until 7:30 p.m. that evening.

He left no-one at the premises for which he and his girlfriend the appellant Ebanks, held the keys. Maureen Palmer, the helper, had not yet arrived. The premises were secured when he left them on the morning of the 13th September.

He denied any knowledge of the drugs or of drugs being sold from the premises.

The appellant Ebanks was arrested on the 15th September 1991 and interviewed under caution by the police.

In light of the decision at which I have arrived, I propose to deal first with the appeal of Betsy Ebanks then turn to deal with that of Dave Rockett.

In each context I will deal separately with what I see to be the main legal issues arising.

So far as the appellant Ebanks is concerned I conclude that her appeal must succeed.

At the close of the Crown's case Crown Counsel, properly in my view, purported to offer no further evidence against her but that offer was rejected by the learned magistrate. Her attorney made a no case submission which was also rejected.

It is therefore important to consider the state of the evidence against her at the close of the Crown's case. As no police officer had testified to seeing her at the premises at the material time that evidence can only be contained in her cautioned interview.

The important excerpts follow:

"Question: Are you a resident at Dave Rockett's house on Crewe Road?

- Answer: I was living there until Thursday night 12th September 1991.
- Question: Do you move your belongings from his house as yet?
- Answer: No, I was going back to get them.
- Question: Why haven't you gone back for them as yet?
- Answer: Because I was going back in the evening and I was waiting until Dave comes back. I went to the house and the guy told me that he was not there so I turned back.
- Question: How long have you been living there with Rockett?
- Answer: Over a year.
- Question: Are you his common-law wife?
- Answer: Yes.
- Question: How long have you been with him?
- Answer: One year and three months.
- Question: What cause you to stop living with him on Thursday night?
- Answer: Because the guys there who is (sic) around the place I told him that I didn't want them there, so he said that the guys help him out with his dogs and clean up the place.
- Question: How many people have keys for the house?
- Answer: Me and him and whenever he is not there Country (Maureen Palmer) who is his helper keep his bunch of keys.
- Question: Was Country at the house on Friday 13th September 1991?
- Answer: Yes.
- Question: Have you ever seen Country meeting with people from time to time that comes to the house?
- Answer: She talks to them.
- Question: Have you ever seen her selling ganja to people that comes there?
- Answer: No.
- Question: How long have you seen the box of baking cups on the kitchen shelf?
- Answer: It wasn't a box, it was a pack.
- Question: Do you know how it got there?
- Answer: No. I see it on the counter.
- Question: How long ago have you seen it there?
- Answer: I saw it there on Wednesday evening the 11th September.
- Question: What time?
- Answer: After 12 mid-day or minutes to 1 p.m.

Question: Are your belongings still there?

Answer: Yes.

Question: Are you planning to go back to live with him?

Answer: No sir. No.

Question: Did you turn back on one of your trips to the house (on the 13th September) when you see police on the premises?

Answer: I see cars there, I didn't see any police, I see people and I turn back.

Question: Why didn't you go and find out what was happening?

Answer: Because it wasn't my business

Question: Have you even seen Rockett with ganja in the house?

Answer: Me se him a smoke it.

Question: Who are the people that are responsible for the sale of ganja from the house?

Answer: Me no know, the only person who would be responsible would be Dave Rockett.

Question: I must tell you that I do not believe that you moved out at all because all your belongings are still at the house and you are just saying that because you know that ganja was at the house when the police raided it.

Answer: I never know ganja was deah."

As already observed, the foregoing was the only evidence on the Crown's case connecting Ebanks in any way with the premises.

There was nothing placing her there at the relevant times between 3 and 5:30 p.m.

It appears from her interview that while admitting access, she denied having custody or control of the premises on the day. She stated she had relinquished her residence there. While it may be inferred that her own sworn testimony later put the lie to that account, certainly at the close of the Crown's case there was insufficient evidence on which to conclude she had custodianship of the premises on the day, let alone the "something more" of which the common law speaks before there can be a prima facie conclusion; requiring an answer, that she was concerned in the possession with intent to supply the drugs found therein.

See Monica Williams v. Regina (1970) 12 J.L.R. 116 and Joseph Peter Cavendish v. Regina (1961) 45 Cr. App. Rep. 374

Further, there was no basis from that evidence for concluding beyond reasonable doubt that Ebanks was in possession, custody or control of the premises or anything within it for the purpose of invoking the statutory presumptions contained in section 7 of the Law and thus requiring her rebuttal.

