80/80

SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v DITROIA and TUCCI

Starke, Crockett and Fullagar JJ

29 August 1980 — [1981] VicRp 28; [1981] VR 247; noted 8 Crim LJ 197

CRIMINAL LAW – NARCOTICS – POSSESSION – PHYSICAL POSSESSION – DE FACTO POSSESSION – EXCLUSIVE PHYSICAL CONTROL: *CUSTOMS ACT* 1901-1973, S233B(1)(ca).

The accused booked a motel room using false names. D. was seen to enter the room and stayed for about 5 minutes and then left. Shortly after the room was searched a suit carrier was discovered in which two packets of a substance later identified as heroin were found. The carrier was left as originally found. Some time later T. was seen to enter the room and when police arrived 30 seconds later, T. had in his hand the two packages which he then dropped. Both accused were later interviewed. D. admitted having gone to the motel for a few minutes and claimed to know nothing of the heroin. T. said he was unaware that the suit carrier contained heroin. Each were convicted and sentenced to imprisonment. Upon appeal—

HELD: Appeals dismissed.

1. De Facto possession is possession consisting of exclusive dominion or control over an article. E.g. the furniture in one's home is in one's possession even when one is absent from the home. Furthermore, it extends to a thing effectively hidden in the premises of another. The word "possession" in s233B(1)(e) of the *Customs Act* 1901 means "physical possession" as defined in *Possession in the Common Law* by Pollock and Wright, pages 118-9, and does not extend to constructive possession; but that physical possession means both actual custody or control and de facto possession.

***R v Bush* (1975) 24 FLR 346; (1975) 5 ALR 387; [1975] 1 NSWLR 298, followed.**

2. This interpretation of s233B(1)(c) is equally correct for s233B(1)(ca). By that provision, if possession is established, the burden is upon the possessor to show reasonable excuse for his possession. Such an excuse might be that he was unaware of the nature of the article possessed by him.

3. In the case of a de facto possessor evidence must be forthcoming of his knowledge of the existence of an article so as to associate him with control of it (e.g. that he has the article in his home or that he has hidden it), whereas with proof of physical possession the fact of holding the article in the possessor's hand will speak for itself. But in neither case need the Crown prove knowledge of the nature of the article so possessed.

STARKE, CROCKETT and FULLAGAR JJ: On 16th May 1980, each applicant was found guilty on indictment of the offence of having in his possession without reasonable excuse a prohibited import reasonably suspected of having been imported into Australia in contravention of the *Customs Act* 1901-1973. The offence is created by s233B(1)(ca) of the Act. The import alleged to have been in the applicants' possession was 20.55 grams of heroin. Heroin is a narcotic substance and a prohibited import to which the section relates. That the substance in question was a prohibited import to which the section related, and that it was reasonably suspected of having been imported into Australia in contravention of the Act, was not denied. What was in contest at the trial of the applicants was the question of inculpatory possession. In this connection it is to be noted that exculpatory possession is made dependent upon a reasonable excuse for that possession and that the section casts on the person in possession the burden of proving the existence of such an excuse. At their jointly held trial Ditroia denied possession whilst Tucci admitted possession but claimed he had a reasonable excuse for that possession, i.e. that he had an honest belief on reasonable grounds in the existence of circumstances which, if true, would make him innocent of the charge.

The Crown case was as follows: That Ditroia lived in a flat in Bay Street, Brighton. The two applicants were well known to each other. In fact at the relevant time Tucci was residing with Ditroia at his flat. On 11th February 1979 the two men booked a room in a motel at Carlton. Ditroia carried out the booking transaction, but Tucci was present and able to hear what was said. The men were booked in under false names and an untrue explanation for wanting the room was

