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SUPREME COURT OF VICTORIA — FULL COURT

R v MAIO

Crockett ACJ, O'Bryan and Nathan JJ

15-17, 28 June 1988 — [1989] VicRp 23; [1989] VR 281; (1988) 38 A Crim R 25

CRIMINAL LAW – NARCOTIC GOODS – HEROIN – "POSSESSION OF PROHIBITED GOODS" – FOUND IN OFFENDER'S PHYSICAL CUSTODY/UNDER OFFENDER'S PHYSICAL CONTROL – MEANING OF "POSSESSION" – WHETHER EXCLUSIVITY RELEVANT WHERE MANUAL CUSTODY: CUSTOMS ACT 1901, S233B.

1. One has in one's possession whatever is to one's knowledge physically in one's custody or under one's physical control.

DPP v Brooks (1974) AC 862; (1974) 59 Cr App R 185, applied;

Moors v Burke [1919] HCA 32; (1919) 26 CLR 265; (1919) 25 ALR 213, distinguished.

2. Where a person seated in a motor car handled a bag containing heroin (which was shortly after found between the front bucket seats of the vehicle) and was also found with another bag containing heroin on his lap, it was not necessary for the jury to consider whether that person had exclusivity of possession of the heroin. Further it was open to the jury to find that the heroin was physically in that person's custody or under his physical control so as to contravene S233B of the Customs Act 1901.

O'BRYAN J: [with whom Crockett ACJ and Nathan J agreed] *[after setting out the facts, the ground of appeal and part of the directions of the trial judge, continued]* ... **[8]** Of the three elements of possession which the prosecution had to prove an issue arises only as to the first element and whether proof that the applicant had physical custody or control of the six bags of heroin contained in the grey bag was a sufficient direction in the circumstances of this case. Mr Rozenes argued that mere custody or control of the bag was insufficient unless the applicant had exclusive physical custody with an intention to have such custody or had put the bag down in a place where he had exclusive physical control over it and its contents. Before turning to the leading authorities, it is important to note that neither party at the trial sought a direction in relation to the concept of joint or shared possession arising out of concert or common purpose. Had the two Chinese persons not pleaded guilty it is clear that the Crown would have contended before the jury that the three occupants of the Datsun were together in possession of the heroin in the bag, relying upon the doctrine of concert. When the two Chinese persons pleaded guilty and the applicant contested the Crown evidence that he was found inside the car, the principal issue became one of determining whether the Crown had proved that the applicant was in the passenger seat of the car and had in his lap a bag of heroin and beside him the grey bag containing six bags of heroin.

Turning now to the authorities, the decision of *Moors v Burke* [1919] HCA 32; (1919) 26 CLR 265; (1919) 25 ALR 213 is the leading case on the offence of **[9]** having in actual possession any personal property suspected of being stolen or unlawfully obtained. The defendant, an officer of the Customs Department, had access, for the purposes of his employment, to a locker in the customs shed in Melbourne. The defendant was not the only officer that had keys to the lockers and another customs clerk had at least an equal and independent right and power of access. The judgment of the High Court which comprised Isaacs, Gavan Duffy and Rich JJ was delivered by Isaacs J. Isaacs J expressed approval of a passage in Pollock and Wright on *Possession in the Common Law* that the ordinary test of possession is answered by the question "Had he separate undivided and exclusive control of the thing?" The Court was, however, concerned with the phrase "actual possession" and at 274 the Court, speaking as to the meaning of the section, said: (at 217 ALR):

"'Having actual possession' means, in this enactment, simply having at the time, in actual fact, and without the necessity of taking any further step, the complete present personal physical control of the property to the exclusion of others not acting in concert with the accused, and whether he has that control by having the property in his present manual custody, or by having it, where he alone has the exclusive right or power to place his hands on it, and so have manual custody when he wishes".

It is clear that the judgment in *Moors case* must be considered in the light of the facts and the question of exclusivity of possession was important because at least one other customs officer had access as of right to the locker in which the stolen property was located. The next case *Williams v Douglas* [1949] HCA 40; (1949) 78 CLR 521; (1950) ALR 223 was also concerned with an offence of having in [10] possession or control gold suspected not to have been lawfully obtained. Certain gold bars were found in a bathroom in a hotel used by a number of lodgers located some distance from the defendant's bedroom. The High Court construed the words "possession or control" in the Act as referring to *de facto* possession and actual control and not to extend the word "possession" to constructive possession. All the members of the Court considered that the question resolved itself into one of fact, namely whether the goods were effectively under the control or *de facto* possession of the claimant. I do not regard the decision in *Williams* as supporting the argument of Mr Rozenes.

Next is the decision *R v Bush* (1975) 24 FLR 346; (1975) 5 ALR 387; [1975] 1 NSWLR 298, a decision of the New South Wales Court of Criminal Appeal. The Court considered the meaning of the word "possession" in the context of a count alleging possession of narcotic goods contrary to S233B of the *Customs Act*. The accused had collected from a post office a parcel containing a framed picture at the back of which was secreted cannabis in plastic bags when he was intercepted by police. The principal question was whether knowledge by the accused of the presence of cannabis in the parcel was an essential element in the offence. The Court held that it was not an essential element upon the true construction of s233B. On this point the decision was subsequently overruled in *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553. In reaching its conclusion the Court considered the meaning of the word "possession". In doing so, the Court referred in particular to *Moors v Burke* and [11] *Williams v Douglas* and the description of possession in the work of Pollock and Wright on *Possession in the Common Law* 1888. Nagle J, in delivering the judgment of the Court, was content to adopt the description for physical possession advanced by Pollock and Wright. He said at 314:

"For present purposes, therefore, we consider that a person has possession of narcotic goods who has what may be synonymously described as *de facto* possession or exclusive physical control of them."