That is the onus which remained on the Crown until the close of its case and which in my view, was not discharged.

By section 7 (1) (b) of the Law, at that stage, the Crown is relieved of the burden of proving knowledge of the drugs only if it has established beyond reasonable doubt, albeit on a prima facie basis, that the accused had possession, custody or control of the thing in which the drugs were found and only then does the presumption arise requiring rebuttal by the accused on a balance of probabilities.

See Gibson v. Regina 1988-89 CILR 336 at page 347 lines 1-10

The police had not seen the appellant Ebanks at the premises at any time on the day. Her own interview did not place her there at the material time, nor did it establish in her any real control over those premises on the day nor over anything within it, save for her own belongings.

The learned magistrate came to this very conclusion in his summing up at page 180 of the transcript lines 30-36 where he said "other than her testimony there is no direct or primary evidence to support the charge".

I conclude therefore that the learned magistrate erred in not accepting the Crown's offer of no further evidence and in rejecting the submission of no case to answer.

Thus he misdirected himself in Law, a misdirection upon which the

appellant can properly rely as a ground of appeal.

See Abbott v. Regina (1955) 39 Cr. App R. 145 and for a discussion of the authorities Archbold 1993 Ed. Volume I paragraph 7-93 pages 1172-1173.

The appellant Ebanks opted to give sworn testimony no doubt in an effort to rebut the statutory or evidential burden which, she may well have thought, then rested on her.

The inculpatory inferences which were drawn from such inconsistencies as arose from her evidence, must in my view, be regarded as oppressive in those circumstances as she ought not to have been called upon in the first place.

For all the foregoing reasons, the appeal of the appellant Ebanks is allowed, her conviction quashed and sentence set aside.

Three grounds of appeal against conviction were advanced on behalf of the appellant Rockett.

Ground I (a) is as follows:

"The evidence of convictions of other people on their admissions of guilt in relation to possession and consumption of ganja ought not to have been admitted at the trial of the appellant. This evidence was admitted and relied upon by the learned trial judge."

The evidence impugned was that given by the Deputy Clerk of Court from the court's records in relation to four persons convicted, by plea or by trial, for consumption or possession of ganja.

There was also the evidence of the police officers to the effect that those four persons were among the suspects detained as a result of Constable Ahmed's observations and transmissions.

Exhibits 8 and 9 were said to have been recovered from two of the

four; George Seymour and Dwight Wright, respectively.

Exhibit 8 contained two packets with pink wrappers.

Another, Calvin Green was detained and from his shirt pocket was recovered a packet described by Constable Redden as a pink cupcake wrapper containing vegetable matter resembling ganja.

The fourth person dealt with in the Deputy Clerk's evidence was Markcom Seymour.

He was the first visitor of whom Constable Ahmed spoke and who had made the utterance "Rockett, Rockett" on approaching the premises.

This finally becomes clear from testimony given by Constable Ahmed when he was recalled.

From Seymour no drugs had been recovered but on being accosted by the police he was seen to swallow something. A specimen of urine taken from him later proved positive for the presence of cannabinoids.

Hence the charge and conviction of which the Deputy Clerk testified in relation to him.

Apart from the evidence I have just described, a good deal of time was spent by the Crown attempting to lead evidence from the police officers of the charges which were brought against those four and others leading to various convictions.

The defence objected and in the absence of full submissions on the matter, the magistrate overruled those submissions.

In his submissions on the appeal Mr. Collins developed his objections to this evidence relying on the long-standing principle most notably reiterated in Hollington v. F. Hewthorn and Co. Ltd (1943) K.B. 587 that at common law a judgment in personam is no evidence of the truth

either of the decision or of its grounds between strangers, or a party and a stranger.

In the Cayman Islands this principle was recently recognised and applied by the Grand Court.

See Regina v. Dexter Ebanks and Shaleen Ebanks Ind. 53/91 written ruling delivered on 20th January 1993.

Although widely criticised by the English courts (see for example Hunter v. Chief Constable of West Midlands (1981) 3 ALL. E.R. 727 per Lord Diplock) and superseded by statute in England, the decision has not been judicially overturned.