given. Only some items and hand baggage were brought to the motel by the men at the time the room was booked. These included a suit carrier held by Tucci. Neither applicant in fact thereafter used the room in any residential sense. At about 6.30 a.m. on the 21st February Ditroia was seen to enter the motel. He stayed for only about five minutes. Some time later narcotics agents searched the room booked by the applicants. They found the suit carrier which contained a suit. In an inside pocket of the coat in the carrier two plastic packets of a substance later identified as heroin were found. The packets were returned to the pocket and the carrier zipped and left as originally found. A vigil was then maintained on the room from a room opposite. At about 5.00am on the 22nd February Tucci was seen to enter the room. About thirty seconds later narcotics agents followed him into the room. Tucci had in his hand the two packages which he then dropped. In explanation Tucci maintained that he had come on behalf of a friend to pay the bill (which payment in fact he had made) and collect his friend's belongings from the room. He maintained that when he picked up the carrier the suit had fallen out and the packets had fallen out of the coat pocket. He had just picked them up, and was about to return them to the suit coat pocket, when the agents entered the room. The agent who had seen the carrier fully fastened up maintained in his evidence that this explanation was demonstrably untenable. Tucci explained that the need for him to collect the clothing arose because his friend was in hospital following an injury. The fact was that on the evening of 21st February Ditroia was admitted to the Alfred Hospital following an injury to his arm. Accordingly Tucci maintained to the agents – and at his trial – that he was an innocent messenger for Ditroia being unaware until their fall from the coat pocket of the existence of the two packages and, of course, of the identity of their content.

Admittedly, his taking up the suit carrier and picking up the fallen packets put him in possession of the heroin whatever test of 'possession' might be the correct one. But, if he was unaware of the nature of the substance in the circumstance that he was a mere messenger for its owner, then that possession was one for which he had a reasonable excuse. Ditroia was interviewed at the Alfred Hospital on the morning of the 23rd. He denied that he had visited the motel for a few minutes on the morning of the 21st. He also denied ownership of the suit coat or any knowledge of it. He claimed to know nothing of any heroin in the pocket of the coat or having told Tucci that heroin was in the pocket.

However, at his trial, Ditroia admitted having gone to the motel for a few minutes at about 6.30am on the 21st to "wash his face and comb his hair". He said Tucci took him to hospital upon his, Ditroia's, suffering an injury from a fall but he denied having asked Tucci to go to the motel for his clothing. He disclaimed knowledge of the heroin in the coat which, by this time, he admitted was his. His explanation for heroin's being found in his pocket was that Tucci must have put it there.

Each applicant made an unsworn statement at the trial. Neither called evidence. Each now applies for leave to appeal against his conviction. Additionally, Tucci seeks leave to appeal against his sentence. On Ditroia's behalf three grounds were argued. As set out in the notice of application they were:

> 1. Not relevant.
>
> 2. "That the learned trial Judge failed to explain to the jury adequately the differences in the case against the applicant from the case made against the co-accused. More specifically –
> (a) The learned trial Judge's directions to the jury failed to adequately explain the concept of possession as it applied against the two accused respectively ...
>
> 3. Not relevant.

In our opinion this ground rests upon a misconception of the relevant law. It appears that the trial Judge – as we have been told other Judges have done in the past – acted upon the view that some distinction is to be drawn between cases of actual physical possession (e.g. when the goods were in the hands of the defendant – as was admittedly the case with Tucci) and de facto possession in relation to the matters necessary to be proved by the Crown. De Facto possession is possession consisting of exclusive dominion or control over an article. E.g. the furniture in one's home is in one's possession even when one is absent from the home. Furthermore, it extends to a thing effectively hidden in the premises of another. *R v Van Swol* [1975] VicRp 5; (1975) VR 61; (1974) 4 ALR 386; (1974) 27 FLR 353. In *R v Bush* (1975) 24 FLR 346; (1975) 5 ALR 387; [1975]

1 NSWLR 298 the New South Wales Court of Appeal, largely in reliance upon the decision of the High Court in *Williams v Douglas* [1949] HCA 40; (1949) 78 CLR 521; [1950] ALR 223, held that the word "possession" in s233B(1)(e) means "physical possession" as defined in *Possession in the Common Law* by Pollock and Wright, pages 118-9, and does not extend to constructive possession; but that physical possession means both actual custody or control and de facto possession in the sense that we have described those terms. Moreover, the Court added that knowledge of the nature of' an article that the possessor knows he has in his actual or de facto custody is not necessary to establish possession in such a sense.