Nagle J, referred to a decision of this Court *R v Van Swol* [1975] VicRp 5; (1975) VR 61; (1974) 4 ALR 386; (1974) 27 FLR 353, a case in which the appellant had hidden a shopping bag containing opium in a tea chest belonging to a woman with whom he shared a room and where she would be unlikely to discover it except by accident or to take it away. It was held that the evidence showed that the accused had the opium in his possession. The decision in *Bush* was not directly concerned with the question involved in the present case, namely whether exclusive physical control of goods had to be proved as an element of possession because exclusivity of physical control was never in issue.

In *Bush* the Court referred to the approach of the Privy Council to possession in *DPP v Brooks* (1974) AC 862; (1974) 59 Cr App R 185, a case in which a driver of a vehicle found to contain sacks of ganja (a dangerous drug) was convicted of an offence of having in his possession the said ganja. In the opinion given by the Privy Council by Lord Diplock, His Lordship said: (at p866):

"In the ordinary use of the word 'possession', one has in one's possession whatever is, to one's knowledge, physically in one's custody or under one's physical control."

[12] His Lordship added: (at p867)

"The only *actus reus* required to constitute an offence under s7(c) is that the dangerous drug should be physically in the custody or under the control of the accused."

A decision of the Court of Appeal in *R v Boyce* (1976) 15 SASR 40 was also referred to in the course of argument. A person in an airport baggage area selected a suitcase from the rack which contained a quantity of a narcotic drug and was immediately arrested. The argument raised by the defendant was whether he had "real exclusive physical control of the suitcase and its contents" because the police were waiting to pounce when the defendant picked up the suitcase. The Court held that "as long as he had hold of the case he had the exclusive control of it until

he was interrupted by the police". (Bray CJ at 44). Clearly, the point did not arise for decision whether exclusive physical control was an essential element of possession as opposed to physical custody or control.

The decision of the High Court in *Teh's case* is most important. Firstly, because it was concerned with the offence charged in the present case and secondly, because the defendant was caught in physical possession of narcotic goods in his baggage which he collected at Melbourne Airport having disembarked from an aircraft. *Teh's case*, unlike *Moors v Burke* was not a container case. Although the principal point at issue in *Teh's case* was whether *mens rea* is required before a person can be held guilty of an offence in relation to s233B, two members of the Court considered the meaning of possession. [13] Dawson J observed that the definition of possession in *Moors v Burke*, to which I have already referred, was "somewhat verbose". He then proceeded to say: (at p505 ALR)

"For the purposes of the criminal law, and for directness and simplicity, it is not possible, to my mind, to think of a better working definition of possession than that given by Lord Diplock in *DPP v Brooks* (*infra*) where he said: 'in the ordinary use of the word 'possession' one has in one's possession whatever is, to one's knowledge, physically in one's custody or under one's physical control'."

Brennan J dealt shortly with the elements of possession. He said at 585: (p494 ALR)

"The *actus reus* of possession is not here in question, but I do not doubt that Nagle J was right in *Bush* where he said ((1975) 1 NSWLR at p316) that what is required is that the narcotic goods 'should be physically in the custody or under the control of the accused'. *DPP v Brooks* (1974) AC 862 an appeal based on a Jamaican Statute that made it an offence for a person to have 'in his possession any ganja', the Judicial Committee held that when a person has physical custody or control of ganja the *actus reus* is established and that the *mens rea* by which that *actus reus* must be accompanied is knowledge that a thing is in the offender's physical custody or control and that the thing is ganja."

Later, His Honour added at 589: (p497 ALR)

"On a count of possession under para (c) the onus is on the prosecution to prove that an accused, at the time when he had physical custody or control of narcotic goods, knew of the existence and nature, or of the likely existence and likely nature, of the narcotic goods in question and that onus is discharged only by proof beyond a reasonable doubt. Again, dependent on the circumstances, proof that narcotic goods are in the physical custody or control of an accused may be sufficient to discharge the onus of proving the knowledge which is an element of the offence."

[14] In my opinion, the facts in the present case involving as they do manual custody did not require the learned Judge to give a *Moors v Burke* definition of possession. It was sufficient to say that one has in one's possession whatever is to one's knowledge physically in one's custody or under one's physical control. I reach this conclusion on the authority of *Teh's case* which upheld the definition of possession given by Lord Diplock in *DPP v Brooks* on facts similar to the facts in the present case. The issue for the jury was whether the open bag placed by the applicant between the two front bucket seats in the Datsun motor car was physically in his custody or under his physical control at the time of arrest. In essence, this direction was given to the jury and in my opinion, it was quite unnecessary for the learned Judge to refer to exclusivity of possession. Such a requirement is appropriate in a container case and unnecessary in a manual possession case. It follows that the complaint of misdirection is not made out and the application for leave to appeal against conviction must fail ...