On the contrary, the decision recently received the highest judicial affirmation by the decision of the Privy Council in Hui Chi-ming v. R (1992) Crim. L.R. 446; an appeal from the Court of Appeal of Hong Kong.

However debatable its validity, this Court is obliged to have regard to the principle until it is legislatively overturned.

It follows that the evidence of the charges and convictions entered against the other parties detained on 13th September 1993 was improperly admitted by the learned magistrate and to the extent that he relied upon it as proof of the offences before him, he misdirected himself in Law.

However, I am of the view that the misdirection notwithstanding, the admission of that evidence was not fatal to the conviction.

The factual content of the impugned testimony was not a necessary pre-condition to the conviction on the charges which were before the court.

Otherwise, there was ample evidence before him from which the learned magistrate could have properly concluded that ganja was being supplied

from the premises on the day.

So far as exhibits 8 and 9 provided real evidence, as opposed to the other narrative accounts, of this, it would be fanciful to suggest that they were anything but packets of ganja provided by Maureen Palmer from the same "stock-in-trade" as that found in Exhibit I, the 36 similar packages. The narrative accounts do provide some further inferential connection between other packets and the 36 packages.

Proof that the 36 packages in fact contained ganja was presented by the analyst's certificate, Exhibit 5.

The Court could well have reached the same conclusion without reference to the evidence of convictions of other parties.

In light of the foregoing, my final views on this point will be expressed below.

Grounds 1 (a) and 2 are interrelated and will be dealt with together. They are as follows:

1 (b) Evidence that a visitor to the appellant's house, called out "Rockett" twice before exchanging something with the co-accused Maureen Palmer ought not to have been relied upon by the learned magistrate as it was hearsay evidence in relation to the appellant Dave Rockett.

2. Even if the use of the word "Rockett" is held to be admissible the learned magistrate ought not to have relied upon this coming to the conclusion that people must have known that the drug could have been obtained at the appellant's house". The use of the word "Rockett" is at best equivocal and the appellant should have been given the benefit of the doubt in relation to the use of his name in these circumstances."

For the following reasons I have concluded that the learned magistrate properly admitted the evidence and that his treatment of that evidence was in accordance with the established principles.

In the context in which it arose, the testimonial import of the words "Rockett, Rockett" involves potential dangers.

Not only could it be taken to imply the positive knowledge of the speaker that Rockett was a person from whom at that place drugs could be obtained, it could also imply that the speaker had been so informed by someone else.

In the testimonial sense therefore the import of the utterance would be worthless hearsay.

Nonetheless the utterance was legally admissible in evidence as a relevant fact, not to disclose the state of mind of the speaker, which in itself would be irrelevant in any event, but because when taken with the actions and events which followed, the utterance gives rise to the inescapable inference that the transaction between the speaker and the person responding, Maureen Palmer, points to the use and indeed the established use of the premises for the purpose of the supply of drugs.

Thus, in the strict sense, the utterance is not hearsay at all and is admissible.

In that sense the utterance is to be likened to the offers of the masseuses in

Woodhouse v. Hall (1980) 72 Cr. App. R. 39

where the fact that the offers were made was in itself relevant to proof of the use to which the premises were put.

To the extent that this evidence may be criticised as being also hearsay, in the testimonial sense, that it discloses the state of mind of the speaker, I would conclude that the statement is admissible

nonetheless as a part of the res gestae and thus as an exception to the hearsay rule. The spontaneity of the utterance with the near contemporaneous transaction which followed makes the evidence about it admissible, its relevance being clear.

The foregoing, as I understand it, was the sort of approach taken by the Privy Council in Ratten v. R (1971) 3 ALL. E.R. 801. to the evidence of the telephone operator about the utterance of the deceased which had been made nearly contemporaneous with the commission of the fatal shooting.

In delivering the opinion of the Board Lord Wilberforce stated at page 23 of the report:

"Words spoken are facts just as much as any other action by a human being. If the speaking of the words is relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on "testimentially" i.e. as establishing some fact narrated by the words. Authority is hardly needed for this proposition but their lordships will restate what was said in the judgment of the Board in Subramanian v. Public Prosecutor (1956) 1 W.L.R. 965 at p 970..."