If this interpretation of s233B(1)(c) is correct, it is undoubtedly equally correct for s233B(1)(ca). By that provision, if possession is established, the burden is upon the possessor to show reasonable excuse for his possession. Such an excuse might be that he was unaware of the nature of the article possessed by him. For some reason that appears unclear it seems that judges have directed juries, and prosecutors have conceded, that proof by the Crown of knowledge by an alleged de facto possessor of the narcotic nature of a commodity said to be in his possession is essential to proof of the offence; although no such proof of knowledge is necessary as against a person with actual control. The correct construction of the provisions of the sub-section admits of no such dichotomy. Indeed, the Court in *Bush's Case* (p404) described "de facto possession" as synonymous with "exclusive physical control" when those terms are used in relation to possession of narcotic goods. In the case of a de facto possessor evidence must doubtless be forthcoming of his knowledge of the existence of an article so as to associate him with control of it (e.g. that he has the article in his home or that he has hidden it), whereas with proof of physical possession the fact of holding the article in the possessor's hand will speak for itself. But in neither case need the Crown prove knowledge of the nature of the article so possessed.

The Court in *Bush's Case* (at p415) summarised its conclusions as follows:

> "We consider, therefore, that in the context in which it is found, and having regard to the purposes already mentioned which the legislative provision is intended to effect, possession in s233B(1)(c) means no more than de facto possession of the narcotic goods concerned in the sense in which we have considered that expression and that the mental element involved extends no further than the intention inherent in de facto possession of such goods, namely, the intention to have exclusive physical control of some article which is in fact narcotic goods or of some article, or some place wherein such goods are in fact carried or contained or located. It is not inherent in that mental element that an accused should know or suspect or have reason to suspect that an item in his de facto possession is narcotic goods. Accordingly, if narcotic goods are found in some bag or garment, or in some package or container, or in some room or place, over which he has the exclusive physical control appropriate to de facto possession, he has them in his possession for the purposes of s233B(1)(c). A claim by him that those goods were slipped into his bag or garment or were inserted into the package or container or planted in his room or other place without his knowledge or suspicion, or reason for suspicion, are matters which he may establish to the tribunal of fact as, according to the circumstances, providing a reasonable excuse for such possession."

We were invited to question the correctness of those conclusions – particularly as it appears they have been the subject of some criticism. Even if we were disposed to do so we would hesitate long before differing from an appellate court of co-ordinate jurisdiction – especially where each court is concerned with the same exercise of Federal jurisdiction. However, we think that *Bush's Case* was correctly decided. In *R v Rawcliffe* 32 FLR 252; (1977) 1 NSWLR 219 a Court of Criminal Appeal consisting of five judges refused to uphold a submission that *Bush's Case* was wrongly decided. Since then it has been followed in many cases. See *R v Router* (1977) 14 ALR 365; *R v Malas* (1978) 21 ALR 225 and *R v Kennedy* (1979) 25 ALR 367.

At the trial the Judge directed the jury that if each applicant was found to have possessed the packages (which fact of possession was admitted by Tucci but denied by Ditroia) then it was unnecessary for the Crown to prove knowledge by either applicant of the nature of the contents of the packages – it being for the applicant to establish lack of knowledge of the identity of the contents so that the jury might judge whether such lack of knowledge, if so proved, amounted to reasonable excuse for the possession.

The charge, if it had remained there, was faultless. However, during a break a short time later the Judge was persuaded by counsel for both Ditroia and the Crown that, so far as Ditroia was concerned, such a direction was incorrect. He was asked to direct the jury that it was for the

Crown to prove knowledge by Ditroia of the nature of the substance found in the room in order to establish that degree of control or dominion necessary in order to demonstrate his de facto possession of the packages. Although this is just what *Bush's Case* held is not required, the Judge was prevailed upon so to charge the jury in purported correction of what he had a little earlier told them.

The second ground of complaint by Ditroia is as to the adequacy of that "re-direction". In "correcting" his direction in this way the learned Judge, erroneously in our opinion, added an ingredient to the offence charged, namely, that it was for the Crown to prove knowledge by Ditroia of the nature of the substance contained in the packages. On the contrary, as we have said, it was for Ditroia to prove lack of knowledge of the contents in support of his defence of reasonable excuse. In so doing the learned Judge's charge was clearly too favourable to Ditroia and, accordingly, cannot be relied upon as a ground of appeal.

In those circumstances it is unnecessary for us to examine the language used by the Judge when making his "correction". In the result this ground cannot be sustained. ...
