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SUPREME COURT OF QUEENSLAND — COURT OF CRIMINAL APPEAL

R v O'TOOLE

Kelly, Matthews and Shepherdson JJ

8 October 1986

CRIMINAL LAW – DRUG OFFENCES – POSSESSION – WHAT CONSTITUTES – JOINT POSSESSION – "EXCLUSIVENESS" – "LAID SOME CLAIM" – PRESENT/FUTURE INTENTION TO EXERCISE CONTROL OVER PROPERTY.

O'T. lived in a garage attached to a house owned and occupied by one Payne. When police officers visited and searched the premises including the room occupied by O'T. nothing of an incriminating nature was found. A short time later, Payne went to a cabinet and produced a bowl in which was a piece of paper containing an amount of LSD. When questioned about the LSD, O'T. said: "They were there for myself and Nikki (Payne) for our own use". O'T. was later charged with having in her possession a dangerous drug. At the hearing, Payne gave evidence that she had placed the drugs in the cabinet, that O'T. was present when this was done, and that O'T. agreed with this course of action. Evidence was also given to the effect that O'T. and Payne intended to use the drugs at some future time. The Magistrate convicted O'T. and fined her the sum of $450. On appeal against the conviction—

HELD: Appeal against conviction dismissed.
(1) One of the elements of physical possession of property is "exclusiveness"; that is, personal physical control to the exclusion of others not acting in concert with the accused. It follows that where a case is found to be one of joint possession, an argument based on "exclusiveness" may fail.

(2) In the present case, having regard to the evidence concerning the joint intended use of the drug and the agreement to place it in the cabinet, it was open to the Magistrate to find a case of joint use and joint possession and that the accused had laid a claim to the property.
***R v Solway* (1984) 2 Qd R 75; (1984) 11 A Crim R 449, applied.**

SHEPHERDSON J: (with whom Kelly SPJ and Matthews J concurred) *[after setting out the facts and part of the Magistrate's findings, continued]:* ... **[3]** Mr Brandis, when making submissions to this Court on the meaning of "have in her possession" in s130 of the *Health Act* conceded that the prosecution had proved beyond reasonable doubt the necessary mental element i.e. sufficient knowledge of the presence of the drug by the accused (See *Williams v R* [1978] HCA 49; [1978] 140 CLR 591; 22 ALR 195; (1978) 53 ALJR 101 and *Re Rohan* (1979) 2 A Crim R 38).

Mr Brandis directed his submission to the concept of physical possession. He analysed that concept into elements of "knowledge", "control", "exclusiveness" and "present intention". The elements on which he placed most reliance were "exclusiveness" and "present intention" and it is with these elements I shall now deal.

As to the first of these namely "exclusiveness" Mr Brandis submitted that by reason of the relationship between Payne and the appellant and the relationship between the appellant and the LSD, the case against the appellant was not one of joint possession but of limited access by the appellant falling short of control; thus he submitted the appellant could not be said to have had the LSD in her possession. I should here say that by "exclusiveness" I understood Mr Brandis to mean personal physical control to the exclusion of others not acting in concert with the appellant.

Mr Brandis conceded that if the case against the appellant was indeed found to be one of joint possession the appellant could not succeed in her appeal to this Court. Mr Brandis relied on *dicta* of the judgment of the High Court in *Moors v Burke* [1919] HCA 32; (1919) 26 CLR 265 at pp270-1; 25 ALR 213 and in *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553; 60 ALR 449 in particular at pp459-460 (Gibbs CJ) and pp494-5 (Brennan J).

I have already set out the Stipendiary Magistrate's findings. Mr Brandis' challenge is to the

findings made at the end of his decision. Although the Stipendiary Magistrate did not accept the appellant as a completely truthful witness there was the evidence in the policeman's note (Exhibit 4) signed by the appellant and in particular the passages in those notes which I have earlier set out. In the cross-examination of Payne the following questions and answers appear:-

"Q. You placed them in the wall unit?
A. We both agreed that I put them in there we ..
Q. You placed them in the wall unit?
A. Yes I did and Sue was there at the presence" (sic)

Earlier in his decision the Stipendiary Magistrate had said -"I intend to refer to parts of the evidence but I wish it clearly understood that I've considered all of the evidence given" and that he did not accept Payne as an honest and reliable witness. Despite such a finding in respect of Payne the Stipendiary Magistrate did not reject all her evidence nor did he specifically refer to the above quoted extract from her evidence.

[4] Further, the Stipendiary Magistrate expressly said that the evidence of the witnesses Paton and Weeks (another police officer) was not challenged and that he accepted them as honest and reliable witnesses. Constable Weeks had given evidence of a conversation with the appellant on 19th December 1985 in which the appellant had said:

"Those trips that the other police got this morning weren't only Nicki's they were mine too."

