[COURT OF CRIMINAL APPEAL, NEW SOUTH WALES]

EDWARD PAUL FILIPPETTI

Street C.J., Slattery and Maxwell JJ.

9 November 1978

Possession — Definition — Exclusive physical control — People other than defendant having access to place where drugs found — Inadequacy of evidence of possession — Poisons Act 1966 (N.S.W.), ss 21, 45A(1) and (4).

When asked by police, the appellant denied that there was any cannabis at his home. Six people including the appellant lived there. All had free access to and made free use of the lounge room where police found a large quantity of cannabis concealed under the cushion of a chair in which another resident was sitting. Beforehand the appellant had tried to create a diversion. He had also produced a smaller quantity of cannabis saying it was all he had. Police subsequently found another small quantity in the appellant's bedroom. In response to a police allegation that he had a large quantity of cannabis in the house and was selling it, the appellant said, "I would like to find out who the bastard was that put me in." He was charged with (deemed) supply of a drug of addiction namely Indian hemp, on the basis of possession of a quantity of cannabis in excess of the prescribed quantity. Filippetti was convicted and appealed.

Held: (per curiam) the appeal be allowed because: (1) The evidence of access to and use of the place in which the large quantity of cannabis was found, by people other than the appellant meant that the Crown had not produced enough evidence to negate possession on the part of any other occupant of the house.

(2) The appellant's protests as to who put him in were equivocal and were an insufficient basis to permit the jury to find beyond reasonable doubt that the cannabis was in the appellant's exclusive physical control.

(3) Accordingly, there was insufficient evidence to enable the jury to conclude that the large quantity of cannabis was in the appellant's exclusive physical control.

Rawcliffe [1977] 1 N.S.W.L.R. 219, referred to.

APPEAL AGAINST CONVICTION.

J. Traill Q.C. and *I. A. MacFarlane*, for the appellant.

J. H. Lawrence, for the Crown.

9 November 1978

STREET C.J. This is an appeal against conviction at a trial before Gee J. on a charge that the appellant on 22 March 1978 at Lake Heights in the State of New South Wales did supply a drug of addiction, to wit Indian hemp. It was the Crown case that on 22 March 1978 the appellant and his mother were present at the Port Kembla Court House when they were spoken to by Detective Watson. Detective Watson introduced himself and said to the appellant:

> "I have received information that you have concealed on your premises at 28 Noble Parade, Lake Heights, a large quantity of buddha sticks and that you are selling them. I have a Search Warrant to search the

> premises and I would like you and your mother to accompany us to your home."

The appellant replied: "I've got nothing at home, it's all just a bit of a hassle, you can come and search if you want . . . ." The appellant then accompanied the police to his home at Lake Heights. This home was a small suburban dwelling. It comprised three bedrooms, a bathroom, a kitchen and a lounge room. It was apparently owned by the appellant's father but he had separated from the appellant's mother some years ago and had not lived in the home for some years. The furniture in the home similarly appears to have been there for some years; there was no precise evidence as to who owned the various items of furniture that were referred to in the evidence. Living in that home on 22 March were the appellant and his fiancée, Anne Wilkie, the appellant's mother, his younger brother, and another couple, Frank Previati and his de facto wife, Judy Gulliver. How these six persons were spread between the three bedrooms does not appear clearly in the evidence. It is, however, apparent that all six of them had common access to and made free use of the lounge room on which particular attention focuses for the purposes of the present appeal.

When they reached the appellant's home they went into his bedroom and commenced to search. The appellant at that stage took one of the police officers aside and said: "Look this is all I've got, it is just a couple of sticks that I smoke" and he then handed over a plastic bag containing four buddha sticks. He continued: "I smoke it now and again, you're not going to bust me for this are you?" He was then told that he was under arrest.

When the police continued searching, the appellant became violent and there was something of an altercation in the bedroom. The appellant's mother came in and, for some reason not accounted for, she fell to the floor. The search then continued and another envelope was found in the appellant's bedroom containing a small amount of Indian hemp. The appellant said in regard to that: "That's mine, I use it now and again."

The search then moved through to the lounge room. The appellant was pulling drawers out violently and pushing them back and was described as being in a very agitated state. He was calling out, "Look, there's nothing here, let's go down to the shed" and his mother also said, ". . . take them down to the garage."

The appellant's mother at that stage was sitting on a chair in the lounge room, apparently sorting some washing. She was asked to get up from the chair and one of the searching police officers then lifted the cushion and found concealed in the spring compartment of the chair a plastic bag in which there was a large quantity of buddha sticks. These were later weighed at over 800 grams of Indian hemp. When the bag was discovered the police officer said to the appellant, "Eddie, does this belong to you?" The appellant replied, "I don't know anything about the sticks. You have just planted them there." The appellant was then warned about not being required to answer questions. He again asserted that the police had planted them there and that he knew nothing about them. The appellant's mother then said:

> "Eddie they didn't bring them in with them, I seen him find them in the chair, tell them the truth, they don't belong to me, Eddie tell them about it."

The appellant then said to one of the police officers, "Who put me in?" To which the answer was made:

> "As I told you before I received information that you had a large quantity of buddha sticks on your premises and that you were selling them."

Then according to the police officer, the appellant said:

> "I would like to find out who the bastard was that put me in. Anne would you get a solicitor, I'm not saying anything more until I see a solicitor."

The appellant was then taken to the police station, and after he had arrived there there was some further conversation that should be briefly recounted. Addressing the searching police officers, he said to them at the police station:

> "I would just like to apologise for the way I carried on in saying that you planted them, I was just upset when I said that but I would like to find out who the bastard was that put me in."