This perennially troublesome distinction between utterance as relevant fact in itself and utterance as evidence of the accuracy or truth of what is uttered has been recently and comprehensively reviewed by the House of Lords in

Kearley v. Regina (1992) 2 ALL.E.R. 345

resulting, not surprisingly, in dissenting and majority opinions.

Including Ratten v. R, the House reviewed the leading English and Commonwealth decisions. A helpful interpretation of the decision in Ratten v. R is to be found in the opinion of Oliver LJ at page 369 letters B-D and page 373 letters E to H.

The majority rejected the argument advanced in Kearley's case; in favour of its admission, that evidence tendered by police officers to the effect that they had received calls and visits at the appellant's

flat in the absence of the appellant was relevant and admissible evidence of what was said by the callers with the implied assertion involved in the callers' requests for drugs, that the appellant was the supplier.

The obvious distinction between Kearley's case (and the line of cases reviewed by the House in the opinions) and the present, is the evidence of Constable Ahmed that actual transactions did take place and the other evidence that the transactions, or at least some of them, involved ganja.

The utterance, when taken with the evidence of the numerous and unsolicited visits and transactions; is but one small factor pointing to the use of the premises.

All that evidence together, in my view, can be regarded as part of the res gestae of the offences of supplying drugs from the premises.

That becomes a part of the res gestae, provided the mental element is otherwise established, of permitting the premises to be used for those purposes and therefore relevant to at least one of the charges against the appellant Rockett.

The evidence was properly admitted and nothing in his summing-up suggests that the learned magistrate misdirected himself on its relevance.

As to the mental element of the offence of permitting the use of the premises for the supply of ganja, in my judgment, proof was properly inferred by the learned magistrate from all the evidence before him.

In particular the recovery of the 36 packages and the box of wrappings (Exhibits 1 and 2) from within the house where Rockett, as its daily and principal resident, could well have come across them, refutes any inference that Palmer and the gardener were acting entirely on their own and without his knowledge.

The evidence which points to the established use of the premises for the illegal purposes also gives rise to the inference that its owner and principal occupant would be aware of the goings-on.

The appellant gave no evidence to rebut those conclusions which, prima facie, were proven at the close of the Crown's case.

The third ground of appeal challenges the conclusion that the appellant was in possession of the drugs or of anything in which they were contained.

In my judgment there is merit in that ground of appeal.

The learned magistrate considered this issue by reference separately to the statutory presumption prescribed by section 7 (1) (b) of the Misuse of Drugs Law (Second Revision) and to the common law.

As to the presumption, it of course, could not arise unless at the end of the Crown's case there was proof beyond reasonable doubt that Rockett was in possession, custody or control of the thing which contained the drugs.

The learned magistrate dealt with this issue by finding that he was shown to be in possession of the "chattels" (at page 6 of his written reasons) and of the "chattel". (at page 7).

The thing which immediately contained the package of drugs was the calabash, not the clothes basket.

It is not clear to which of them the learned magistrate referred or whether he was referring to both.

Regardless, I do not think there was evidence to ground the conclusion that the appellant was in actual possession, custody or control of the container of the drugs for the purposes of giving rise to the presumption.

While the circumstances point to his knowledge of, or acquiescence to, the presence of drugs and to his knowledge of its sale from the premises, it is not an irresistible inference to be drawn that he must have had possession, custody or control of the container in which they were kept on the day.

Mr. Clarke further submitted that for the purposes of the statutory presumptions, the house itself may be regarded as the "thing" in which the drugs were ultimately contained, a matter of construction on which, it seems, there have been differing opinions of this court.

In Joyce Ann Seymour and Patrick Green v. Regina 1988-89 CILR N. 9 (written judgment delivered on 29th September 1988) Collett C.J. stated:

"In my judgment an apartment which is real property as contrasted with chattels, is not within the meaning of the word "anything" as used in that subsection. The presumption does not arise against an occupier of premises merely because a controlled drug is found concealed in those premises. The prosecution must go further and prove that it was contained in some chattel located on the premises and that the accused person against whom it is sought to invoke that presumption was in possession of that chattel at the relevant time."