In my opinion there was ample evidence on which the Stipendiary Magistrate could base his finding that the drug was for the joint use of the appellant and Payne. Mr Brandis' argument on "exclusiveness" fails.

As to the second element on which the appellant relied before this Court namely "present intention", Mr Brandis referred the Court to its decision in *R v Solway* (1984) 2 QR 75; (1984) 11 A Crim R 449. Relying upon statements in that case he submitted that the evidence against the appellant disclosed only an intention to use the LSD in the future. *Solway* he submitted was authority for the proposition that if there was evidence only of intention to do something with the LSD in the future the appellant's conviction could not stand. In that case Solway was charged with the offence of possession of a prohibited plant Indian Hemp. A police officer spoke to Solway at a shopping centre and in response to an inquiry as to whether he had other prohibited plants or pipes at his house which he had used for smoking marihuana replied, "There's some in the bathroom cupboard". He told the police that by that he meant marihuana but was not prepared to show them around his home without a warrant. A warrant was obtained.

The police and Solway went to a house at Inala where they saw Solway's mother. Solway directed the police officer to the bathroom, opened a cupboard and indicated a plastic bag containing some green leaf material in an empty beer glass which also contained a $20 note. Solway told the police officer that marihuana was in the plastic bag. In response to an inquiry as to who owned the marihuana Solway said "We had a big party here about 6 weeks ago for my mother's birthday and someone told me that there was some marihuana in the cupboard here." He told the police that he had looked into the cupboard about two weeks after the party when he had gone to look for something; that he did not tell anyone else that the marihuana was there; that he was going to dump it and that he had left the marihuana in the bathroom cupboard because it had slipped his mind.

In convicting Solway the Stipendiary Magistrate was satisfied on the evidence that Solway had knowledge of the presence of the marihuana on the day in question; that he also had the opportunity to exercise physical possession of it at any time he chose, and that he told the police officer he intended to dump it. The Magistrate found that Solway had physical possession and also had asserted a right to exercise a right over the material at any time it suited him.

On appeal, Demack J (with whose reasons Campbell CJ and Connolly J agreed) said (at p77):-

"Here the evidence shows that Solway knew the cannabis was in the bathroom cupboard. There was no basis for finding that the cupboard was used exclusively by him ... the most significant feature

> of the case is that at no time had Solway laid any claim to the cannabis, or done anything to shift it or hide it. All he had done was form an intention to do something in the future. In my opinion that falls short of proving that **[5]** he had the cannabis in his possession. In my opinion before a person can be said to be in possession of any object he must not only know of its existence, but he must have laid some claim to it (*Warneminde*) (a reference to *R v Warneminde* (1978) QR 371) or exercised some control over it (*Thomas and Todd*) (a reference to *Thomas* (1981) 6 A Crim R 66 and *Todd* [1976] Qd R 21; (1982) 6 A Crim R 105). These two possibilities can be inferred if it is in a container over which he had exclusive control (*Morgan*) (a reference to *Morgan* (1979) 1 A Crim R 377). But mere knowledge of its existence coupled with a future intention to exercise control is not enough."

Solway's appeal was allowed. Mr Brandis submitted that the evidence against the present appellant, taken at its highest, showed only an intention to use the LSD at some future time i.e. Christmas or New Year. However the Stipendiary Magistrate found "that the defendant intended to use the drug at some time and that she had in fact laid a claim to that drug when it was placed in the cupboard when both persons were present". This expression "laid a claim" may well have been taken by the Stipendiary Magistrate from *Solway's case*. There was the above evidence of Nicole Payne not specifically rejected to the effect that both she and the appellant had agreed that Payne should put the LSD tablets in the wall unit. In my view the Stipendiary Magistrate's finding that the appellant had laid a claim to the drug at the time stated shows that he must have accepted that part of Payne's evidence as credible.

In my opinion the evidence from the police officers which I have earlier set out when coupled with the evidence from the witness Payne to which I have just referred was sufficient to enable the Stipendiary Magistrate to find, albeit by inference, that the appellant had laid a claim to the LSD when it was placed in the cupboard at a time when both persons were present. If the parties had agreed, as the witness Payne asserted they did, the fact of that agreement was in my view sufficient basis for the positive inference drawn by the Stipendiary Magistrate that the appellant had laid a claim to the LSD tablets. The appellant had admitted to the police officer that the tablets were there "for myself and Nikki for our own use".

The argument on "present intention" also fails. In my opinion the Stipendiary Magistrate did not misdirect himself as claimed in the ground of appeal. I would dismiss the appeal against conviction and refuse the application for leave to appeal against sentence.

[Judgment supplied courtesy of CSM Queensland].