He was told that he was going to be charged and he said: "I am sorry about what I said, I know that you didn't put them there."

This was the substance of the Crown evidence in respect of the charge brought against the appellant and upon which he was convicted. He was sentenced by Gee J. on 21 July 1978 to five years penal servitude with a non-parole period for two years.

A number of grounds of appeal have been filed, but for present purposes it is sufficient to refer to the first and second grounds, namely:

Ground 1

> "That his Honour the trial judge erred in not ruling at the close of the Crown case that there was no evidence to support the charge in the indictment."

Ground 2

> "That his Honour erred in not ruling that there was no evidence fit to go to the jury in support of the charge in the indictment."

It should be added that one of the other grounds of appeal contained a number of detailed criticisms of the summing up. In this connection, assuming that there was sufficient evidence to go to the jury to justify a conviction, I should say that the summing up is in my view impeccable — it contains both an entirely fair as well as a legally admirable summary to the jury of both the relevant law, the evidence in the Crown case and the nature of the defence case. If it were necessary to discuss in detail the challenges to the summing up, I would reject them as unfounded.

In my view, however, the same cannot be said of the two grounds of appeal that I have quoted. At the centre of the Crown case, indeed crucial to it, was the issue of possession on the part of the appellant of the buddha sticks. His Honour correctly summed up to the jury the concept of possession as laid down by this Court in *Rawcliffe* [1977] 1 N.S.W.L.R. 219. He directed his attention to this same concept when the submission was made to him at the close of the Crown case that there was not sufficient evidence to justify the jury in concluding that the present appellant had the exclusive physical control over this Indian hemp. It was not of course in his physical custody, being concealed in a chair in this communal lounge room.

It was accordingly necessary, in order to justify the factual basis upon which the statutory deeming of supply would proceed, to establish that the buddha sticks were in the appellant's exclusive physical control. At one stage of the trial it was suggested that perhaps the Crown case could be put upon the basis of joint possession on the part of the appellant and his mother and perhaps one or more of the other occupants of the house. This, however, was not pressed, and the Crown case as it stood and as it was propounded at the close of the Crown evidence was of individual exclusive physical control in the appellant.

Counsel for the appellant at the trial took objection at the close of the evidence to its adequacy to support a verdict of guilty. In ruling on that, his Honour was impressed by the significance of the appellant's false denial at the police station at the outset. His conduct both in attempting to create a diversion when the small amount of Indian hemp was disclosed by him to the police and in seeking to get the police to leave the lounge room to search in the shed was also considered by his Honour to be material which the jury might regard as identifying the appellant in particular with the exclusive physical control of the buddha sticks in the chair. Finally, his Honour regarded the appellant's protests of "Who put me in?" and "I would like to find out who the bastard was that put me in" as capable of being regarded by the jury as an admission on his part that the possession of these buddha sticks was in him.

The difficulty confronting the Crown in this case comes from the large number of persons occupying this comparatively small house and all using the lounge room where the buddha sticks were found. The only Indian hemp found in the appellant's bedroom was the small quantity that has been mentioned and this was not relied upon by the Crown as involving any criminal offence on the part of the appellant. The finding of the buddha sticks in the chair in this lounge room where all six occupants of the house apparently had equally free access, and so far as the evidence goes in fact made equally free use, would not readily establish that there was exclusive physical control of these buddha sticks in any one of the occupants unless there were some other evidence to accompany the finding of the buddha sticks.

Ultimately the matter appears to come down to the question of whether the Crown had satisfactorily produced material that the jury could regard as negating possession on the part of the other occupant of the house, particularly the mother, of these buddha sticks. It will be recalled that so far as physical contact with the chair is concerned, the mother was in fact sitting in the chair and had to be asked to move before the buddha sticks were found. The appellant's protests as to who put him in are equivocal, and, although they undoubtedly do nothing to help his case, they do not, whether standing alone or taken in conjunction with the other evidence, amount to a sufficient basis to permit the jury to find beyond reasonable doubt that he had impliedly admitted that the buddha sticks were in his exclusive physical control.

For those reasons I am of the view that the submission made to his Honour at the conclusion of the Crown case was well founded. It was a difficult case to present from the Crown's point of view by reason of this large number of persons occupying this lounge room. The inescapable fact is

that there was not enough evidence to enable the jury to rule out the possibility that these buddha sticks in fact were in possession of one of the other occupants, perhaps the mother, nor was there enough evidence to enable the jury to conclude beyond reasonable doubt that the buddha sticks in the chair were in the exclusive physical control of the appellant.

I am accordingly of the view that the point taken by counsel for the appellant at the conclusion of the evidence and ably argued by Mr Traill Q.C. on this appeal is well founded and that the conviction should be quashed. The case is not one for a new trial inasmuch as the whole of the Crown case is before the court and there is no reason to anticipate that any stronger case could be made on a new trial.

Accordingly, I would propose that the appeal be allowed and that the conviction be quashed.

SLATTERY J. I agree with the judgment of the Chief Justice and with the orders proposed and have nothing to add.

MAXWELL J. I agree with the orders proposed by the Chief Justice and the reasons he has given in support thereof, and I have nothing to add.

STREET C.J. The order of the court is that the appeal is allowed and the conviction is quashed.

Appeal allowed.
Conviction quashed.

Solicitors for the appellant: *Dudley Westgarth & Co.*

D.B.