Mr. Clarke submits that that observation having been made in a context where the Court did find there was a chattel within the house containing the drugs and applied the presumption, was made obiter and that the preferable approach was that taken in

Marvin Robert Johnson v. Regina 1990-91 CILR N. 9
(written judgment delivered on 1st March 1991)

where drugs were found openly lying in a house of which the accused was in possession, custody or control and it was held that the house may be a "thing" containing drugs so as to raise the presumption under S. 7 (1) (b) that the appellant was knowingly in possession of the drugs.

I note however that the Court did go on to find that there was evidence in that latter case from which to infer possession even

without the presumption.

In the course of the judgment Harre J (as he then was) observed in reference to the decision in Seymour and Green v. Regina (infra)

"It is not in my judgment right to regard it as authority for the proposition that in all cases the presumption does not relate to real property simply because it is real property. The learned Chief Justice was making the contrast with chattels in a case where the drug was in fact concealed in a chattel and it was to that situation, in my judgment to which his observations were directed." (emphasis added)

The words in emphasis are significant. They imply there is nothing in the nature of an apartment or house that precludes the mischief of its use as a "container" within which to secrete illegal drugs.

In my view, while the Court in Johnson's case found evidence on which the inferences of guilt could be drawn without the presumption, it was also being mindful of that sort of mischief which could arise from the immediate use of a house or more typically, a fixture within it, say a locked cupboard; for the secreting of illegal drugs.

The Court recognized that the narrower interpretation would preclude the application of the presumption in such circumstances.

On the other hand, there are, however, obvious dangers involved in the wider interpretation bearing in mind the likelihood, in most cases, that a house will have more than one occupant or will allow access, often unsupervised, to any number of persons.

Where occupancy and control of the premises can be shown to be vested entirely in the defendant, the presumption hardly takes the Crown's case any further than direct or circumstantial evidence would.

That was the result in Johnson's case.

In the contexts in which the word "anything" appears throughout the

various subsections of section 7 of the Misuse of Drugs Law, I am myself inclined to the narrower view, as a matter of construction, that the word is intended to relate to chattels, to moveables which might be used as containers as such.

On the facts of the present matter for reasons which follow, I find I need not decide on that issue, but I leave that aspect of the matter with the observation that it does require general clarification.

Here although the drugs were inside the house, they were directly contained within the calabash.

Having regard to the possession and dealing inferentially attributed to Maureen Palmer (and in respect of which she was convicted) it would be entirely fictional to conclude that the drugs were contained in anything but that in which she must have left them; the calabash.

Unlike in Marvin Johnson v. R the drugs were not openly lying about the house itself.

I therefore conclude that the presumption did not arise in any context in the case.

I also differ from the learned magistrate's conclusion that there was "something more" which when taken with the appellant's control and occupancy of the premises, established his possession with intent to supply the particular drugs in exhibit 1.

There is no inherent inconsistency between the proper inferences that the appellant Rockett knew or acquiesced in Maureen Palmer's use of the premises and a finding, on the other hand, that he had no custody or control of the drugs being sold on the particular day.

When Exhibit 1 was recovered by the police he had not yet returned home for the day and the drugs in Exhibit 1 could not yet therefore have been reduced into his custody or control by virtue of his presence in the house and there is nothing, from which it can be

inferred he must have known that drugs would be left from the day's activities.

The appeal against conviction on the charge of possession with intent to supply is therefore allowed, the conviction quashed and the sentence set aside.

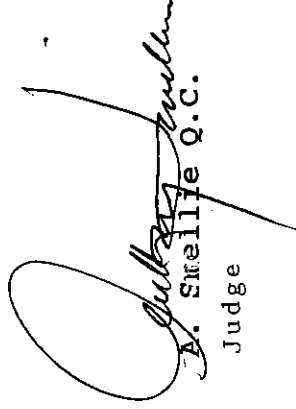
In respect of the charge of permitting the use of the premises, the conviction is sound and for the reasons already stated, I consider the matter appropriate for the application of the proviso to section 172 in respect of the misdirections in law which resulted in the admission and reliance on the evidence of the convictions of other parties.

The appeal against conviction on that charge is dismissed.

That then leaves the appeal against sentence on the charge of permitting and on charge 5334/91 for consuming.

Submissions were not made on that aspect of the appeal and the opportunity will be given for them upon the delivery of judgment.

24th September 1993


A. Smeilie Q.C.
Judge

